КОНСТИТУЦИОНЕН СЪД
Вх. № 10 / к.д. 6/2012
Дата 3.08.2012

65

6.VIII.2012

РЕПУБЛИКА БЪЛГАРИЯ
МИНИСТЕРСТВО НА ПРАВОСЪДИЕТО

Изх. № 10-00-6 03.08.2012
/моля цитирайте при отговор/

На Ваш № ....

ДО

Г-Н ЕВГЕНИ ТАНЧЕВ - ПРЕДСЕДАТЕЛ
КОНСТИТУЦИОНЕН СЪД
НА РЕПУБЛИКА БЪЛГАРИЯ

На ваш № 10/ к.д. 6/2012 г. от 20.07.2012 г.

УВАЖАЕМИ ГОСПОДИН ТАНЧЕВ,

Благодаря Ви за изпратеното ми Определение на съда от 17.07.2012 г.

Предоставям на уважаемия Конституционен съд експертните мнения на Европейската комисия чрез право (Венецианската комисия) – в оригинал и в превод на български език – по законопроектите за отнемане в полза на държавата на незаконно придобито имущество.

Приложения:

1. Междинно становище по Законопроекта на Венецианската комисия от 16.03.2010 г. (на английски език).
2. Коментар по четвъртия ревизиран Законопроект от Ф. Фланаган / 25.02.2011 г. (на английски език).
3. Коментар по четвъртия ревизиран Законопроект от Г. Мадона / 25.02.2011 г. (на английски език).
4. Становище по шестия ревизиран Законопроект на Венецианската комисия от 20.06.2011 г. (на английски език).
5. Становище по шестия ревизиран Законопроект на Венецианската комисия от 20.06.2011 г. (на български език).

МИНИСТЪР:

ДИАНА КОВАЧЕВА

РЕПУБЛИКА БЪЛГАРИЯ МИНИСТЕРСТВО НА ПРАВОСЪДИЕТО

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Превод от английски

ЛОГО : КОМИСИЯ ВЕНЕЦИЯ

ЛОГО: СЪВЕТ НА ЕВРОПА

CDL-AD(2011)023

Страсбург, 20 юни 2011 г.

Становище № 563/2009

Европейска комисия за демокрация чрез право

(Комисия Венеция)

СТАНОВИЩЕ

НА ШЕСТИЯ РЕВИЗИРАН ЗАКОНОПРОЕКТ ЗА ОТНЕМАНЕ НА ИМУЩЕСТВО, ПРИДОБИТО ЧРЕЗ ПРЕСТЪПНА ДЕЙНОСТ ИЛИ АДМИНИСТРАТИВНИ НАРУШЕНИЯ

НА БЪЛГАРИЯ

Утвърдено от Комисия Венеция на 87-та пленарна сесия

(Венеция, 17-18 юни 2011 г.)

на базата на коментарите на

г-жа Финола ФЛАНАГАН (член, Ирландия)

г-н Йохан ХИРШФЕЛТ (резервен член, Швеция)

г-н Гуидо НЕПИ МОДОНА (резервен член, Италия)

I. Въведение

1. В края на 2009 г. българските власти подготвиха нов проект на Закон за отнемане в полза на държавата на незаконно придобито имущество (CDL(2010)002). Целта на законопроекта бе да се въведе гражданска конфискация, която не е базирана на присъда, като по този начин се даде възможност на държавата да отнема не само имущество с криминален произход, но и всякакво „незаконно придобито" имущество, без за това да се изисква присъда. Това бе представено като мярка за улесняване на противодействието на тенденцията, организираните престъпни групи да използват ресурсите си, за да се разграничат от престъпните дейности и прикрият незаконния произход на имуществото си. Това бе ключов проблем в България. По искане на Постоянния представител на България Венецианската комисия прие междинно становище по този законопроект през март 2010 г.(CDL-AD(2010)027). В това междинно становище Комисията установи, че законопроектът съдържа известни недостатъци и прилагане му може да доведе до нарушение на фундаменталните права, гарантирани от Конституцията на България и ЕКПЧ.

2. След приемането на това междинно становище Комисията се ангажира с интензивно и плодотворно сътрудничество с българските власти, в резултат на което се стигна до група изменения на законопроекта, подготвени съгласно препоръките на Комисията (CDL(2010)040). Този ревизиран законопроект бе подложен на оценка от Комисията във второто нейно междинно становище, прието през юни 2010 г. (CDL-AD(2010)019), където Комисията препоръча да се направят допълнителни изменения на този законопроект.

3. Делегация на Комисията посети София през септември 2010 г. и разгледа преработения законопроект заедно с българските власти. Третият коригиран вариант на законопроекта (CDL(2010)082), подготвен в светлината на второто междинно становище и на срещите през септември, бе оценен от Комисията в нейното окончателно становище, прието през октомври 2010 (CDL-AD(2010)030).

4. В края на ноември 2010 г. на Комисията беше изпратен за поредна правна оценка четвъртият коригиран вариант на Закона за отнемане в полза на държавата на имущество, придобито от престъпна или друга незаконна дейност (CDL(2010)127). В ранната пролет на 2011 г. обаче, българските власти решиха да оттеглят тази версия на законопроекта, поради установена от тях необходимост от допълнителни подобрения. Бе изготвена нова, пета версия на законопроекта и бе уговорено провеждане на нова среща за обсъждане между българските власти и Венецианската комисия. Срещата се състоя в София на 12 и 13 май 2011 г. На 16 май 2011 г. шестият коригиран вариант на проект на Закона за отнемане в полза на държавата на имущество, придобито от престъпна дейност или административни нарушения беше изпратен на Венецианската комисия за оценка (CDLREF(2011)032). Текстът бе подготвен с намерението да отговори на отношението, изразено от Комисията в нейните предишни становища и по време на срещата в София през май 2011 г.

5. Настоящото окончателно становище се основава на коментарите на госпожа Финола Фланаган и на господата Непи-Модона и Хиршфелт, както и на обсъжданията по време на срещата в София на 12 и 13 май. Становището беше прието от Венецианската комисия на нейната 87 пленарна сесия (Венеция, 17-18 юни 2011 г.).

II. Общ коментар

6. Българският законопроект в областта на конфискациите първоначално възприема за модел ирландския Закон за облагите от престъпления. Същевременно, въпросният проект на закон в значителна степен се различава от ирландския закон. Създаден, за да отговори на конкретни недостатъци в българската правна система и общество, този законодателен текст е доста по-комплексен и в известна степен по-строг, с всички произтичащи от това трудности.

7. Новият проект на Закон за отнемане в полза на държавата на имущество, придобито от престъпна дейност или административни нарушения (наричан по-нататък „законопроекта"), изпратен на 16 май, е съобразен с повечето препоръки на делегацията на Комисията, направени на предишната среща в София. Затова Венецианската комисия приветства ревизирания законопроект, който е съобразен в голяма степен с българската конституция и с международните стандарти за човешки права в тази материя. Всъщност, ЕСПЧ по принцип одобрява конфискацията, включително конфискацията без осъдителна присъда, в случаите когато общественият интерес е достътъчно силен и правата, гарантирани от ЕСПЧ, се спазват.

8. Комисията желае да подчертае още веднъж комплексния характер на този важен законотворчески труд. Той същевременно е един доста дискусионен законопроект. В тази връзка е важно приемането на законопроекта да се съчетае с напредък по неговото прилагане; начинът, по който законопроектът ще се тълкува и прилага е от огромно значение в частта на съответствието му с международните стандарти за човешки права.

9. Освен това, един широкообхватен закон за гражданската конфискация трябва да се съчетае също с високо качество на законодателството в криминалното и административното материално право, гражданския, наказателния и административния процесуални кодекси, както и с добре организирана и ефективна система от съдилища и административни управителни органи. За успешното функциониране в практиката на такъв тип законодателство е също толкова важно да се създаде и поддържа добра „правна култура", в рамките на която да се въведе един толкова прецизен закон.

10. Комисията отново изразява признателност за ползотворното сътрудничество с отговорните за изработването на закона български власти и изразява пълната си подкрепа за тяхната силна воля за борба с корупцията и организираната престъпност в страната. Комисията се надява, че законопроектът ще бъде приет навреме от българския парламент.

III. Конкретни коментари

A. Заглавие и цел на законопроекта

11. Венецианската комисия приветства промяната в заглавието на законопроекта, както и факта, че езикът, използван в текста е по-точен и последователен, което следва да допринесе за по-единно тълкуване на законопроекта в практиката. Все пак трябва да

се отбележи, че при използването на израза „престъпна дейност или административни нарушения" авторите понякога използват „или", а понякога „и".

12. Алинея (2) на Чл. 1 включва само облаги от престъпна дейност. Мнението на Венецианската комисия е, тази разпоредба да се прилага и за облаги, придобити вследствие на административни нарушения.

13. По целта на законопроекта Комисията препоръчва съчетаването на алинеи 2 и 3 на Чл.2, като се добави следната част от алинея 2 „при спазване правото на защита на засегнатите лица и избягване на риска от несправедливост" в алинея 3 на същия член. Промяната би допринесла за по-добър баланс на възможните ограничения (виж и по-долу, Параграф 59).

Б. Компетентна служба за извършване на разследване и образуване на производство по гражданска конфискация

1. Членове и процедура по избор

14. Съгласно Чл. 3 от законопроекта, членовете на Комисията за установяване на имущество, придобито от престъпна дейност и от административни нарушения (наричана по-нататък „КУИППДАН") не могат да „*упражняват свободна професия или друга платена професионална дейност*" (Алинея 2 т. 4). По време на срещата в София през май 2011 г. българските власти обясниха, че тази формулировка нормално се използва в други правни инструменти и следва да се тълкува като фактически забраняваща *всякаква* друга професионална дейност за времето на членство в КУИППДАН.

15. Чл. 16, ал. 2 предвижда стажът на членовете на комисията и на директорите и инспекторите в териториалните дирекции на длъжност, „*за която се изисква висше икономическо образование, се зачита за стаж по специалността*". Препоръчва се в края на текста да се прибавят думите "for public employment" „при наемане на работа в публичния сектор". Този израз изяснява значението на тази разпоредба.

16. Относно процедурата по избор на членовете на КУИППДАН, Комисията със съжаление отбелязва, че разпоредбата за избор на членовете на КУИППДАН отново е изменена в този проект на закона. Новият Чл. 4, ал. 2 вече не изисква заместник-председателят и двама от членовете на КУИППДАН да се избират с квалифицирано мнозинство (2/3 от гласовете) от Народното събрание.

17. Българските власти обясниха тази промяна с факта, че Чл. 81, ал. 2 от Конституцията на Република България предвижда решенията на Народното събрание да се приемат само с „мнозинство на повече от половината от присъстващите народни представители, освен в случаите, когато Конституцията изисква квалифицирано мнозинство". По тази причина съществува възможността Конституционният съд да обяви изискване за квалифицирано (2/3) мнозинство за противоконституционно.

18. Предвид това, Комисията желае да отбележи, че националният конституционен съд обичайно се намесва в случаи, когато липсват гаранции, не и когато законодателен акт залага по-строги гаранции, какъвто е случаят с настоящата, която би усилила независимостта и представителния характер на КУИППДАН.

19. Като напомня причините, изложени в нейното Окончателно становище (CDL-AD(2010)030), Венецианската комисия препоръчва връщане на изискването за

квалифицирано мнозинство в Чл. 4, ал. 2. Такава разпоредба би могла да въздейства положително за улесняване на процедурата за изменение на Чл. 81, ал. 2 от Конституцията на България. Наистина е изключително важно, във всичките си дейности КУИППДАН да бъде непартийна и да бъде възприемана като такава. Цялостната цел на законопроекта е да се противопостави на престъпността и корупцията и едно разпростиращо се съмнение, че самата КУИППДАН не е непартийна ще подкопае напълно законопроекта. При настоящите обстоятелства, в които са наслоени случаи на корупция в администрацията, особено важно е прилагането на настоящия законопроект да е извън всякакво съмнение. В тази връзка Комисията приветства позитивния ангажимент от страна на българските власти по въпроса, съдържащ се в мотивите към законопроекта.

2. Мониторинг

20. Прилагането на законопроекта трябва да се наблюдава отблизо и постоянно, за да се гарантира, че той реално е постигнал целта си по подходящ начин, в съгласие с конституционните стандарти и със стандартите за човешки права.

21. Становището на Венецианската комисия е, че работата на КУИППДАН следва да бъде наблюдавана от Народното събрание в смисъла на общ надзор на функционирането на КУИППДАН. Мониторингът не бива да се фокусира върху работата по конкретни случаи на конфискация. Затова би било подходящо да се замени терминът „контрол" в чл. 11, ал. 1 с термина „надзор".

22. Същото важи и за органите, посочени в чл. 10, т.е. директорите и инспекторите от териториалните дирекции (отговорни за установяването на релевантно имущество). Би могло да се помисли за въвеждане на специфична разпоредба, която да гласи, че надзорът над органите на КУИППДАН се осъществява от същата постоянна комисия на народното събрание, която упражнява надзор над самата КУИППДАН.

В. Приложно поле на законопроекта

23. Основната разлика между различните версии на този законопроект се отнася до обхвата на приложение, т.е. имуществото, чиито източници могат да се проверяват от компетентния орган, и причините за започване на проверка от КУИППДАН. Въпросът за приложното поле, заедно с процедурните гаранции за периода на производството, са съществени от гледна точка на съвместимостта на законопроекта със стандартите за човешките права.

24. Законопроектът сега има значително по-широк обхват в сравнение с предишни версии: КУИППДАН е опълномощена да започва проверка на произхода на имущество, за което има „основателно предположение", че е придобито като облага от престъпна дейност или от административни нарушения (Чл. 18).

25. Чл. 19 – чл. 22 уреждат точните основания за образуване на производство. По този начин следното имущество може да е обект на проверката на източниците за придобиването му:

1. Имущество, свързано конкретно, установимо престъпление, извършено от лице:

- привлечено като обвиняем за престъпление по Наказателния кодекс, от естество да създава облаги ... [изброени престъпления] (Чл. 19, ал. 1)

- което <u>не е</u> (*подчертано от нас*) било привлечено като обвиняем за престъпление поради технически причини като обявяване на амнистия, смърт на лицето или изтекла законова давност (Чл. 19, ал. 2)
- срещу което наказателното производство е спряно по специфични причини (Чл. 19, ал. 3)

26. Във връзка с израза „привлечено като обвиняем лице" Венецианската комисия отбелязва, че съгласно българския Наказателно-процесуален кодекс стандартите за привличане като обвиняем" са по-високи от тези за откриване на наказателно производство.

> Чл. 219. (1) от Наказателно-процесуален кодекс гласи: *„Когато се съберат достатъчно доказателства за виновността на определено лице в извършване на престъпление от общ характер и не са налице някои от основанията за прекратяване на наказателното производство, разследващият орган докладва на прокурора и привлича лицето като обвиняем със съставяне на съответно постановление"*. От друга страна съгласно Чл. 207. (1) *„Досъдебно производство се образува, когато са налице законен повод и достатъчно данни за извършено престъпление"*.

27. В Чл. 19, ал. 1 изброяването на престъпленията в отделни точки ще позволи по-ясно разбиране за това, кои престъпления могат да доведат до образуване на производство пред КУИППДАН. В тази връзка Венецианската комисия отбелязва, че редица престъпления са отстранени от ревизирания Чл. 19, без да се даде обяснение за това.

2. Имущество, <u>притежавано или контролирано от трети лица:</u>

- за които може основателно да се предполага, че е придобито от престъпна дейност на друго лице, привлечено като обвиняем за престъпление по чл. 19, ал. 1. (чл. 20).

28. Горната разпоредба засяга и физически, и юридически лица. Това не е нова разпоредба; Венецианската комисия одобрява разясненията, направени в разглеждания законопроект, които покриват често срещатата ситуация, при която лицето, придобило собственост чрез престъпна дейност, от един момент нататък не я притежава или контролира (така наречената система „сламен човек").

29. КУИППДАН също така образува производство, когато има признат акт на чуждестранен съд за някое от престъпленията по чл. 19, ал. 1 по реда на Наказателно-процесуалния кодекс (Чл. 21).

30. При всеки от случаите, изброени по-горе, КУИППДАН започва производство след уведомление от съответните съдебни органи (Чл. 23).

3. Имущество, <u>придобито в резултат на административни нарушения, когато</u>:

- те са от естество да създават облага
- стойността на придобитата облага е над 150 000 лв.

31. Новият чл. 21 разширява основанията за образуване на производство за установяване на имущество, като разрешава образуването на производство не само при специфично, установимо престъпление под съответните административни закони, но и при *всяко* административно нарушение, което отговаря на горните две условия. Отчитайки това много широко приложно поле, Комисията одобрява

включването на изискване за „влезли в сила административни актове, с които се установява административно нарушение" като основание за образуване на производство пред КУИППДАН (чл. 23, ал. 6). От друга страна, Комисията препоръчва по-добре да се уточни естеството на административните нарушения, като се добави терминът „незаконна" пред „облага", както е направено в чл. 19, ал. 1.

32. Комисията забелязва обаче, че преди да се заведе дело, се изисква да е достигнат прагът от 150 000 български лева за стойността на постъпленията по едно административно нарушение, което съответства на 75 000 евро. Това е твърде висок праг, особено след като не се предвижда праг във връзка с други категории нарушения, за които може да се започне дело. Например, съгласно Ирландската наредба за приходи от престъпления, прагът е установен на 13 000 евро.

33. Комисията също така отбелязва, че в мотивите към законопроекта се споменава, че Законът за административните нарушения и наказания (ЗАНН) има свои собствени правила за отнемане на „облагите от нарушението". В случай че в производство по ЗАНН съдебна инстанция реши да не налага конфискация, то при последвало производство по настоящия законопроект всички изисквания по настоящия законопроект трябва да бъдат спазени.

34. По време на проверката, КУИППДАН ще работи в тясно сътрудничество с други държавни институции – полицията, Държавната агенция „Национална сигурност", Агенция „Митници", Националната агенция по приходите и прокуратурата. Тези институции извършват съвместно проверка за произхода на имуществото (членове 28 до 40). Директорите и инспекторите на териториалните дирекции са органи на КУИППДАН, от които се изисква да обменят информация относно определени видове имущество с гореспоменатите държавни институции. Механизмът, който е предвиден в законопроекта, изглежда поставя действията на КУИППДАН в зависимост от информацията, осигурена от тези държавни институции (чл. 37) и това е добре. Комисията отбелязва, че чл. 37 се отнася към чл. 24, вместо към чл. 23. Това следва да бъде коригирано в окончателната версия на законопроекта.

35. Относно взаимодействието между КУИППДАН и другите държавни органи, Комисията повтаря наблюденията си, изразени в окончателното становище по 3-та ревизирана версия на законопроекта: „Разследването и отнемането на имущество от престъпна дейност може да бъде и често е дълъг, труден и сложен процес. Навременното, откритото и систематичното сътрудничество и координация между правоприлагащите органи (полиция, митници и други национални власти), съдебните органи (и прокурори, и съдии), както и данъчните органи и официални длъжности лица, занимаващи се с борбата с корупцията и организираната престъпност, имат ключово значение, за да стане отнемането на имуществото от незаконна и престъпна дейност ефективно на практика. (...) фактът, че не бяха постигнати достатъчни резултати в борбата с организираната престъпност и корупцията показва необходимостта от подобряване на съдебната практика в случаите на измами на високо ниво и на корупция, както и прилагането на най-добрите практики в другите държави-членки." (5. Виж CDL-AD (2010)030, параграф 26.)

36. По този начин Комисията призовава съответните български власти системно да си сътрудничат с цел ефективно прилагане на този законопроект.

Г. Компетенции на органите на КУИППД

37. Съгласно ревизираната Глава 4, правата на КУИППДАН по разследване са по-ограничени отколкото в предходните проекти на закона; така, възможността да се поиска претърсване или изземване, съгласно процедурата по Наказателния кодекс, е премахната от законопроекта. (6. Виж CDL-AD(2010)30, параграф 24). Това може да се обясни с факта, че целият етап на проверка от КУИППДАН сега е ex parte (едностранен). Проверяваното лице ще бъде информирано за производството, само след налагане на обезпечителни мерки от съда. (чл. 65 и чл. 66, виж по-долу, параграф 41).

Д. Критерии за доказване и презумпция за оспорване на обвинението по време на производство по отнемане в съда

38. Глава VI предвижда срокове и процедура за налагане на обезпечителни мерки и отнемане на имущество, когато може да се направи основателно предположение, че е придобито от престъпна дейност или административни нарушения.

1. Обезпечителни мерки

39. КУИППДАН може да внесе в съда искане за обезпечение на бъдещ иск за отнемане на имуществото чрез налагане на възбрана или запор, или други подходящи мерки върху имуществото, на базата на „доклад", изготвен от Директора на териториалната дирекция (Чл. 41). Обезпечителна мярка може да бъде наложена, когато може да се направи „основателно предположение", че:

- Облагите са придобити пряко или не от престъпна дейност или административно нарушение (Чл. 41 §1); или
- Имуществото на физическото лице е придобито като облага от престъпна дейност, тъй като стойността му към момента на придобиване значително надвишава нетния доход на проверяваното лице и на членовете на неговото семейство по време на проверявания период и не е установен друг законен източник на доходи (член 41§2);
- Имуществото на юридическото лице е придобито като облага от престъпна дейност, тъй като стойността му, посочена в годишния финансов отчет по чл. 22а и 22б от Закона за счетоводство, съществено надвишава задълженията по годишния финансов отчет минус получените средства и балансовата стойност на разходите по обслужване на заем и не е установен никакъв друг законен източник на доходи (чл. 41§(1)3).

40. Относно чл. 41(1)§1, в първото изречение следва да бъде добавена думата „дейност".

41. Относно чл. 41(1)§2, българските власти обясниха, че същественото несъответствие между имуществото и доходите на лицето и неговото или нейното семейство ще се използва само като доказателство за извършено престъпление съгласно член 19§1, по отношение на лицето, което е конституирано като обвиняем по този член. Това трябва да бъде уточнено, като се добавят референции към чл. 19 до 22 в чл. 41(1)§1 и чл. 19 и 20 в чл. 41(1)§2-§3.

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42. Точка 3 от чл. 41§1 е нова разпоредба. Не е възможно, при липса на посочени закони, да се направят по-точни коментари по тази разпоредба.

43. Относно терминологията, по мнение на Венецианската комисия, достатъчно е да се използва изразът: „съществено несъответствие в имуществото на едно юридическо лице" и на „едно физическо лице" в чл. 41§1, §2 и §3, каквато е дефиницията на израза в допълнителните разпоредби (§9, т. 9 (1) и (2)).

44. Както е споменато по-горе, процедурите по проверка на КУИППДАН и исканията към съда за налагане на обезпечителна мярка са ex parte (едностранни). След като е наложена обезпечителна мярка, КУИППДАН ще „покани" въпросното лице да представи писмена декларация с цел да оспори доказателствата, представени от КУИППДАН в искането им за налагане на обезпечителната мярка (чл. 65§1). Ответникът не е длъжен да представи подобна декларация и няма да носи никаква отговорност, в случай, че той или тя реши да не я предостави. Освен това, чл. 67 изрично гласи, че непредставянето на декларация от страна на ответника „не може да служи за основание да се правят заключения срещу лицето и членовете на неговото или нейното семейство." В становището на Венецианската комисия, тази разпоредба е адресирана и към КУИППД, и към съда; би било добре тя да е ясно формулирана в горепосочения член.

45. Чл. 68 ал.4 осигурява правото „да бъдеш представляван" по време на проверката от КУИППДАН. Венецианската комисия вече подчерта значението на гарантирането на пълно право на защита по време на производството, след налагането на обезпечителните мерки. По този начин силно се препоръчва и правото на законна защита, и правото да бъдеш представляван от адвокат или друго лице да са изрично споменати, както е направено в чл. 56 от българската конституция.

46. Чл. 68(5) също уточнява, че заявленията, направени от проверяваното лице не могат да бъдат използвани за „започване на наказателно производство срещу него или нея" или „като доказателство срещу това лице". Във връзка с последното се препоръчва да се уточни, че тази разпоредба се прилага също и за да се забрани използването на заявленията като доказателство по време на текущо наказателно производство срещу въпросното лице, тъй като тези заявления може да се използват като доказателство в други граждански производства. Подобно уточнение би допринесло за една по-добра защита на правото да не „свидетелстващ" срещу себе си, както е гарантирано от Европейската конвенция за правата на човека (7. Виж практиката на ЕСПЧ, решение от 17/12/1996 по дело Saunders vs. UK). Според Комисията, този принцип следва също да се прилага по отношение на производство срещу съпруга/съпругата на споменатото лице.

2. Имущество, което може да бъде отнето

47. Венецианската комисия приветства новата формулировка на чл. 70, която сега уточнява критериите за доказаност за отнемане на имущество, придобито от престъпна дейност или административно нарушение. Тя отбелязва също, че „периодът, който подлежи на проверка", споменат в Чл. 70, ал. 2, се определя от КУИППДАН (Чл. 8, ал. 1, т. 1). В тази връзка следва да се отбележи, че давностният срок беше променен от 20 на 15 години (чл. 82). Това все още е доста дълъг период за такъв вид закон с обратна сила. В тази връзка Комисията отбелязва, че може да се наложи КУИППДАН да ограничи проверката си до по-кратък период от време,

базиран на ефективност (т.е. концентрация на налични ресурси) и пропорционалност.

48. Съгласно Чл. 70, ал. 1, т. 3 „обект на отнемане е и имущество, за което е установено значително несъответствие /.../". В тази връзка Комисията препоръчва след думата „несъответствие" да се вмъкне изразът „с нетния доход, както е предвидено в Чл. 41, ал. 2 и ал. 3". Това би подобрило последователността и яснотата на текста.

49. Чл. 75 е повторение на чл. 20 от законопроекта; препоръчва се да се заличи от текста.

3. Отнемане

50. В своите предишни становища, Комисията напомни, че системите за гражданска конфискация без предявяване на обвинение са предназначени да гарантират, че основният въпрос, т.е. дали имуществото е от престъпна дейност или административни нарушения, следва по-скоро да се доказва според гражданския критерий за доказаност - „баланса на вероятностите", отколкото според наказателния „при отсъствие на основателно съмнение". Един по-нисък критерий за доказаност би трябвало да даде възможност на държавата по-лесно да получи отнемане на въпросното имущество и така да ограничи финансирането на престъпни дейности. Също така беше изтъкнато, че необходимите процесуални гаранции, особено презумпцията за оспоримост на обвинението, са от съществено значение за осигуряване на съвместимост на производството по гражданска конфискация, без предявяване на обвинение с Българската конституция и европейските стандартите по отношение на върховенството на закона и спазването на човешките права.

51. Новият Член 87 сега доразвива по-ясно въпроса за критериите за доказаност и презумпцията за оспоримост на обвинението по дела за отнемане на имущество пред съда.

52. Относно имущество, придобито от административни нарушения, от КУИППДАН сега се изисква да представи доказателство относно „вида на административното нарушение и съществуването на причинна връзка между нарушението и придобитите облаги" (подчертаването е добавено, Член 87 ал. 5.4).

53. Що се отнася до имущество, придобито от престъпна дейност, КУИППДАН следва да докаже „с наличието на достатъчни доказателства", че имуществото е придобито като облага от престъпна дейност (Член 87 ал. 6).

54. Освен това, чл. 87, ал. 5 изисква КУИППДАН да представи доказателства за „наличието на съществено несъответствие по отношение на имуществото на дадено физическото лице" (т. 5) и „наличието на съществено несъответствие по отношение на имуществото на дадено юридическо лице" (т. 6). Венецианската комисия препоръчва да се вмъкне препратката към Чл. 41§1.2 в т. 5 и препратката към Чл. 41§1.3 в т. 6.

55. Същият праг за доказване, че въпросното имущество има или няма законен произход, се изисква и от ответника (87§7). Съгласно Чл. 90 съдът ще разпореди фактическо отнемане на имуществото ако техният престъпен или незаконен произход „е доказан с по-висока степен на вероятност отколкото степента на доказване на противното".

56. За да се разграничат ясно двата различни етапа на доказване (от страна на КУИППДАН и от страна на ответника), Венецианската комисия силно препоръчва да се уточни, че след като КУИППДАН е представила достатъчно доказателства за образуване на производство, тежестта на доказване пада върху ответника, който може да отговори с достоверно обяснение, как той или тя законно е придобил(а) правото на собственост или контрол върху въпросното имущество. И още веднъж, ролята на съда при оценяване на доказателствата, представени от страните, е от най-голямо значение.

57. Нивото, на което е установен прагът на доказаност при една система за отнемане е от решаващо значение; ако той е установен твърде високо, на държавните органи може да коства прекалени усилия постигането на обезпечителна мярка и действително отнемане. Ако прагът е твърде нисък, това може да означава нежелателна намеса в основните човешки права на ответника. В този смисъл, начинът, по който държавните органи, главно прокурорът, съдията и съответните административни органи, ще решават този проблем в своето ежедневно правораздаване, ще бъде от решаващо значение, за да постигнат целта си за намаляване на корупцията и организираната престъпност в страната.

58. Венецианската комисия също отбелязва, че новият чл. 87§8 премахва изискването да не бъдат правени обосновани изводи срещу проверяваното лице, в случай, че той или тя не може да представи писмен документ „поради изтичане на периода от време, определен за запазването му". Новият текст гласи, че „в случаите, когато се изисква доказателство във вид на писмен документ", никакви доказателствени изводи не могат да бъдат направени, когато изискваният документ „е загубен или унищожен не по вина на страната". Целта на тази промяна е неясна. Българските власти информираха Венецианската комисия, че ако задължителното време за запазване на документа е изтекло и документът не е запазен, тази разпоредба също ще се прилага. Не изглежда да има необходимост от „доказване", че документът е бил изгубен или унищожен. Ако ответникът е в състояние да даде разумни основания за „несъществуването" на документа, това би могло, съгласно обстоятелствата, да се счита за достатъчно доказателство. Това изглежда добър пример за необходимостта съдилищата да могат свободно да оценяват представените от страните доказателства.

59. Комисията изразява съжалявение, че от законопроекта е премахната възможността, съдът да не прилага презумпцията, че въпросното имущество произхожда от престъпна дейност, ако има сериозен риск от нарушаване на справедливостта (8 Виж CDL-AD(2010)030, ал. 36). Тази промяна беше обяснена от българските власти с факта, че в българския граждански процес съдията стриктно следва да се придържа към законодателните изисквания и няма право на свое усмотрение да не прилага презумпцията поради причини, свързани със справедливостта.

Е. Допълнителни разпоредби

60. Допълнителните разпоредби сега дефинират „облаги от престъпления" като „всяко имущество, което не е вероятно да е придобито по друг начин, освен от престъпление" (§2). Същевременно обаче липсва дефиниция на административно нарушение (предишната т.3). Венецианската комисия предлага да се добави нова точка 3, определяща дефиниция на израза „облаги от административно нарушение", като се има предвид имущество, придобито от административни нарушения, които

по своето естество могат да доведат до незаконни облаги. Тази разпоредба ще гарантира спазването на принципа на законността.

IV. Заключение

61. Венецианската комисия признава ползотворното сътрудничество между българското Министерство на правосъдието и Венецианската комисия и изразява своята пълна подкрепа за тяхната силна воля за борба с корупцията и организираната престъпност в страната.

62. Тя също така приветства усилията, положени от българските власти да отговорят на нейните наблюдения и препоръки. Наистина, шестата ревизирана версия на законопроекта отразява повечето от най-важните проблеми, изразени по-рано от Венецианската комисия. В допълнение, мотивите към законопроекта включват възможността за предприемане на бъдещи конституционни промени за осигуряване на квалифицирано мнозинство за избора на членове на КУИППДАН – една промяна, която би гарантирала, че КУИППДАН ще бъде независима и безпристрастна при извършването на всички свои дейности.

63. Венецианската комисия се надява, че законопроектът скоро ще бъде приет от българския парламент. Тя подчертава, че е от съществено значение, законопроектът е да бъде тълкуван и прилаган по начин, който съблюдава върховенството на закона и международните стандарти за правата на човека. Комисията също така изтъква важността на своевременното, открито и системно сътрудничество между КУИППДАН, правоприлагащите органи (полиция, митници и други национални власти), съдебните органи (и прокурори, и съдии), както и данъчните органи, и държавните служители, занимаващи се с борбата с корупцията и организираната престъпност в България.

64. Комисията остава на разположение на българските власти за всякакво по-нататъшно съдействие по този въпрос.

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Strasbourg, 16 March 2010

Opinion no. 563 / 2009

CDL-AD(2010)010
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

INTERIM OPINION

ON THE DRAFT ACT ON FORFEITURE IN FAVOUR OF THE STATE OF ILLEGALLY ACQUIRED ASSETS

OF BULGARIA

Adopted by the Venice Commission
at its 82nd Plenary Session
(Venice, 12-13 March 2010)

on the basis of comments by

Mr Johan HIRSCHFELDT (Substitute Member, Sweden)
Mr Guido NEPPI MODONA (Substitute Member, Italy)

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I. Introduction

1. By a letter dated 16 November 2009, the Permanent Representative of Bulgaria requested an opinion on the draft Law on Forfeiture in Favour of the State of Illegally Acquired Assets hereinafter "the Draft Law".

2. Mr Neppi Modona and Mr Hirschfeldt were appointed as rapporteurs.

3. The Venice Commission received a revised version of the Draft Law on 1 February 2010(CDL(2010)002),.

4. A meeting between the representatives of the Bulgarian authorities, Ms Petrova, the Vice Minister of Justice and Ms Nikolova, Head of the International Programmes and Projects Division (Ministry of Justice), Mr Hirschfeldt and Mr Seger from the Organised Crime Division of the Council of Europe took place in Strasbourg, on 5 February 2010.

5. The following interim opinion was drawn up on the basis of the rapporteurs' comments and of the information gathered during the meeting; it was adopted by the Venice Commission at its 82nd Plenary Session (Venice,12-13 March 2010).

II. Background information

6. In its Resolution 1211 (2000) on Honouring of obligations and commitments by Bulgaria, the Parliamentary Assembly decided to close the monitoring procedure for Bulgaria and initiate a dialogue with the Bulgarian authorities on, among others, the issue of independence of the judiciary and efforts to combat corruption[1].

7. Meanwhile, Bulgaria became a full member of the European Union on 1 January 2007. Upon accession to the European Union (EU), the fight against corruption and organized crime was identified as one of the areas where a set of specific measures was required by the EU within the framework of the post-Accession cooperation and progress measurement procedure. Under the Cooperation and Verification Mechanism set up by the EU Commission, Bulgaria is required to, *inter alia*, "Implement a strategy to fight organised crime, focusing on serious crime, money laundering as well as on *the systematic confiscation of assets of criminals /…/*"[2] (emphasis added).

8. The Council of Europe has accompanied Bulgaria in its efforts to fight against corruption and organized crime notably, through its Group of States against Corruption (GRECO) and MONEYVAL. In its Second Evaluation Report on Bulgaria, GRECO welcomed the preparation of the draft Law on the Forfeiture to the State of Proceeds of Crime. However, it recommended to extend the scope of application of the said draft Law in order to also cover the proceeds of crime held by legal persons. It also recommended to *"analyse the practical application of the provisions on forfeiture of proceeds of crime with a view to its enhancement and to focus attention on forfeiture as an integral and equally important part of the criminal procedure*"[3].

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[1] PACE Resolution 1211 (2000) on Honouring of obligations and commitments by Bulgaria, Paragraph 4.
[2] EU Commission Decision of 13/12/2006 on 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 organized crime (C(2006)6570 final, Annex, benchmark No. 6.
[3] Second Evaluation Report on Bulgaria, GRECOEval II Rep (2004) 13 E, §§ 28 and 29.

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9. In 2005 Bulgaria adopted the Law on the Forfeiture to the State of Proceeds of Crime (hereinafter: the 2005 Law), which complements the confiscation and forfeiture of objects regime existing under the general Criminal Code[4].

10. The 2005 Law introduced the concept of criminal asset recovery within the framework of the civil legal proceedings. It regulates the terms and procedure for imposition of seizure[5] and forfeiture to the State of any assets derived, directly or indirectly, from criminal activity which has not been restored to the victim or which has not been forfeited to the State or confiscated under other laws. The proceeds of crime can be forfeited not only from the examined person but also from third parties, including legal persons. The body in charge of the procedure is the Multidisciplinary Commission for Establishing of Property Acquired from Criminal Activity (CEPACA). The investigation procedure run by the CEPACA runs in parallel with the criminal proceedings. The CEPACA can bring motivated requests to the courts to apply freezing orders to the property in question, but it cannot request deprivation of the criminal assets, unless the criminal proceeding is concluded and a suspect convicted.

11. During the period 2005 to 2008, the CEPACA only analysed 10 forfeiture procedures under the 2005 Law initiated against 10 persons who had committed bribery offences. The CEPACA claimed that this lack of efficiency in the implementation of the Law was due to the restrictions placed on its functioning by the law itself. On this basis, in 2008 the CEPACA prepared proposals for amendments to the 2005 Law aimed at strengthening the powers of the CEPACA.

12. In its addendum to the Compliance report[6], GRECO invited the Bulgarian authorities to "*take due account to proposals for amendments to the 2005 Law put forward by the CEPACA in order to ensure the effective application of the forfeiture proceedings*".

13. In its latest report on progress in Bulgaria under the Cooperation and Verification Mechanism, the EU Commission considered that the lack of progress in the work of the CEPACA under the 2005 Law was largely due to the fact that freezing of assets derived from crime is practiced only several months into the pre-trial phase or at the time of indictment and therefore loses most of its operation effect. In addition, the conditions of asset freezing provided for in the 2005 Law were seen as too restrictive and not adequate to tackle the reality and extent of organised crime in the country by the EU Commission[7].

14. In response to this criticism, the Bulgarian authorities prepared a new draft Law on Forfeiture in favour of the State of Illegally Acquired Assets, under consideration (hereinafter: "the draft Law").

15. The draft Law preserves the philosophy of the existing law but introduces certain substantial changes. The new Identification of Illegally Acquired Assets Commission (hereinafter: "the IAA Commission") is given the power to initiate investigations into suspicious assets deriving not only from criminal activities in connection with specific crimes under the Criminal Code listed in the draft Law, but also from other "*illegal activities*". It was also given rather large investigative powers. The most innovative change regards the possibility for the Commission to request forfeiture of the property even in cases where no

[4] In Bulgarian legal system, confiscation and forfeiture are two different mechanisms used for the deprivation of instrumentalities and proceeds of crime. *Confiscation* is a sanction, usually facultative, the imposition of which depends on the criminal responsibility of the offender (Art. 37 of the Penal Code). Confiscation is provided for in a number of offences specified in the Penal Code. It can be imposed only in respect of the current assets of the perpetrator, i.e. assets possessed at the time the sentence is pronounced. *Forfeiture* is a deprivation measure applied notwithstanding penal responsibility ; it is mandatory in respect of instrumentalities and proceeds of crime. Both measures apply only in respect of natural persons.

[5] It should be noted that the 2005 Law does not use the term "seizure", but speaks instead of "securing measure".

[6] Second Evaluation Round. Addendum to the Compliance Report on Bulgaria, GRECO RC-II(2007)4E, of 2 July 2009, §7.

[7] Report from the Commission to the European Parliament and the Council, on Progress in Bulgaria under the Co-operation and Verification Mechanism, Brussels, 22/07/2009 (point 2).

criminal conviction had been made. In the proceedings for injunction and forfeiture the burden of proof is on the examined person who has to demonstrate that the source of the funds used to purchase the assets in question is legal.

III. General observations on forfeiture as a tool for criminal assets recovery

16. Assets forfeiture, i.e. the government taking of property connected to criminal activity, is increasingly seen as a critical tool for combating corruption and organized crime. Its main purpose is preventive: restricting the funding of criminal activities - by interrupting the reinvestment of such resources in the economic turnover - and thus discouraging the criminal conduct. In continental Europe (the civil law countries) forfeiture or confiscation element is generally part of the criminal procedure. It requires a criminal proceedings and conviction, and is often part of the sentencing process.

17. The forfeiture is used not only to confiscate tools for or fruits of the specific crime (basic confiscation). There is an ongoing trend in Europe accepting more far-reaching measures of forfeiture in the form of extended confiscation. Different assets owned by a person convicted of an offence related to organized crime can be confiscated in certain situations[8].

18. There appears to be a recent trend to use a non-conviction based civil proceedings as a means of recovering the proceeds of crime (e.g. Australia, Ireland, Italy, United States, UK and South Africa). This is notably the case in common law countries.

19. Non-conviction based forfeiture enables States to recover illegally obtained assets from a person through a direct action against his or her property without the requirement of a criminal conviction. The State is generally required to prove within the balance of probabilities that the examined person's assets derive, directly or indirectly, from criminal activity.

20. The trend towards civil forfeiture has been prompted by the tendency of organized criminal groups to use their resources to distance themselves from the criminal activity and to hide the illicit origin of their assets. In some instances, the influence of corrupt officials and other practical realities may prevent criminal investigations entirely or for a long time. In such cases, civil forfeiture may be the only tool available to recover the proceeds of crimes and to exact some measure of justice.

21. The Bulgarian draft Law is strongly inspired by the Irish Proceeds of Crime Act. This transplant from a common law context to a civil law context seems an innovation which needs to be studied with care.

22. Given the situation in Bulgaria, the choice of its authorities to use a non-conviction based forfeiture as a tool in fighting corruption and organized crime in a country cannot be criticised. The draft Law can also be seen as an answer to requests from international organisations for Bulgaria to reform its legislation in this field.

23. Whilst the purpose of this mechanism is to be strongly encouraged, it should not have the effect of reducing the guarantees contained in the European Convention on Human Rights (hereinafter: the ECHR).

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[8] *Cf.* European Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property.

IV. The relevant international law instruments

24. The use of non-conviction based forfeiture is explicitly allowed in the UN Convention against Corruption[9]. The EU Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property also provides for this possibility[10].

25. The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198) does not explicitly mention non-conviction based forfeiture. However, some of its articles can be interpreted as allowing this possibility, on condition that it regards assets related to criminal activities or acts connected therewith. Thus, according to Article 3 §1, "*Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property*". "Confiscation" is defined as *"a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property* (Article 1.d).

26. The Explanatory Report to the ETS 198 points out that the definition of "confiscation" includes also, where applicable, "forfeiture"; the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is not a criminal judge, as long as the decision was taken by a judge in the sense of Article 6 ECHR[11].

V. Analysis of the draft Law

27. According to Article 5 of the Bulgarian Constitution, the ratified international agreements are considered part of the domestic law. They supersede any contradictory domestic legislation.

28. The present opinion is formulated in the light of the Council of Europe standards, especially Article 6 of the European Convention on Human Rights (ECHR)and Article 1, Protocol 1.

29. The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, the EU Council Framework Decision 2005/201/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property was also taken into account as well as the relevant documents of the Council of Europe GRECO and MONEYVAL.

30. It is important to mention that the English translation of the text submitted to the Venice Commission for consideration is occasionally unclear and seems not correct in all its details.

A. The scope of the Law

31. According to Article 1 of the draft Law, the forfeiture procedure will not be limited to property obtained, directly or indirectly, from criminal activity as it is currently the case under the 2005 Law, but will also apply to any "*illegally acquired assets*". These are defined as

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[9] UNCAC, 2004, Art. 54.§1.c "*Consider taking such measure as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases*".
[10] EU Council framework decision 2005/212/JHA of 24 February 2005. OJEU, L 68/49, Art. 3 §4.
[11] Paragraphs 39 and 40.

"*assets not corresponding to the income of the owner and his/her family, and for which no legitimate source of origin has been established*" (§1, Supplementary provisions of the draft Law).

32. This provision, in conjunction with Article 9 §§ 3 to 5 reveals that the State wishes to use civil forfeiture procedure not only in the fight against corruption and organized crime, but also in the aim of recovering assets derived from certain offences under the Customs Act, the Prevention and Disclosure of Conflict of Interests Act, as well as under the Publicity of the Property of Persons Occupying High State Positions. Extending the scope of application of the draft Law was said to be necessary for a State to be able to successfully fight the "inexplicable enrichment"[12].

33. As mentioned earlier, assets forfeiture may be a critical tool in fighting corruption and organized crime. The European Court of Human Rights approves forfeiture in principle, including non-conviction based forfeiture where the general interest is strong enough and where the rights guaranteed under the ECHR are respected[13].

34. Confiscation or forfeiture is an interference with the right to peaceful enjoyment of possessions (Article 1, Protocol 1 to the ECHR). As long as this measure is preventive in the sense that it prevents the affected party using its property, the Court applies Article 1 §2, Protocol 1 ECHR. The measure will be regarded as justified if a) provided by law; b) serves the general interest and c) is proportionate to the aim pursued.

35. In the *Phillips v. UK*, the ECtHR considered that a confiscation order issued after criminal conviction constituted a "penalty" within the meaning of Article 1.§2 Protocol 1 ECHR, and operated "*in the way of a deterrent to those considering engaging in drug trafficking and deprive a person of profits received from drug trafficking*" (p. 52). Thus, given the importance of the aim pursued, the Court did not consider the interference suffered by the applicant disproportionate.

36. In *Arcuri and others v. Italy*, there were no criminal proceedings directly related to the confiscation order issued. The ECtHR pointed out that "*even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 Protocol 1, which gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest".* It also stressed that the impugned measure forms part of a crime-prevention policy. "*The confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established".* It therefore considered that "*the aim of the resulting interference serves the general interest and was proportionate to the legitimate aim pursued".*. In this case, the Court took into account the specific situation in the respondent State and the difficulties it encountered in the fight against the Mafia and other criminal organisations.

37. In all relevant cases, however, the confiscation was only available for alleged proceeds of *criminal activity.*

38. The Venice Commission is aware of the gravity of corruption and organised crime in Bulgaria, and welcomes the efforts of the authorities to find new methods for effective counteraction against these phenomena.

39. The Venice Commission acknowledges the fact that the extension of the scope of the draft Law and the corresponding change of its title is the result of the wish of the Bulgarian

[12] Communication by the Bulgarian authorities during the Strasbourg meeting on 5 February 2010.
[13] E.g. ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001; ECtHR, *Butler v. UK*, Decision of 27 June 2002.

authorities to address the phenomenon of "inexplicable enrichment" of public servants widely spread in the country. However, the Venice Commission stresses that the Bulgarian authorities must ensure that the relevant procedures be devised and carried out in compliance with the Constitution, the ECHR and the European standards concerning the rule of law and respect for human rights.

40. Further, it would be important to formulate the general and public interests, the aim and purpose of the draft Law in a precise and exhaustive manner. This would serve as a basis for the "proportionality-test" that must be undertaken within the administration of justice by the national courts dealing with cases of forfeiture.

41. Besides the examined person, the draft Law also encompasses a wide range of categories of third persons. Articles 25 and 26 list, among others, "*assets acquired by the underage children or the spouse*", "*assets transferred by the person under examination to the spouse, a cohabitee, a former spouse, lineal relatives up to any degree of consanguinity and to collateral relatives up to the forth degree of consanguinity, /.../ persons of acquaintance, of intimate, friendly, official, financial, economical and any other relation /.../*". Are also covered "*assets, which are incorporated into the assets or acquired by a legal entity controlled by the person under examination*" (Article 29). According to Article 28 of the draft Law, assets onerously transferred to third persons will only be subject to forfeiture "*provided that they knew or had to suspect the illegal origin of the assets in question or that they are acquired in order to avoid the forfeiture or conceal the source or the real rights on them*".

42. The requirement of the link between the assets of the third parties and the examined person was accepted by the ECtHR. In *Arcuri v. Italy*, the Court considered that the analysis of the financial situation of the concerned third parties and the nature of their relationship with the examined person clearly indicated that "*all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Arcuri's unlawful profits and were* de facto *managed by him /.../*"[14].

43. In this regard, the Venice Commission recalls that a civil forfeiture system should balance the will to recover assets deriving from illegal activities - and which have been deliberately transferred to third parties as part of the laundering process - with appropriate safeguards for the protection of third parties rights (who may be genuinely innocent property owners). The criterion of a personal, official, financial, economic or "any other relation" with the examined person (Article 26 of the draft Law) is not sufficiently precise and it may be questioned whether it would be sufficient to justify the forfeiture of a third party's assets under Article 1, Protocol 1 to the ECHR. As to the requirement of the (supposed) knowledge of the origin of the acquired assets by the third parties (Article 28), the Commission was informed that it applies to *all* third parties mentioned in the draft Law. This should be clearly stated in the relevant provisions of the draft Law.

[14] Cf. also ECtHR, *Riela v. Italy,* Decision of 4 September 2001.

B. Agency in charge of carrying out investigations and instituting civil forfeiture Procedure

44. Article 2 of the draft Law establishes the Identification of Illegally Acquired Assets Commission (hereinafter: "the IAA Commission") as a specialised State body responsible for carrying out civil forfeiture investigations and instituting civil forfeiture proceedings.

45. The IAA Commission is an administrative collegial body, composed of five members: the President, appointed by the Prime Minister, the Deputy President and two members, elected by the National Assembly, and one member appointed by the President of the Republic (Article 2 §3). Such composition of the IAA Commission aims at guaranteeing its independence and impartiality.

46. In this regard, the Venice Commission considers that introducing the requirement of a qualified (two-third) majority for the election of the Deputy Chairperson and two members of the IAA Commission by the National Assembly would allow to avoid direct involvement of the governmental political parties and thus ensure the independence of the IAA Commission.

47. The IAA Commission shall have local units enjoying the status of territorial directorates. These shall play a significant role in the investigation procedure as well as in the forfeiture proceedings insofar the IAA Commission request for seizure and forfeiture of assets will be based on the report prepared by the Director of the respective territorial directorate. (Article 34 §1, see bellow).

48. Given the role the directors of territorial directorates in the forfeiture proceedings, the Commission recommends that the same criteria for eligibility for membership of the IAA Commission provided for in Article 2 §5 apply also to eligibility for the office of director of a territorial directorate.

49. The obligation of the Commission to submit an annual report of activities to the National Assembly, the President of the Republic, and the Council of Ministers provided for in Article 5 § 5 is to be welcomed.

C. Decision-making powers of the IAA Commission

50. According to Article 5, the Commission shall make decisions on, among others, "*the conclusion of a settlement*" (§ 1.5). During the Strasbourg meeting, the Bulgarian authorities pointed out that such a settlement agreement must be submitted to the Court and approved by it, in accordance with the requirements provided for in Article 54 of the draft Law. The Commission strongly recommends to reword the relevant provisions of Article 5 in this sense and introduce an explicit reference to Article 54.

D. Investigation proceedings

51. Articles 9 to 16 give the grounds for instituting investigation procedure by the IAA Commission. The proceedings can be triggered by, amongst others, criminal charges or a criminal conviction but also by "*criminal way of living*" of a given person derived from the fact that a person was convicted for certain crimes within a period of five years or that two or more pre-trial proceedings for certain crimes have been instituted against him or her (Article 9 §2).

52. As for the relations between criminal proceedings and civil proceedings, article 53 §8 empowers the IAA Commission to request the Court, in charge of deciding upon the actual forfeiture of presumably illegally acquired assets, to suspend the proceedings until conclusion of the criminal proceedings against the person. Such a provision entails the risk of becoming

the ordinary relationship between criminal and civil proceedings, thus limiting the advantages of non-conviction based forfeiture.

53. The Commission welcomes the fact that the draft legislation is intended to apply to proceeds of crimes which are committed outside Bulgaria: the investigation can be triggered by criminal proceedings instituted in another State or by a foreign sentence for crimes such as those listed in Article 9 § 1.1 (Article 10 §1.3). Further, according to Article 10 §1.4, investigation can also be initiated with regard to assets derived from the illegal activity carried out in a country other then Bulgaria when such activity is unlawful under the criminal law of that country.

E. Investigation powers of the IAA Commission authorities

54. Articles 18 to 23 provide for the far-reaching investigative powers of the "IAA Commission's authorities", i.e. the directors of territorial directorates and the inspectors at the territorial directorates. Some of them are problematic. Article 18 §2 gives the Commission's authorities the right to "*request assistance and seek information from all State and municipal authorities, traders, banks, credit institutions, other legal entities, notaries and private enforcement agents*". According to Article 58 of the draft Law, should these persons not submit the requested information within one month, they may be fined up to 5 000 BGN (cca 2500€), if the act does not constitute a criminal offence. As to the authority which will decide on this, Article 3 seems to indicate that it is the Chairperson of the IAA Commission[15].

55. Information is the necessary material from which successful asset forfeiture cases are built and legislation need to ensure that investigators have lawful access to such information. This provision of the draft Law however, goes very far. While it may not be necessary to require investigators to obtain every piece of information by means of court orders, the institution or a person concerned should have the right to a judicial review.

56. Further, Article 20 §2.1 of the draft Law provides that, for the purpose of investigation, the Commission authorities can "*require explanations from the person under examination, from his/her spouse and from third parties*", and "*can require from natural persons information, explanations and documents in view of identification of the source and value of the assets*" (§2.4).

57. The information and documents obtained through examination can result in seizure and forfeiture of the assets. Without some protection these provisions are likely to engage the right to defense under Article 6 §1.c ECHR, as well as under Article 56 (the right to be accompanied by legal counsel when appearing before a State agency) of the Constitution of Bulgaria.

58. In the Commission's view, the requirement to obtain a court order for requesting certain information and documents may be an adequate safeguard to provide reasonable protection for the concerned persons, as the court would have to assess the proportionality of the order. It would also be useful to explicitly providing for the right to a legal counsel during examination by the Commission's authorities.

59. Article 20 § 2.7 gives the IAA Commission the possibility of seeking the assistance of the Ministry of the Interior (the police) to perform search or seizure in accordance with the Code of criminal procedure. This means, according to the explanations provided by the Bulgarian authorities, that the police will need to apply to the Prosecutor in order to proceed

[15] « *The Chairperson of the Commission shall /../ 5. Issue penalty decrees on violations committed under this Act*".

with a search or seizure, while the court will have the power to endorse or annul the relevant acts. The Venice Commission underlines the need to provide, in full and in all cases, the guarantees of Article 8 ECHR and of Article 33 of the Bulgarian Constitution.

F. Seizure and forfeiture proceedings before the court

60. Articles 34 to 50 provide for the terms and procedure for the imposition of an injunction order on presumably illegally acquired assets. Based on a report provided by the director of the respective territorial directorate, the IAA Commission shall request the seizure of the illegally acquired assets. The Court is due to decide within 48 hours; the court decision is subject to immediate enforcement. Article 36 §2 guarantees the right to judicial review of the court's decision before an appeal judge.

61. The Venice Commission welcomes the introduction of the provision which imposes the time limit for the duration of the injunction order. It provides (Article 51 §2) an important procedural safeguard: the injunction order will stay in force until the expiration of three months from the date of its making and shall then lapse unless the IAA Commission claims forfeiture of the assets in favour of the State. It is however, regrettable that it is up to the examined person to request the court to revoke the injunction order (Article 51 §3).

62. Following the imposition of injunctions on the property of the examined person, the IAA Commission can decide to claim actual forfeiture in favour of the State "*of the monetary equivalent of the illegally acquired property*" (Article 51 §1). The court shall conduct an adversarial hearing, with the participation of a prosecutor (Article 53). The court decision is subject to appeal by the general procedure.

63. As previously mentioned, seizure and forfeiture procedure can proceed independently of any criminal proceedings. This possibility may raise problems as concerns the presumption of innocence under Article 6 §2 ECHR.

64. Article 6§2 ECHR applies only where someone is "charged with a criminal offence". In this regard, the Venice Commission notes that this term has a partially autonomous meaning in the case-law of the European Court on Human Rights. When deciding whether someone is so charged, the Court takes into account: a) the classification adopted by the national legal system: If the case is classified as non-criminal, the Court further considers b) the essential nature of the proceedings. In *Philips v. United Kingdom,* the Court held that proceedings for a confiscation order after conviction are not within Article 6 §2 ECHR insofar as their purpose was not to punish the appellant; the procedure of forfeiture was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender[16]. However, in the civil forfeiture proceedings under the draft Law under consideration, the examined person may not have been charged for with a criminal offence at all or may even have been acquitted of it. As in such a case, the forfeiture proceedings will be founded on an allegation that the examined person holds "illegally acquired assets", bringing such proceedings seems likely to involve an allegation of criminal conduct of which the person will not have been convicted.

65. The third criterion used by the Court is the type and severity of the penalty to which the examined person would be liable in the forfeiture proceedings. The amount of money involved in such proceedings is likely to be substantial (a minimum amount being fixed at 20 000 BGN/cca. 10 000 €), which could possibly lead to consider the proceedings as amounting to a "criminal charge" in the sense of Article 6§2 ECHR.

[16] ECtHR, *Phillips v. UK*, Judgment of 5 July 2001, p. 34.

66. In conclusion, the Venice Commission is of the opinion that clearly stating the general interest and purpose of the law, elaborating in more detail the procedural safeguards contained in the draft Law, particularly the applicable evidentiary and standard of proof rules, and safeguards for the protection of third parties' rights would, in principle, be capable of ensuring that a fair balance is maintained between the rights of those involved and the general interest.

G. Standard of proof and rebuttable presumption

67. Civil forfeiture systems are designed to ensure that the central issue, i.e. whether the property amounts to criminal proceeds, is to be proved to the civil standard of proof of the "balance of probabilities" rather than the criminal standard of "beyond reasonable doubt". Some countries also provide for rebuttable presumptions in their civil forfeiture regimes. The underlying thinking under a rebuttable presumption is that it is easier for a person to establish that his or her property was lawfully acquired, than it is for the authorities to establish the contrary.

68. The Bulgarian draft Law requires the IAA Commission to make "*a reasoned motion, supported by evidence*" to obtain an injunction order on the illegally acquired assets from the competent Court (Article 34 §2). The court must decide within 48 hours. The draft Law is silent as to the way in which the court should apply the statutory assumptions so as to avoid a possible ground of incompatibility with human rights standards, when deciding whether to grant an asset injunction order or not.

69. The Venice Commission welcomes the fact that the draft Law provides for the necessary procedural safeguards, i.e. a non-suspensive right of appeal, the ability to release funds under controlled circumstances to cover legal and living costs of the examined person and the three months time limit beyond which the assets cannot be restrained.

70. Once the IAA Commission establishes that it can be reasonably assumed that assets have been illegally acquired, the burden of proof shifts to the examined person. "*When no legitimate source has been proven, the monetary equivalent of any assets whose value exceeds the income of the person and his or her family shall be forfeited*" (Article 24). The presumption also applies to assets in possession of the listed categories of third parties "*until the reverse is established by evidence*" (Articles 25 to 29).

71. The possibility for a State to require a examined person to demonstrate the lawful origin of assets liable to forfeiture ("reversal of proof") is provided for in a number of relevant international instruments[17], including the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[18]:

3 §4. Each party shall adopt such legislative and other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law".

72. While this obligation clearly relates to the kind of "reversal of proof" provided for in the draft Law under consideration, the CoE Convention explicitly refers to "an offender", i.e. at least the suspected perpetrator of the offences generating the proceeds, even if not convicted.

[17] UNCAC, Article 31 § 8, UNTOC, Article 12 § 7, Vienna Convention, Article 5 § 7.
[18] *Cf.* Article 3.4.

73. As for the other, more distant parties covered in the draft Law under consideration, the Venice Commission recommends introducing an explicit reference to the requirement for the IAA Commission to establish, to the civil level of proof, that the individual either knew or should have known or suspected the illegal origin of the assets in question, provided for in Article 28 of the draft Law.

74. The ECHR does not explicitly regulate the allocation of the burden of proof; in this regard, the ECtHR considered that "*the Convention does not prohibit presumptions in principle*"[19]. The fairness of a trial "*is not vitiated on account of the prosecution's reliance on presumptions of fact or law which operate to the detriment of the accused, provided such presumptions are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*"[20] . Another important safeguard is the obligation for the court to evaluate all provided evidence carefully and objectively, and base the forfeiture order on that evidence[21]. In the *Arcuri v. Italy* case, the Court considered "*whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities*". It found that "*the Italian courts were debarred from basing their decisions on mere suspicions. They had to establish and assess objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily*"[22].

75. Specifying evidential thresholds the authorities should meet in order to obtain actual assets forfeiture in the legislation is therefore important, because it allows to ensure that forfeiture of assets do not amount to unjustified interference with the examined person's right to peaceful enjoyment of his/her possessions or violate his or her right to fair trial or the right to equality of treatment. It also creates uniformity, guarantees certainty and predictability, and ensures that the legislature, not the judiciary, creates the rules that govern the forfeiture process. This is particularly important in regimes with a judiciary inexperienced in forfeiture and in situations in which corruption has permeated the administration of justice.

76. The Commission also recalls the relevance of judicial discretion. According to Article 53, if the person under investigation (or the other affected party) fails to prove the lawful origin of his or her property the court must move to making a forfeiture order. There may be a range of (justified) reasons why such an inability to prove might arise and the court should have a residual power to nevertheless decline to make an order if the interests of justice so require. In the *Phillips v. UK* case, the ECtHR thus emphasized the competence of the judge to use a discretion "*not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice*" (para. 43).

77. The draft Law under consideration does not specify in sufficient detail the evidential threshold required for obtaining the actual forfeiture of presumably illegally acquired assets. According to Article 51 of the draft Law "*based on a reasoned conclusion made by the director of the territorial directorate, the Commission shall decide to claim forfeiture /.../*". It is not clear whether such a "reasoned conclusion" is the same which served for requesting the injunction or not.

78. Equally, the draft Law is silent as to the way in which the Court should apply the statutory assumptions so as to avoid a possible ground of incompatibility with the human rights standards, when deciding whether to order actual asset forfeiture.

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[19] ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001.
[20] ECtHR, *Butler v. UK*, Decision of 27 June 2002, p. 8.
[21] *Ibidem*.
[22] ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001.

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79. The Commission recommends to elaborate in more detail the evidential threshold for requesting both the imposition of injunction on presumably illegally acquired property and the actual forfeiture of that property, and the standard of proof.

H. The role of the prosecutor in the forfeiture proceedings

80. Article 53 §1 of the draft Law provides for the participation of the public prosecutor in the forfeiture proceedings before the court. Also, the prosecutor's approval is necessary for concluding a settlement agreement with the person under examination (Article 54 §3, see also above para. 52).

81. In Bulgaria, like in some other Council of Europe member states, the prosecutor's office also have some non-penal law responsibilities: the Bulgarian Constitution provides that the Prosecutor's Office shall "ensure that legality is observed" by, *inter alia*, "taking part in civil and administrative proceedings whenever required to do so by law" (Article 127.iv).

82. Opinion No 3 (2008) of the Consultative Council of European Prosecutors (CCEP) on "The Role of Prosecution Services outside the Criminal Law Field" does not exclude a role of the prosecutor's office outside the criminal law field. It states that "*The variety of functions of prosecution services outside the criminal law field results from national legal and historical traditions. It is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests, respecting the rule of law principle and its international obligations*" (para. 31)[23].

83. However, where the prosecution service is entrusted with functions outside the criminal law field, these functions should be carried out in accordance with the number of principles:

> *" a. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;*
> *b. the respect of impartiality and fairness should characterize the action of prosecutors acting outside the criminal law field as well;*
> *c. these functions are carried out "on behalf of society and in the public interest", to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;*
> *d. such competencies of prosecutors should be regulated by law as precisely as possible;*
> *e. there should be no undue intervention in the activities of prosecution services;*
> *f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);*
> *g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court;*
> *h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;*
> *i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;*

[23] Adopted by the CCPE at its 3rd Plenary meeting, Strasbourg, 15-17 October 2008.

j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments (para. 34)".

84. These principles were reconfirmed in the Joint Opinion of Consultative Council of Judges of Europe (CJCE) and CCPE on the relationship between judges and prosecutors[24].

85. Similar considerations can be found in the PACE Recommendation 1604 (2003) on Role of the public prosecutor's office in a democratic society governed by the rule of law (para. 7.v).
86. The Venice Commission therefore recommends to reconsider the role of the prosecutor in the civil forfeiture proceedings, and ensure that the above mentioned principles are respected.

I. Management of seized and forfeited assets

87. Creating an effective non-conviction based asset forfeiture system requires not only the enactment of a comprehensive legislation, but also an organisational infrastructure to cope with the many practical issues that occur when handling seized and forfeited property, including the custody, safe storage, management, and disposition of such property. The choice of the body in charge of seized and forfeited asset management is important for the success of the forfeiture process as duties of the asset manager can be complex, requiring familiarity with law, finance, business and real estate issues.

88. The Bulgarian draft Law is rather weak in this respect. In fact, it entrusts the Minister of Finances with the power to appoint, on a case-by-case basis, "*a public enforcement agent*" in charge of managing seized and forfeited assets (Articles 38 §1 and 56 §2). The money deriving from the selling of the forfeited assets will go into the State budget (Article 56 §4).
89. The solution adopted by the draft Law under consideration does not seem appropriate insofar as it makes difficult to ensure integrity, accountability and transparency in a forfeiture process.

90. In this regard, the Venice Commission notes the G-8 "Best Practices for the Administration of Seized Assets"[25]. Among the principles advocated by the G-8 are the following:

a) There should be a clear separation of duties such that no single person has authority over all aspects of asset administration or if one person does have authority over all aspects of asset administration, he or she should be fully accountable for its actions to a higher body;

b) assets administration should be subject to an annual examination by independent auditors, similar experts or otherwise in accordance with national law. The examination may include the certification of financial records, and the findings should be made available to the public, where appropriate;

c) no one should receive a personal benefit or use seized property for personal purposes.

91. The Bulgarian authorities have informed the Commission about the intention to introduce a new paragraph in Article 56 providing for the establishment of a special fund for the deposit of seized and forfeited assets. Such a fund would serve to encourage the development of small and medium enterprises in the country.

[24] Opinion No. 12 (2009), CM(2009), 15 December 2009, in particular §§ 64-66.
[25] G-8 Lyon/Roma Group. Criminal Legal Affairs Subgroup, 27 April 2005, p.2.

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92. The establishment of a special asset seizure and forfeiture fund would be welcomed. Such a fund can facilitate the effective disbursement of assets after they have been forfeited, and has additional advantages related to the administration of seized assets. Liquidated assets would be deposited into an interest-bearing account pending the outcome of the forfeiture proceedings. Such a procedure may be particularly useful for the administration of seized currency, which would not otherwise earn interest or would incur unnecessary storage risks or costs.

93. In this regard, the Venice Commission also notes the Final Declaration of the G8 ministerial meeting in 2009[26], which mentions the option for a State to allocate resources diverted from organized crime for the sake of *social utility*. It stresses that such an option would have a significant impact on gaining social acceptance of legal rules ("culture of legality") and in restoring the citizens' confidence in the state institutions.

94. The Venice Commission therefore strongly recommends to introduce relevant provisions ensuring the establishment of an asset seizure and forfeiture fund as well as of the adequate structures for control and auditing of asset administration. Further, a particular attention should be made to ensure that property offered for public sale is not purchased by exponents of organized crime or by a man of straw of a the very person from whom the property in question has been forfeited.

V. Conclusion

95. Corruption and organized crime are a threat to national security and stability; they undermine the rule of law and negatively affect the state economy. Today, the threat from organized crime is more spread out and more complex than in the past. As a result, it is even more necessary to strengthen appropriate national measures for an effective fight against these phenomena.

96. The Venice Commission is aware of the fact that the need for an effective seizure and forfeiture of assets derived from illegal activities is one of the crucial questions in Bulgaria. The issue is also topical in many other countries, which have also introduced or envisage to introduce non-conviction based civil forfeiture.

97. The Venice Commission recalls however that, despite their justified purpose, non-conviction civil forfeiture proceedings must be devised and carried out in compliance with the Bulgarian Constitution and taking into account European standards concerning the rule of law and respect for human rights.

98. The new draft Law is an expression of the will of the Bulgarian authorities to introduce a new means of combating corruption and organized crime. As such, the Venice Commission welcomes and encourages the efforts of Bulgaria in this direction.

99. However, extending the scope of application of the draft Law also to "illegal (i.e. not only criminal) activities", i.e. certain offences under the Customs Act, the Prevention and Disclosure of Conflict of Interests Act, and under the Publicity of the Property of Persons Occupying High State Positions, is only possible provided that the guarantees provided in the ECHR and in the Bulgarian Constitution are always carefully respected.

[26] Final Declaration, 30 May 2009, p.5.

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100. The draft Law, in its current wording, presents a certain number of shortcomings and its implementation may result in the infringements of fundamental rights guaranteed by the Bulgarian Constitution and the ECHR. In this respect, the Venice Commission makes the following key recommendations:

- formulate the general and public interests, the aim and purpose of the new law in a more precise and exhaustive manner;
- introduce the requirement of a qualified (two-third) majority for the election of the Deputy Chairperson and two members of the IAA Commission by the National Assembly;
- introduce the obligation of the IAA Commission to obtain a court order for requesting certain information and documents from the examined persons;
- provide for the right to a legal counsel during questioning by the Commission's authorities;
- clarify and strengthen the procedural safeguards contained in the draft Law, particularly the applicable evidential threshold, standard of proof and safeguards for the protection of third parties' rights;
- reconsider the role of the prosecutor in the forfeiture proceedings and ensure it complies with the European standards concerning the rule of law and respect of human rights;
- introduce relevant provisions ensuring the establishment of an asset seizure and forfeiture fund as well as of the adequate structures for control and auditing of asset administration.

101. The Venice Commission remains at the disposal of the authorities of Bulgaria for any further assistance in this matter.

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Strasbourg, 25 February 2011

Opinion no. 563/2010

CDL(2011)009*
Engl.only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE FOURTH REVISED DRAFT LAW

ON FORFEITURE IN FAVOUR OF THE STATE OF ASSETS ACQUIRED THROUGH CRIMINAL OR ANOTHER ILLEGAL ACTIVITY

OF BULGARIA

by

Ms Finola FLANAGAN (Member, Ireland)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. I have read the three opinions prepared to date by Mr Johan Hirschfeldt and Mr Guido Neppi Modona and adopted by the Venice Commission and note the developments that have occurred in the draft laws prepared by the Bulgarian authorities in taking account their comments. As regards the Fourth (and latest) revised draft law now under examination, I consider that a number of important issues still remain to be resolved.

2. In addition, I would observe that the Fourth draft law is a complex piece of legislation and far from easy to understand containing many difficult legal concepts. It also appears to be a very controversial draft law and, in my opinion, a further meeting with the Bulgarian authorities would help to clarify matters that have arisen since a previous meeting. It may be that certain of the issues identified below can be explained satisfactorily or that they only arise because of translation issues.

Election of the Commission

3. It is noted that the Fourth draft law does not require that the Deputy Chair and two other members of the Commission be elected by a two-thirds majority of the National Assembly as was required by the Third draft law Article 4 and as was recommended by the Interim Opinion at paragraph 46. It is recommended that this qualified majority rule be re-instated. It is extremely important that the Commission in carrying out all of its activities be and be seen to be impartial. The whole purpose of this law is to address crime and corruption and any widespread belief that the Commission itself was not impartial would undermine it completely. In circumstances where there is a history of corruption within the public administration, it is especially important that the implementation of this draft law be above suspicion.

4. Chapter Two sets out the rules for the establishment of the Commission, appointment of its members and supervision. It is important that the Commission's activities be visibly supervised by the National Assembly to insure its credibility with the public and with persons with whom it has dealings. This also applies to authorities referred to in Article 10 i.e. the directors and inspectors of territorial directorates who are the Commission authorities who identify relevant assets. Consideration might be given to providing specifically that the supervision of the Article 10 authorities also be subject to the same standing committee of the National Assembly that supervises the Commission itself. The implementation of this law should be closely and regularly monitored to ensure that it actually achieves its purpose in an appropriate fashion consistent with constitutional and human rights standards. Monitoring is especially important in the case of a law such as this which operates in favour of the state and which contains legal presumptions and which transfers the burden of proof from the state to the respondent/defendant.

Examination of Origin of Assets by the Commission

5. Article 20 of the Fourth Revised Draft Law differs from Article 20 of the Third draft law in response to the Venice Commission Final Opinion adopted in October 2010. This is the Article in both draft laws which prescribes the assets whose sources may be examined by the Commission. In the Third draft law it would appear from Article 23(1)2 that the Commission may only initiate proceedings to examine the source of assets where the person whose assets are to be examined is already "*constituted as an accused*" pursuant to one of the offences listed in Article 20(2)1. This would mean that the Commission "*cannot initiate seizure and forfeiture proceedings before the court if there is not, at least, a pre-criminal proceeding started. This remains true even when the examination has actually identified the lack of correspondence between the value of the assets acquired and the income of the examined person or his or her family members*"[1]. In the Third draft law the

[1] CDL-AD(2010)30 paragraph 10

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circumstances where assets were assumed to be acquired through *"illegal activity"* were specifically set out in article 20(2) and included specified offences and circumstances where *"effective administrative acts"* existed against the relevant person under specified legislation.

6. Now in the Fourth draft law, the Bulgarian authorities have amended the terms of Article 20 to provide that the Commission may institute proceedings to identify the origin of assets *"for which there is a doubt that it has been acquired as a benefit from criminal or another illegal activity"*. This phrase *"criminal or another illegal activity"* is defined in the Fourth draft law to mean *"all activity effected in the territory of the Republic of Bulgaria or abroad which is constituted as a criminal offence or administrative violation under the Bulgarian law."* One might assume from this that *"illegal activity"* equates to *"administrative violation."* However this is not explicitly stated.

7. Other undefined phrases are used in the Fourth revised draft law in addition to the defined phrase *"criminal or other illegal activity"*. It is thus not always clear what different activities are intended to be covered by the various terms used i.e. by *"criminal activity"* when used on its own (e.g. Article, 22(1), 23(2), 25(5), 46(1)2), *"illegal activity"* when used on its own (e.g. Article 24), the defined *"criminal or [an]other illegal activity"* when used on its own (e.g. Article 20(1)1, 46(1)1) and finally *"criminal or [an]other illegal activity"* when used in conjunction with *"criminal activity"* (e.g. Article 1(1), 20(2)). The difference between *"criminal activity"* and *"illegal activity"* is not made clear in the definition or elsewhere in the draft law[2].

8. The *"Reasons"* at the end of the Fourth draft law, which it is assumed do not form part of the law, state that *"unlike the existing law, the forfeiture of assets acquired through criminal activity is not preceded by a conviction that has entered into force which is what is identified with the civil forfeiture mechanism ...the proceedings develop and are finalised before there is a conviction in force for a crime..."*

9. It is also important that it be clear from the draft law whether the legislative intention is that the property in relation to which the Commission may institute proceedings for identification of the origin of assets is or is not required to be connected to specific, identifiable crimes and or other specific, identifiable illegal activity. The draft law is, in certain respects, unclear in relation to this core matter.

10. It is understood that Irish[3] and other legislation has provided a basis for this draft law. In the Irish law *"'proceeds of crime' means any property obtained or received at any time (whether before or after the passing of [the] Act) by or as a result of or in connection with criminal conduct". "Criminal conduct"* is defined to mean *"any conduct...which constitutes an offence or more than one offence"*[4] and includes conduct outside the State which would constitute an offence. It has been held by the Irish Supreme Court that the targeted asset does not need to be linked to a particular offence and that the Act would be *"useless and unworkable"* if so interpreted[5]. In this case the police officer gave evidence as to the nature of the criminal activities allegedly committed by the respondent and the funds claimed to have been obtained thereby were identified as the source or funding for the purchase and development of the property which was frozen. Part of the evidence was hearsay which evidence is expressly admissible under the Act. The drafting technique used in the provision was explained as follows: *"the word 'crime' is not preceded by a definite or indefinite article and this clearly indicates that it is the legislative intention that the Act should have application in circumstances where the plaintiff is unable to show a relationship between the property alleged to be the proceeds of crime and the particular crime or crimes."*

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[2] An undated paper addressed to the President of the National Assembly, the Prime Minister, the Ministry of Justice and the Venice Commission from various attorneys, representatives of legal academia and human rights activists makes the point that there is no clear definition of the concept of *"illegal activity"* and that its interpretation is left entirely to the discretion of the Commission established under the draft law.

[3] CDL-AD(2010)010 paragraph 21

[4] Proceeds of Crime Act 1996 section 1 as amended by Proceeds of Crime (Amendment) Act section 3(a)(i)

[5] *McK v. A.F.* [2005] 2 I.R. 163 at 169

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11. Chapter Three of the Fourth draft law sets out when the Commission shall institute proceedings to establish the origin of assets. Article 20 would appear to be a general provision and the specific circumstances in which the Commission is required to institute proceedings are governed by the subsequent Articles of the Chapter. **Article 21(1)** provides that the "*Commission shall institute proceedings to establish the origin of the assets of a person who has been constituted as an accused for an offence...under [specified crimes] of the Criminal Code...*" In this case the Commission institutes proceedings at the point when the person whose assets are under investigation has been charged with a relevant criminal offence. It is stated at Article 21(2) that such proceedings shall be instituted "*...to establish the origin of the assets of a person against whom penal proceeding have not been instituted*" (emphasis added) where there is a technical reason for not having instituted proceedings such as that an amnesty has been introduced or a possible accused has died or a time limit for prosecution has expired. Article 21(3) requires the Commission to institute proceedings where the criminal proceedings have been suspended for specified reasons. In all of these cases no trial or conviction is required before the Commission institutes proceedings to establish the origin of assets but generally the owner of the assets must be charged with one of the specified criminal offences unless the exceptions in sub-Articles (2) or (3) apply and the assets are therefore connected to specific, identifiable crime.

12. **Article 22** provides that the "*Commission shall institute proceedings to establish the origin of the assets of a person* [*or legal person*] *for which there are sufficient data that it possesses or has obtained assets acquired through or in connection with criminal activity of another person regardless of the implementation of the penal responsibility of the perpetrator.*" In these cases there is no requirement that a conviction has been secured against the "*...other person*"/"*perpetrator*" when proceedings are instituted though it is less clear whether a criminal prosecution is required to be commenced and therefore whether a specific identifiable crime relating to the "*...other person*"/"*perpetrator*" is required. It is recommended that this be clarified.

13. Under this section it is only assets obtained through "*criminal activity*" that can be investigated as distinct from assets obtained through "*criminal or other illegal activity*" as defined. It is not clear why assets obtained through "*other illegal activity*" are excluded from investigation under this Article or, as pointed out in paragraph 5 above, were it to be included, what activity "*other illegal activity*" would comprehend.

14. **Article 23(1)** permits the Commission to institute proceedings relating to crimes and criminal activity carried out abroad where there is "*an act of a foreign court concerning any of the [specified] crimes, recognised under the procedure provided for in the Criminal Procedure Act*". Article 23(2) provides that the Commission may institute proceedings "*where there have been identified assets acquired from criminal activity or assets acquired through or in connection with criminal activity carried out abroad*". It is unclear whether charges must only have been brought or whether convictions must be secured before the Commission can take proceedings in these cases. It is noted that only "*criminal activity*" is covered under this Article and the considerations referred to in paragraph 5 above apply.

15. **Article 24** permits the Commission "*to establish the origin of concrete assets for which there are data that they have been obtained as a benefit through or in connection with illegal activity...*" This is the first occasion on which the phrase "*illegal activity*" is used on its own rather than as part of the phrase "*criminal or other illegal activity*" which is specifically defined in the draft law. It is not clear therefore what is intended to be comprehended in the phrase "*illegal activity*" in this Article.

16. It is not stated in this Article who is the person to be examined. Presumably it is intended that the person to be examined is the person who has obtained the benefit from the illegal activity. This should be clarified.

Injunctions

17. It has not been made clear in the draft law whether examination proceedings before the Commission and applications to court for an injunction are made on notice to the person in possession of the assets or *ex parte*. This should be clarified.

18. **Article 46 (1)** provides the two circumstances in which the Commission may present an application to the Court seeking an injunction by way of attachment or garnishment or appropriate measures on assets on the basis of a report provided by the Director of the territorial directive. An injunction can be sought where it has been established that:

> "1. *There is a concrete benefit acquired through or in connection with criminal or another illegal activity;*
>
> 2. *The value of the assets ... substantially exceeds the net income of the examined person and of his/her family members... wherefrom it can be reasonably assumed that the assets have been acquired from criminal activity."*

The word "*or*" should be inserted between 1 and 2 above so as to clarify that these are alternative bases for the imposition of an injunction. (This may in fact be clear in the Bulgarian original of the draft law but it is not clear in translation.)

19. Under Irish civil forfeiture law proceedings are always taken against a person on the basis that the "*person is in possession or control of ... specified property... that... constitutes, directly or indirectly, proceeds of crime, or ... specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime...*" (Emphasis added.) A proceeds of crime application must therefore have a respondent who is in possession of or control of the asset (not including possession by the police, revenue or a receiver). This is because proceeds of crime proceedings are proceedings "*in rem*" involving civil restraint of property which can ultimately result in forfeiture if the assets are not returned or otherwise disposed of.

20. Pursuant to **Article 48(2)** an injunction is granted where evidence establishes "*that the person... has acquired, possesses or controls*" specific assets from criminal or other illegal activity or has acquired assets from criminal activity shown by a substantial lack of correspondence between assets and income of the person and his or her family. Since the purpose of the injunction and, ultimately, forfeiture is to restrain the asset in favour of the State then possession or control would appear to be the appropriate basis for proceeding as distinct from acquisition. A person who has acquired property from criminal or other illegal activity might well not be in possession or control of it after a certain point. It can be noted that under Irish law the fact that a person in possession or control of the property against whom an order is sought may not himself or herself have been involved in criminal activity or aware that the property constituted the proceeds of crime. However this would not prevent the court from making a freezing order unless it was satisfied that there would be "*a serious risk of injustice*". Consideration might therefore be given to limiting the persons against whom injunctions and forfeiture may be sought to those in possession or control of the asset.

21. **Article 48(2)** sets out the circumstances where the Court shall grant the injunction requested. One of these is that, in the absence of the injunction, "*it will be impossible or difficult to exercise the rights under the court's decision...*" It is not clear what "*rights*" are involved here, though maybe assumed that they involve matters that arise in relation to getting in the assets and on forfeiture.

Forfeiture

22. It is noted that **Article 90** makes respondents in the proceedings "*the person under examination*" and the persons who would be considered third parties to whom the examined person had transferred assets (cf Articles 78(1), 79, 80 and 85) and these persons are potentially subject to forfeiture under the draft law.

23. **Article 92** sets out the evidence that the Commission shall provide in forfeiture proceedings including evidence of lack of correspondence between assets and income and of knowledge or assumption of third parties that the assets may have been acquired through criminal or other illegal activity. However, none of this evidence should be conclusive and the possibility of counteracting it by evidence called on behalf of the defendant must be available. The evidence of the Commission must create only a *prima facie* case which may be answered by the defendant with a credible explanation as to how he or she lawfully came into possession or control of the property. This is the position in the Irish Proceeds of Crime law[6]. The role of the court in assessing evidence is all-important.

24. It would clarify matters if **Article 93** expressly stated which presumptions may be disregarded by the court where there would be a serious risk of injustice. Alternatively, this provision should be included in the specific article on each occasion in which the presumption arises. It is essential that the court have the appropriate discretion in order to do justice in matters before it and specifically not to make orders against defendants where the presumption of a criminal or illegal origin of assets is rebutted.

[6] *McK v H. & H* Supreme Court 28 November 2006

Strasbourg, 25 February 2011

Opinion no. 563/2010

CDL(2011)008*
Engl.only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE FOURTH REVISED DRAFT LAW

ON FORFEITURE IN FAVOUR OF THE STATE OF ASSETS ACQUIRED THROUGH CRIMINAL OR ANOTHER ILLEGAL ACTIVITY

OF BULGARIA

by

Mr Guido NEPPI MODONA (Substitute Member, Italy)

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1. In the final opinion on the Bulgarian third revised draft law, adopted by the Venice Commission at its 84th Plenary Session (15-16 October 2010), the Commission commended "the fact that the third revised draft law... has followed most suggestions previously expressed by the Commission" (§ 6); among the conclusions, the Commission welcomed "the efforts made by the Bulgarian authorities to respond to its observations and recommendations... and acknowledges the fruitful co-operation between the Bulgarian Ministry of Justice and the Venice Commission, which has brought the third revised draft Law even closer to the practice in other countries while ensuring the respect for fundamental rights and freedoms" (§ 42). It has also expressed hope that "this draft law will soon be adopted by the parliament of Bugaria".

2. In the October Plenary Session it was said that there were reasons to believe that the third revised Bulgarian draft Law and our draft final opinion would have been the last ones. In fact, the core matter and the most critical issue of the draft Law – that is, the scope of application of the civil forfeiture only to assets acquired through criminal activities or extended to assets related to other illegal activities - was settled in a reasonable and fair way.
Following the two main suggestions of the Venice Commission, the third Bulgarian draft Law (1) extended its scope of application to assets of illegal origin not necessarily linked to criminal activity, and (2) guaranteed the proceedings of the Commission through the implementation of the right of defence and judicial control on critical acts, as search, seizure, and the examination of the suspect.

3. In particular, art. 20 (2) 2, 3, 4 empowered the CEPAIA to carry out investigations also in case of a specific administrative violation of the Custom Act, the Law on Prevention and Disclosure of Conflict of Interest, and the Public Disclosure of Senior Public Official Act (a possibility provided for in the first version of the Bulgarian draft Law).

4. The favourable opinion expressed by the Venice Commission in October 2010 cannot be shared with respect to the fourth revised draft Law. Without reasons that are clear to me, the disposition and the systematic order of the text are deeply upset, and it becomes very difficult, if not impossible, to compare it with the previous versions of the draft Law.

By this point of view I subscribe to the general remarks of Mr. Hirschfeldt (in particular, § 1-5). Like Mr. Hirschfeldt, I also believe that new actors (for instance, the legal department of the Council of Ministers and the legal commission of the National Assembly) intervened in the Bulgarian law-making-process but in the absence of any official documents it is difficult to understand the reasons of this new disposition of the draft Law. In this regard, the document "Annex 16 – Reasons to the draft Law" is rather generic and the explanations of the changes, prepared by the vice Minister Mrs Petrova, only cover some articles.

5. After having assessed the three subsequent versions of the Bulgarian draft Law on forfeiture - all of them strictly related – and adopted two interim and one final opinion, the Venice Commission has been asked to examine and evaluate a deeply different fourth version, whose chapters seem to be written by different hands. As Ms Flanagan pointed out, fundamental juridical concepts, as for instance "another illegal activity", "other illegal activity", "illegal activity", used alone or in conjunction with "criminal activity", are not clearly defined and may be used in different meanings (see Flanagan comment, § 6-10, 15). This implies uncertainty and confusion on essential notions, I would say the core matter of the draft law, in violation of the principle of legality.

In fact, it would be necessary to rewrite a large part of the draft law.

6. Moreover, the fourth draft law appears to worsen the previous versions. Let me give only two examples: Art. 4 (3) of the third draft law provided for a qualified majority of two thirds for the election by the National Assembly of the deputy President and two members of the CEPAIA. This provision, which had strengthened the democratic and representative character of the CEPAIA and its independence (see also Ms. Flanagan comment, § 3), disappeared in this fourth draft law, without any explanation. The provision would have made the procedure easier for the necessary amendment of art. 81 § 2 of the Bulgarian Constitution.

Second, as mentioned above (§ 3), art. 20 of the third draft law explicitly provided for the cases in which the scope of the law is extended to illegal activity, i.e. the administrative violations under the three specific Bulgarian laws strictly related to the possibility of acquiring assets through illegal activity. Now art. 24 (1) of the fourth draft law talks generically of assets obtained "through or in connection with illegal activity", without any reference to the violations of specific administrative laws. In so doing, art. 24 could violate the principle of legality, for the absolute vagueness and uncertainty of the notion of "illegal activity".