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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT SECOND INTERIM OPINION

ON THE DRAFT ACT
ON FORFEITURE IN FAVOUR OF THE STATE
OF CRIMINAL ASSETS

OF BULGARIA

on the basis of comments by

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I. Introduction

1. In late 2009, the Bulgarian authorities prepared a new draft Law on Forfeiture in favor of the State of Illegally Acquired Assets (CDL(2010)002). Further to a request by the Permanent Representative of Bulgaria, the Venice Commission adopted an interim opinion on this draft Law (CDL-AD(2010)027). In its interim opinion, the Commission found that 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.

2. In May 2010, the Bulgarian authorities submitted a revised draft Law on Forfeiture in favour of the State of Criminal Assets (CDL(2010)040) to the Venice Commission for assessment.

3. *The following second interim opinion was drawn up on the basis of the comments by Messrs Neppi-Modona and Hirschfeldt; it was adopted by the Venice Commission at its Plenary Session (Venice, 2010).*

II. General comment to the draft law

4. The present Opinion has to be seen as a follow-up to the interim opinion given on the draft Law on Forfeiture in favor of the State of Illegally Acquired Assets (CDL-AD(2010)027). It will focus on issues where the Commission had expressed critical views in its previous opinion.

5. As a general comment, the Commission commends the fact that the revised draft Law on Forfeiture in favour of the State of Criminal Assets (hereinafter: the revised draft Law) has followed several suggestions expressed by the Commission in its previous opinion. It notes, however, that a number of important issues previously raised have not been addressed, fully or in part.

6. The following detailed comments are based on an English translation of the revised draft Law. The translation may not accurately reflect the original version on all points and, consequently, certain comments can be due to problems of translation.

III. Analysis of the draft law

A. The scope of the Law

7. Perhaps the most substantial change brought by the revised draft Law is its more limited scope of application. As its title indicates, the revised draft Law now applies only to assets acquired through “*criminal activity*” (Article 1). At the same time, it allows the State to recover criminally obtained assets from a person involved in a criminal procedure and not only, as it is the case in the existing Law, already convicted. Further to a telephone conversation with the Bulgarian authorities, it became clear that this modification is due to their interpretation of the Venice Commission concerns regarding the possible effects of a non-conviction based civil forfeiture on the effective protection of the fundamental human rights, expressed in its interim opinion (see paras. 38-39).

8. However, in its interim opinion, the Venice Commission made clear that extending the scope of application of the draft Law also to “*illegal activities*” was acceptable, provided that the civil forfeiture proceedings are devised and carried out in compliance with the Bulgarian Constitution and the European Convention on Human Rights (hereinafter: ECHR)¹. It also recommended the Bulgarian authorities to better specify the aim and purpose of the draft Law and the general and public interests, in order to provide a basis for the “*proportionality-test*” that must be undertaken within the administration of justice by the national courts dealing with cases of forfeiture (see interim opinion, paras. 39-40). In the Venice Commission’s opinion, the new

¹ See interim opinion, paras. 96-99.

Article 2 of the revised draft Law on announcing its purpose does not sufficiently respond to this recommendation. The revised draft Law could specify that the mentioned purposes have to be confined within reasonable limits given the importance of what is at stake for the involved private parties (e.g. the right to peaceful enjoyment of possessions).

9. This reduced scope of application of the revised draft Law represents a major change in the philosophy of the whole law. In the context of the first draft law, it had been explained to the Venice Commission that the extension of the forfeiture to “illegal activities” was deemed to be essential in the fight against corruption in Bulgaria. The revised draft Law has abandoned this approach altogether.

10. At any rate, it may be useful to define the term “assets acquired through criminal activity”. A possible definition could be similar to one used in the Irish Proceeds of Crime Act, which defines proceeds of crime as “any property obtained or received by, or as a result of, or in connection with the commission of an offence”².

11. The new Article 26 of the revised draft Law keeps open the possibility to start an “examination”, or the investigation proceedings, also with regard to assets of “illegitimate origin”. When a lack of correspondence between the value of the assets acquired and the income of the examined person and his or her family members is established, “*the Commission will inform the respective authorities of the Ministry of Interior*” (§ 3). However, the Commission will only formally institute proceedings if the examined person is “*constituted as an accused party for any of the criminal offences referred to in Article 20§1.1*” (Article 26§4). This means that the CEPACA is only empowered to act when a criminal procedure is open for one of the crimes of Article 20, that is, in parallel with the prosecutor or the criminal judges.

12. Concerning third persons covered by the revised draft law, Articles 43, 46 and 47 now clearly require the link between the assets of the third parties and the examined person. This change provides appropriate safeguards for the protection of third parties rights (who may be genuinely innocent property owners). It also corresponds to the recommendation expressed by the Commission in its previous opinion.

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

13. According to Article 3 of the revised draft Law, the former Identification of Illegally Acquired Assets Commission has been renamed the Commission for Establishing Property Acquired through Criminal Activity (hereinafter: “the CEPACA”).

14. While the order of the relevant provisions of the revised draft Law regarding the composition, election and nomination of the CEPACA members, and its functioning has changed, their content remained basically the same.

15. In this regard, the Venice Commission strongly regrets that its recommendation to introduce the requirement of a qualified (two-third) majority for the election of the Deputy Chairperson and two members of the CEPACA by the National Assembly was not taken up. As previously pointed out, such requirement would allow to avoid direct involvement of the governmental political parties and thus ensure the independence of the CEPACA.

16. Also, the revised draft Law did not change the eligibility criteria for the directors of territorial directorates and the inspectors at the territorial directorates (Article 13). In its interim opinion, the Venice Commission suggested to apply the same criteria as those applicable for eligibility for membership of the CEPACA provided for in the new Article 5. The reason for this recommendation was the significant role given to these authorities in the investigation procedure as well as in the forfeiture proceedings.

² Criminal Proceeds Act, section 1.

17. The Venice Commission notes the new Article 14 which prohibits the CEPACA members, directors and even inspectors to be members of a political party or a coalition, organization pursuing political goals as well as to perform political activity. While such a provision is very far reaching, it does not necessarily provide a sufficient guarantee of the independence of the CEPACA. A requirement of a qualified (two/third) majority for the election of three of the members of CEPACA (para. 15) would probably as such have an even greater impact on the independence of the CEPACA.

C. Decision-making powers of the CEPACA

18. The Venice Commission welcomes new Article 8§5 which reaffirms the power of the CEPACA to decide on, among others, "*the conclusion of a settlement*" in accordance with the requirements provided for in the new Article 80. This change corresponds to the Venice Commission's recommendation given in its interim opinion.

19. According to Article 8§2, the decisions of the CEPACA will be adopted by a majority of more than one half of the members and "*shall be reasoned*". As mentioned in its interim opinion, a non-conviction based forfeiture system will benefit from legislated evidentiary rules that are specific and well defined. In the Venice Commission's opinion, the revised draft Law could thus usefully add another paragraph elaborating more on the meaning of a "reasoned" decision. Such a general provision would clarify the level of proof that is required to sustain a given decision. A different degree of reasoning should be required for requests for injunctions and for actual forfeiture.

D. Investigation proceedings

20. As mentioned above, in conformity with the revised draft Law, the investigation proceedings by the CEPACA can now be triggered only by criminal charges, a criminal conviction and the fact that two or more pre-trial proceedings for "*deliberate publicly actionable criminal offences have been instituted against him or her within a period of five years after he or she has been constituted as an accused for the first offence*" (Article 20).

21. In this regard, the Venice Commission assumes that the wording "*a person who has been constituted as an accused*" in Article 20 §1 does not require that a criminal proceedings before a Court has actually started. It supposes that also a pre-trial investigation initiated by a Prosecutor would suffice for the CEPACA to institute proceedings under the revised draft Law.

E. Investigation powers of the CEPACA authorities

22. While its order and numbering have changed, the new Chapter III, Section II (Articles 27 to 39) on powers of the CEPACA authorities i.e. the directors of territorial directorates and the inspectors at the territorial directorates, takes up all the provisions commented upon in the Venice Commission's interim opinion.

23. The new Article 38 § 3 now correctly introduce the right to a legal counsel during examination by the CEPACA's authorities. This modification, as well as the provision in § 2 on notification of material, will contribute to ensure the right to defense of the examined person, as guaranteed by Article 6 §1.c ECHR, as well as by Article 56 of the Constitution of Bulgaria. The Venice Commission also notes the new Article 32.§2.7 which now provides expressly for the power of "*a judge*" to endorse the request for assistance from the bodies of the Ministry of Interior for search or seizure under the procedure of the Penal Procedure Code. It strongly recommends to replace the term "a judge" with a specific reference to the competent court.

24. On the other hand, the revised draft Law still lacks an explicit provision introducing an obligation for the CEPACA to obtain a Court order for requesting certain information and documents (see interim opinion, para. 58).

25. Further, the meaning of Article 38§1 stating that the CEPACA “*shall give possibility to the examined person to participate in the proceedings after enactment of the injunctions imposed upon the assets*” is unclear. The manner of participation should be specified.

26. As to Article 39 and a record of proceedings to be drawn up for “*each action under this Act*”, it is recommended to clearly specify that statements obtained from the examined person should not be used in criminal proceedings in a way to incriminate him or her. Such clarification would contribute to protecting the right not to incriminate oneself, as guaranteed by the ECHR³.

F. Seizure and forfeiture proceedings before the court

27. Chapter IV, Section I provides for the terms and procedure for the imposition of an injunction order on assets presumably acquired through criminal activity. Based on a “report” provided by the director of the respective territorial directorate, the CEPACA shall request the seizure of the assets presumably acquired through criminal activity. The Court is due to decide within 48 hours; court’s decision is subject to immediate enforcement. Article 52 §3 guarantees the right to judicial review of the court’s decision before an appeal judge.

28. With regard to the possibility to revoke the injunction order if within three months from the date of its making the CEPACA did not claim forfeiture of the assets concerned, the Venice Commission is still of the view that it is regrettable that it is up to the examined person to request the court to revoke the injunction order⁴ (new Article 75§3 – or correctly §2).

G. Standard of proof and rebuttable presumption

29. In its interim opinion, the Venice Commission pointed out that “*specifying evidential thresholds the authorities should meet in order to obtain actual assets forfeiture in the legislation is 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*” (para. 75).

30. It has also recalled the relevance of the court’s obligation to “*evaluate all provided evidence carefully and objectively, and base the forfeiture order on that evidence*” (para. 74).

31. The revised draft Law now elaborates in some more detail on the standard of proof required from the CEPACA and its authorities to sustain a forfeiture action. However, the relevant provisions lack clarity and coherence.

32. Article 40§1 provides for asset forfeiture on an evidential threshold of “*reasonable supposition*”. This term is defined as “*present where the assets are not corresponding to the income of the examined person and of his or her family members and no legitimate source thereof has been established*”. It may be questionable whether such a definition will actually help the courts in applying the law. A “reasonable supposition” should be deemed to be present

³ See ECtHR, *Saunders v. UK*, judgment of 17/12/1996.

⁴ See interim opinion, para. 61.

when a reasonably cautious person has enough elements to believe that the assets in question derive from criminal activities.

33. With regard to the proceedings for injunction order, Article 51 requires the same level of evidential threshold (through its paragraph 1 and 4). On the other hand however, in its paragraph 6, it requires the CEPACA to terminate the proceedings without imposing injunctions “*where from the collected evidence it has been established that the income of the examined person and his or her family members have legitimate source*” (emphasis added). In the Venice Commission’s opinion, it does not seem justified to require higher evidential threshold than from CEPACA. It is thus recommended to replace the expression “it has been established” with “it could be reasonably assumed”. The same is true as regards the termination of the procedure for actual forfeiture (Article 74§3).

34. In addition, for the sake of coherence, the reference to “legitimate origin” or “legitimate source” should be replaced with a wording with reference to “criminal activities” in Articles 40§2, 51, 74§3 and 79§5.

35. With regard to third parties, the Venice Commission appreciates the introduction of an explicit reference to the requirement for the CEPACA to establish that the individual either knew or should have known or suspected the criminal origin of the assets in question, now provided for in Articles 46 – 47 of the draft Law. This is welcomed as it should, in principle, ensure that a fair balance is maintained between the rights of those involved and the general interest.

36. As to the procedure for actual forfeiture, the new Article 74 §2 gives some more detail on the contents of the “*reasoned conclusion made by the director of the territorial directorate*”, which shall serve as a basis for claiming forfeiture in favor of the State. Also, the new Article 79§4 further specifies the kind of evidence the CEPACA should produce in order to obtain assets forfeiture.

37. The Venice Commission regrets that the revised draft Law did not make any changes with regard 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 an injunction order or actual asset forfeiture (see Article 79§5 and the interim opinion, paras. 74-76).

H. The role of the prosecutor in the forfeiture proceedings

38. In reply to the Venice Commission’s concerns with the role of the prosecutor in the civil forfeiture proceedings (see interim opinion, paras. 80-86), the revised draft Law removed the possibility for the prosecutor to take part in the proceedings (new Article 79) and to give its approval for a settlement agreement (new Article 80).

I. Management of seized and forfeited assets

39. In its interim opinion, the Venice Commission welcomed the intention of the Bulgarian authorities to provide for the establishment of a special fund for the deposit of seized and forfeited assets, which would serve to encourage the development of small and medium enterprises in the country (see para. 91). It thus suggested to introduce relevant provisions ensuring the establishment of an asset seizure and forfeiture fund in the revised draft Law as well as of the adequate structures for control and auditing of asset administration (see paras. 92-94).

40. The revised draft Law now establishes two different systems for management of seized and of forfeited assets. According to Article 81, the property under injunction “*shall be left for management and use by the examined person or the person holding the property at the moment of imposing injunction*” (emphasis added). A number of exceptions from this general rule are however, provided for: the CEPACA can “*decide to manage by itself the property*”

under injunction (Article 83) and to put on sale movable things that are perishable or subject to substantial devaluation (Article 84§1). Article 87 establishes a special regime of administration for movables of historic, scientific, artistic or numismatic value and for noble metals, precious stones or artefacts.

41. In the Venice Commission's opinion, leaving the seized property for "use" by the examined person does not seem appropriate. Using property before the entry of a court order of forfeiture can diminish the value of the property and may delegitimize the system in the eyes of the public. While of course, there may be times where provisional use is unavoidable, in such cases there must be strict controls on the purpose and time limits for such use.

42. Article 86§1 requires the CEPACA to open a bank account "*in the name of the examined person*" on which will be deposited all proceeds from the sale of the movables as well as the seized currency. It would be appropriate to appoint a special trustee for managing the aforementioned proceeds.

43. As for the criminal assets actually forfeited, the draft Law establishes the Interdepartmental Board for Management of the forfeited assets ("the Board") and the Management of the proceeds from forfeited criminal assets fund ("the Fund"). The composition of the Board includes the representatives from all relevant ministries of the country with a Deputy Minister of Finance as Chairperson (Article 89§3). It is up to the Board to decide, by simple majority, and to propose to the "*Council of Ministers to leave for management the assets forfeited /.../, to grant them for humanitarian purpose or to entrust the sale thereof*". The property designated for sale is to be liquidated "*by a public enforcement agent appointed by the Minister of Finance*" (Article 92§1).

44. All seized and forfeited assets, after liquidation, are to be deposited into the newly created Fund (Article 94), to be established as a "*second-level spending unit within the Minister of Finance*" (article 93§2).

45. The revised draft Law now also specifies how will the financial resources of the Fund be spent. The Venice Commission notes that the development of small and medium enterprises, mentioned by the Bulgarian authorities (see the interim opinion para. 91), does not figure in the revised draft.

46. Article 95 states that the financial resources of the Fund shall be spent to:

"a) cover the expenses for management of the secured property and other expenses related to the application of this Act;

b) pay compensations awarded under the terms and the procedure established by the Liability of the State and the Municipalities for Damages Act and

c) pay compensation awarded by judgements of the European Court of Human Rights on claims against illegal acts when applying the law".

47. Allocating the proceeds of assets forfeiture for law enforcement as a contribution is welcome as it can help to ensure that a forfeiture programme is self-sustaining. It can also convey a symbolic message in the fight against crime and corruption when criminals have the fruits of their crimes used against them.

48. At the same time, the Bulgarian authorities should ensure that there is sufficient amount of funds appropriated through the regular state budget for the forfeiture system to function effectively. This is needed as revenues from seizures and expenditures on cases may not be synchronized, leaving the forfeiture system short of resources for some periods followed by an increase in resources that may exceed immediate needs.

49. On the other hand, allocating the resources of the Fund for fulfilling the ordinary State obligations such as paying compensation awarded by judgments of the ECtHR is not appropriate. The Venice Commission considers that such expenses should be covered from the regular state budget.

I. Conclusion

50. The Venice Commission acknowledges the efforts made by the Bulgarian authorities to respond to its concerns and recommendations. The revised draft Law addresses several of the main concerns previously expressed by the Venice Commission. It now provides for the appropriate safeguards for the protection of third parties rights, introduces the right to a legal counsel during examination by the CEPACA's authorities, and elaborates in some more detail on the standard of proof required from the CEPACA and its authorities to sustain a forfeiture action. The revised draft Law also removed the possibility for the prosecutor to play an active role in the forfeiture proceedings.

51. However, the Venice Commission takes note of the sudden and fundamental change of approach, that is the total exclusion of illegally acquired assets - with the exception of assets derived from criminal activities - from the scope of application of the law. This amounts in fact to strongly limiting the concept of civil forfeiture altogether, as only assets derived from criminal activities are now concerned.

52. A certain number of issues remain problematic. The following recommendations remain valid:

- 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 CEPACA to obtain a court order for requesting certain information and documents from the examined persons;
- replace the term "*a judge*" in Article 32§2 with a specific reference to a competent court;
- clarify the procedural safeguards contained in the revised draft Law, particularly the evidential threshold required from the CEPACA and its authorities, and the court's duty to evaluate provided evidence carefully and objectively;
- introduce appropriate control measures on the purpose and time limits for the use of the seized property;
- modify the rules on management of the seized property.

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