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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON THE CONCEPT PAPER FOR A NEW LAW
ON STATUTORY INSTRUMENTS
OF BULGARIA**

**Adopted by the Venice Commission
at its 78th plenary session
(Venice, 13-14 March 2009)**

on the basis of comments from

**Mr Sergio BARTOLE (member, Italy)
Mr Luzius MADER (expert, Switzerland)**

I. Introduction

1. *By letter dated 23 September 2008, Mr Petkov, Permanent Representative of Bulgaria to the Council of Europe, requested the Venice Commission's opinion on the draft concept paper for a new law on statutory instruments.*
2. *Mr Sergio Bartole, member for Italy and Mr Luzius Mader, Professor at the Institute of Advanced Studies in Public Administration (IDHEAP), Lausanne, Switzerland, as expert, were appointed rapporteurs and presented their observations (CDL(2009)022 and CDL(2009)023 respectively). The rapporteurs worked on an English and a French version of the draft concept paper, as adopted by the Bulgarian Council of Ministers on 18 December 2008 (CDL(2009)001).*
3. *In order to obtain a clearer picture of the political, institutional and legal context of this draft, Mr Mader and Ms Martin from the Venice Commission made a fact-finding visit to Sofia on 27 and 28 January 2009.*
4. *The visit was very well organised by the Ministry of Justice. The delegation held talks with the Minister for Justice, Ms Tacheva, in the presence of Mr Tanchev and Mr Kirov, member and substitute member respectively for Bulgaria. There were also meetings with collaborators from the Council on Legislation of the Ministry of Justice, representatives from the parliamentary committee on legal affairs, members of the parliamentary advisory legislative council, the president of the Supreme Administrative Court and representatives of the non-governmental organisation "Open Society".*
5. *The visit proved to be a very useful one and led to a better understanding of the national context, the legislative process in general and the issues involved in the adoption of this draft concept paper.*
6. *The following opinion has been drafted on the basis of the rapporteurs' observations and the information obtained during the visit. It was adopted by the Venice Commission at its 78th session (Venice, 13 and 14 March 2009).*

II. General information

7. The information obtained during the visit gave the delegation a better understanding of the context of the draft concept paper.
8. The draft concept paper was adopted by the Bulgarian Council of Ministers on 18 December 2008. According to the information obtained, the new law on statutory instruments (hereinafter the LSI) which will emerge from this concept paper is already being drafted in the Ministry of Justice and should be put to the national parliament as soon as possible. The delegation was told that the Venice Commission would also be asked to make comments and issue an opinion on the draft new LSI.
9. The comments and this opinion are based on the analysis of the draft concept paper itself and also take into account a number of existing statutory texts, in particular the constitution of the Republic of Bulgaria, the law on statutory instruments currently in force, Decree No. 883 on implementation of this law and the rules of procedure governing the activity of parliament and the Council of Ministers. The Ministry of Justice was kind enough to provide the rapporteurs with copies of these documents.

III. General observations

10. While the meetings and discussions held during the visit undoubtedly provided a better insight into the institutional, political, administrative and professional context and made it possible to take greater account of the relevant statutory environment already in existence, an analysis of the draft law relating to the new LSI which will be the outcome of the concept paper will enable us to make more detailed comments on certain aspects of the concept paper which, on some points, is expressed in fairly general terms.

11. Before commenting on the draft concept paper as such, it would be appropriate first of all to make a general remark on the desirability and necessity of such a concept paper for a law on statutory instruments.

Desirability of a concept paper for a new law on statutory instruments

12. A general concept paper for a law on statutory instruments is a well-established tradition in the Bulgarian legal landscape. Such a concept paper was drafted prior to the passing of the law on statutory instruments, enacted in 1973, which is still in force.

13. While a law on statutory instruments is clearly not indispensable (it will be noted that most European countries do not have one), this type of legislation is common in several East European countries and reflects a legal drafting tradition or culture specific to those states.

14. Moreover, the need for a concept paper on a draft law on statutory instruments would appear to have been expressed at international level. When Bulgaria acceded to the European Union on 1 January 2007, a mechanism for co-operation and verification was established¹. Under this mechanism, an action plan was drawn up by the Bulgarian authorities setting out the measures that Bulgaria intended to take in order to address the benchmarks. The drafting of a concept paper for the law on statutory instruments appears as item 2.10 of the action plan for implementing the benchmarks in the areas of judicial reform and the fight against corruption and organised crime².

15. By way of introduction, from a legal, and more specifically legal drafting point of view, such an approach is of clear practical benefit, even though the LSI is of the same statutory level as the other laws and does not take precedence over them. The LSI can help give greater weight to the rules governing the drafting of legislation, provide a clearer overview of these rules and ensure greater consistency. The Venice Commission cannot but welcome the pursuance of such objectives.

16. Nonetheless, as the following observations will show, this approach alone should not be regarded as sufficient to achieve those objectives.

17. Furthermore, some issues warrant additional observations and some remain problematic. These issues require further study so as to improve the concept paper and the law that will be drafted as a result, in order to ensure the quality, consistency and efficiency of the Bulgarian legal landscape.

¹ Decision 2006/929/EC of the European Commission of 13 December 2006 establishing a mechanism for co-operation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime (OJ L approved by the Council of Europe and following up on the report by the European Commission of 27 June 2007 on progress made by Bulgaria of 14.12.2006, p. 58).

² The action plan can be consulted via the following link: <http://www.mvr.bg/en/EUIntegration>.

Substantive observations – Specific questions

Content and purpose of the draft concept paper

18. The draft concept paper is divided into three parts. Part I sets out the reasons for a new LSI. Part II describes its regulatory scope and Part III outlines the structure and fundamental contents of the future law.

19. The rapporteurs have no particular comments on Part II. Comments will cover Parts I and III, highlighting the specific points and issues for which substantive observations are called for.

20. Parts I and III serve different purposes. Part I highlights a number of major points that will doubtless have to appear in the government report accompanying the draft law, whereas Part III has a dual purpose: first, it enables the minister responsible for drawing up the draft law and, subsequently, the government to take decisions in principle and lay down the criteria, in form and substance, for preparing draft laws. Second, it has an important methodological function insofar as producing a plan of the instrument is a first stage in the drafting work proper.

21. From this point of view, the approach adopted, ie a concept paper setting out the content and general plan of the statutory instrument is a sensible one in terms of both the methodology and management of the drafting of a piece of legislation. The Venice Commission endorses and welcomes such an approach.

22. Nonetheless, at another level, it must be pointed out that the draft concept paper deals at the same time with the question of general public policies (especially when referring to legislative programmes or strategies) and draft laws designed to implement the legislative policies and strategies previously adopted.

23. The Venice Commission would like to remind drafters that legislative programmes and strategies are not, in principle, included in pieces of legislation.

24. Legislative programmes and strategies are political documents intended to present public policies to resolve administrative, social or economic issues. They will underline the objectives of the proposed policies and the ways and means to be adopted in order to achieve those objectives. As such, they have an administrative, economic and social content whose preparation and examination require knowledge in these fields.

25. Implementation of these legislative programmes and strategies clearly requires the drawing up of draft legislation, but this is obviously a different stage from the framing of public policies. Draft laws come at a later stage and can be drafted only on the basis of previous documents comprising the legislative programmes and strategies approved.

26. Furthermore, the drafting of legislative programmes or strategies requires totally different technical expertise than that required in the case of draft laws and consequently does not necessarily involve the input of the same bodies. In addition, public consultation is not essential because of their occasionally very technical nature.

27. While legal experts cannot work without taking into account the strategy and programme-related documents, or without the co-operation of administrative, economic and social experts, their involvement comes at a stage which is subsequent to the preparation of and decisions on legislative programmes and strategies.

28. For these reasons, the benchmarks for evaluating legislative programmes and strategies must be different from those applicable to draft laws. Moreover, the procedure for verifying legislative policy documents should not be applied to the examination of the legal structure and formulation of statutory instruments.

29. While the content of draft laws does indeed depend on the choices made when drawing up legislative policies, the authors must comply with drafting, doctrinal, terminological and constitutional rules.

30. The Commission therefore strongly recommends that the draft concept paper make a clearer distinction between the obviously different stages of drafting documents relating to legislative policy (which in addition to technical expertise comprises a political dimension) and the drawing up and technical and legal verification of a draft law.

31. Furthermore, it should be noted that Part I (the need for a new law on statutory instruments) of the draft concept paper by and large merely describes the main shortcomings of current Bulgarian legislation, along with the major problems relating to the drafting and enactment of statutory instruments in Bulgaria, without any further explanation as to the factors which may have led to these shortcomings.

32. In order to address the shortcomings noted, the factors or causes of these should also be identified and analysed. This would show that the enactment of a new LSI could be only one way of improving the situation.

33. The Venice Commission wishes to point out that the enactment of a law on statutory instruments is undoubtedly sensible and necessary, but should be viewed as only a partial contribution to the general aim of improving the quality of Bulgarian legislation. The Commission believes that the emphasis placed on enactment of this new law should not give the impression that legislating is all that needs to be done.

34. There is a need for other, additional, measures not all of which would require the adoption of new regulations but which would address the current shortcomings and problems in the legislation, in terms of both statutory instruments and legislative process.

35. These additional measures include instruments to assist with the drafting of legislation. These could be handbooks, manuals, collections of best practice, check-lists, etc.

36. As pointed out in the Venice Commission's report on legislative initiative³, law drafting clearly requires specific technical knowledge and experience. The drafting requirements of the conversion into law of governmental policy have frequently led to the adoption of drafting handbooks, containing a collection of recommended drafting techniques.

37. Such works not only provide technical assistance in the law drafting process, but also ensure a degree of consistency.

38. They would also help the public or judicial authorities in the task of interpreting the legislation. The draft concept paper does in fact make provision for the adoption of detailed rules on the interpretation (in particular by the Constitutional Court) and enforcement of statutory instruments. Section 46 of the 1973 Law on Statutory instruments currently in force contains some rules about the interpretation of statutory instruments, following the doctrine and traditions of European law in this area. Although this article could be a useful basis for the future LSI, the rules on interpreting statutory instruments should also be taken into account when writing the handbook on drafting guidelines. If they are to be operational, such works must be constantly updated, taking account of developments in both legislation and case-law.

39. Adoption of such handbooks does not require the passing of a statutory instrument. They generally contain guidelines drawn up by the authorities responsible for drafting legislation. It is not advisable to provide for sanctions in the event of failure to comply with

³ See CDL-AD(2008)035, in particular paragraphs 133-139.

these guidelines, and indeed such a system would be difficult to implement. The penalty for poorly drafted texts will be the incorrect application or non-application of the law or its objectives, which constitutes a sufficient sanction in itself.

40. In addition, networks (inter-ministerial and possibly including parliamentary departments and external experts) should be set up, to encourage exchanges between practitioners and academics with an interest in legal drafting.

41. One should not underestimate the need for training for legal drafters (lawyers or other professionals involved in legal drafting).

42. While the draft concept paper refers at the end of Part I to the need for additional measures, these unfortunately are not clearly defined.

43. Accordingly, the Venice Commission believes it important for the draft concept paper, and the LSI, to make explicit provision for the development of aids, such as handbooks and the setting up of exchange networks, not forgetting the organisation of training courses.

44. Such activities could be assigned to the Council on Legislation as stipulated in the draft concept paper, or to another administrative unit.

45. While these activities would not be specified in the LSI, the latter must at least set out the legal basis on which they could be carried out and funded.

Types of statutory instrument

46. According to the concept paper, Chapter 2 of the future LSI will cover the types of statutory instrument.

47. The inclusion of a chapter on this subject is to be welcomed. It will help ensure harmonised terminology and clarify where the different legislative acts fit into the hierarchy of rules.

The statutory content of the new law according to the concept paper

48. In accordance with an acknowledged principle, laws should contain provisions of an exclusively statutory nature, ie which create rights or obligations, set up bodies and define their duties and responsibilities or lay down their procedures.

49. It must be pointed out, however, that the concept paper appears to contain elements which are not genuinely statutory in nature, such as purely descriptive or explanatory elements intended for legal drafters. Examples are: the principles of legal regulation referred to in Chapter 1; Chapter 9 (implementation and interpretation of statutory instruments) which provides that the future LSI will reflect the current state of case-law and doctrine as regards interpretation of statutory instruments; and the reference in Chapter 4 (drawing up of draft statutory instruments) to the fact that the draft law will designate the author. These elements do not have a clear statutory nature.

50. The Venice Commission recommends that the drafters of the future LSI ensure that the text contains exclusively provisions of a purely statutory nature.

Amount of regulatory detail in the future LSI according to the draft concept paper

51. The wording of the concept paper gives the impression that the LSI could be very, if not excessively detailed. The explanations given regarding the preliminary impact studies and the results of the enforcement of statutory instruments (Chapter 10) should not necessarily be included in the law itself. While such ex ante and ex post assessments are essential stages in

any methodical approach to drafting and implementing statutory instruments, a law is not the best vehicle for such explanations and clarifications or for provisions relating to purely administrative details.

52. The administrative details could be addressed and included in the implementing decree for the LSI, but this decree appears to have been completely overlooked in the concept paper.

53. The Commission recommends that the drafters take care not to overload the LSI with provisions relating to purely administrative details which could easily be included in the implementing decree, which has yet to be produced.

Scope of the new law

54. The scope of the future LSI is defined broadly.

55. Quite rightly, the law will apply, in principle, to all statutory instruments – and accordingly also to infra-legal acts – even though the predominant emphasis is on laws. The Venice Commission cannot but endorse and welcome a broad definition of the scope of the future LSI.

56. Nonetheless, two observations are called for.

57. The first relates to the acts of the European Union. Although these are not national statutory instruments and, consequently, fall outside the scope of the LSI, it would be helpful if the concept paper and the LSI itself devoted a specific chapter to this constantly increasing body of legislation.

58. The second relates to bills tabled by members of parliament, to be dealt with in Chapter 14 of the future LSI⁴. While the concept paper clearly states that the new LSI will lay down the general requirements to be complied with when drafting member's bills, it seems to refer at the same time to a constitutional obstacle deriving from the right of members of parliament to initiate legislation, and from the parliament's rules of procedure. This would appear to run counter to the value of having a law on statutory instruments if such a law were not to cover all draft statutory instruments prepared by parliament.

59. The ambiguity in the concept paper regarding the extent to which the new LSI will apply to statutory instruments prepared or amended by members of parliament constitutes a serious ground for criticism and cannot meet with the approval of the Venice Commission.

60. Indeed, it would be a serious error of interpretation to see in the decisions of the Bulgarian Constitutional Court⁵, cited in the concept paper, an exemption for members of parliament from the obligation to comply with the quality requirement rules to be included in the future LSI or in the other legal drafting tools, such as handbooks, guides, etc.

61. Meeting legislative quality requirements would not result in a limitation of the constitutional prerogatives conferred on parliament. In contrast, such requirements would enable parliament to fulfil its responsibility in the legislative field and in the implementation of the policies and strategies it supports.

62. The constitutional rules governing parliament's legislative initiative are designed to ensure that members of parliament are able to initiate and amend statutory instruments in

⁴ In the English version of the draft concept paper submitted.

⁵ No. 7/2001 "the Constitution does not restrict the possibilities available to the legislature to amend or supplement draft laws between readings".

accordance with their political choices and convictions⁶. They should not be interpreted as authorising members of parliament to evade the quality requirements of legal drafting.

63. Accordingly, the Venice Commission cannot but reiterate that it is absolutely essential for the parliamentary procedures for drafting bills or amendments to bills to comply with the same quality requirements, and particularly those to be included in the future LSI.

Incorporation in the regulatory or legislative environment

64. At present, the rules on the drafting, adoption and publication of statutory instruments are to be found in a multitude of different statutory instruments.

65. Apart from the law on statutory instruments and its implementing decree, there is also the law on official publications and the rules of procedure for the organisation and activities of parliament and the Council of Ministers.

66. It is not possible, on the basis of the concept paper, to have a full picture of or examine the different relations between these instruments. Ideally, therefore, the concept paper should be clearer on this point and stipulate that the future LSI will contain explicit provisions so as to ensure that it is incorporated in the best possible way into the existing regulatory environment.

67. Moreover, insofar as one part at least of the provisions of the implementing decree for the current law on statutory instruments will, according to the concept paper, be included in the future LSI, there remains the outstanding question of the adaptations that will need to be made regarding the implementing decree of the future LSI.

68. In this respect, the comments made in paragraphs 51 to 53 above on the detailed substance of the future LSI should also be taken into consideration.

69. The Venice Commission recommends that incorporation of the future LSI in Bulgaria's regulatory environment be specified more explicitly, with due consideration given to the recommendations made regarding the detailed substance of the law.

Interministerial (or internal) consultation

70. Interministerial collaboration is a particularly important aspect of the procedure to be followed when planning and drafting statutory instruments. This involves specifying the respective tasks of the lead ministries, the Ministry of Justice (and in particular the Council on Legislation) and other ministries having cross-cutting tasks in the drafting of regulatory texts, departments of the Prime Minister, etc.

71. Even though the concept paper addresses this aspect in several places, it would be much better if it made a clear distinction between (i) methods and (ii) organisational and procedural aspects.

72. The Venice Commission therefore recommends that the drafters of the concept paper and the future LSI make a clear distinction between (i) methods and (ii) organisational and procedural aspects.

Inter-institutional collaboration

73. Inter-institutional collaboration is vital for improving the quality of statutory instruments.

⁶ See the Venice Commission's report on legislative initiative, CDL-AD(2008)035.

74. Accordingly, the concept paper should make explicit provision for the necessary collaboration between the government and parliament to be reciprocal and to be carried out in different contexts specific to each institution and at various stages in the drafting of the law.

75. There are several possible approaches: for example drafting handbooks and guides could be drawn up in total consultation between the two institutions; quality control departments could be set up in parliament along the lines of those in government; provision could be made for the Council on Legislation to issue an opinion on draft laws drawn up by parliament, and draft laws could be verified by parliamentary experts before they are passed in parliament.

76. While these co-operation procedures should not be formally included in the future LSI, they should at least be explicitly mentioned in the concept paper.

77. The Venice Commission therefore recommends that the concept paper and the future LSI provide a clearer description of the planned institutional collaboration processes. It is essential to reiterate that both the executive and the legislative must comply with legislative quality requirements and with the terms of the future LSI.

Public consultation

78. The draft concept paper states that the new law will place particular emphasis on external consultation, particularly public discussion on draft statutory instruments.

79. The Venice Commission has, in the course of its opinions⁷, had occasion to highlight the necessity of civil society participation in the legislative process via external consultation. The Commission, therefore, cannot but welcome this position.

80. Nevertheless, the conditions for this external consultation as described in the draft concept paper call for a number of remarks.

81. The external consultation as presented in the draft concept paper is particularly regulated and restrictive. Discussions do not appear to be left to the initiative of the interested parties.

82. Rather they will be organised by the competent authorities under a very formal procedure which does not comply with the principles of free political debate.

83. In point of fact, proposals have to be announced publicly and debates organised in the form of round tables and panel discussions. Written comments will be accepted only if they are not anonymous and must be handed in within one month. This deadline is, moreover, relatively short and could be far from sufficient. It does not make for broad debate among the organisations concerned, with the result that there is the danger that the positions expressed by the organisations will not be very representative.

84. The danger of extreme formalisation of public consultation is also that the organising authorities could be in complete control of directing the consultation process. Furthermore, there is no guarantee that any remarks, comments or alternative proposals made outside this very strict context may be looked at or taken into consideration under the same conditions as those applying to the formal external consultation procedure.

85. The Venice Commission strongly recommends that the external public consultation procedure be reviewed and made significantly more flexible.

⁷ See in particular CDL-AD(2008)042, paragraph 28.

86. Moreover, the concept paper would appear to indicate that public discussion will be systematic and relate to all draft statutory instruments. While the Commission attaches great importance to public consultation, arranging for such consultation for every draft statutory instrument would be difficult to implement and not necessarily a good thing. Preferably priority should be given to holding public, sincere and genuine public consultation for major bills or other statutory instruments.

87. Lastly, in the interests of transparency, it would be appropriate to publish the positions adopted.

88. In addition, in order to offer a further guarantee of both the quality and interpretation of the law, it would be helpful if the authorities were to explain, for example in a report accompanying the draft law before parliament, how and to what extent these positions have been reflected and have influenced the statutory instrument.

89. Accordingly, the Commission recommends that the positions decided upon following the public consultation be adopted in a transparent way and published, and that consideration be given to a written report on their impact on the draft law.

Comments on the structure of the draft concept paper

90. It would be more logical to introduce some changes to the order of chapters of the new LSI, as described in Chapter III of the concept paper.

91. For example, Chapter 2 (Type of statutory instruments) relating to a specific point would be better placed before Chapter 5 (composition (structure) of statutory instruments).

92. Chapter 3 (Planning of statutory instruments) relating to a particular type of statutory instrument could come after the chapters dealing with all statutory instruments.

93. Chapter 4 (Drawing up of draft statutory instruments) is too disparate in that it deals with a multitude of different aspects relating either to methodology in the drafting or to matters of an institutional nature. These different aspects should be relocated to the relevant existing chapters in order to improve the quality, logic and balance of the overall structure.

94. There should be a separate chapter dealing with the "Council on Legislation", the supervisory body for the quality of draft statutory instruments.

95. There should also be a separate chapter dealing with the rules on the draft European Union instruments.

96. Chapter 11, on the body monitoring and reporting on the enforcement of the LSI, could quite easily be incorporated into a chapter on the Council on Legislation since, according to the draft concept paper, it is the Ministry of Justice which will be responsible for assessing the law.

97. Similarly, Chapter 8 (Binding effect of statutory instruments), which is intended to set out in a systematic way the rules on the effect of statutory instruments in terms of time and space, could be included in Chapter 5 on the structure of statutory instruments. This chapter should also address the matter of the substantive scope of the law (contained in the introductory provisions of statutory instruments), transitional provisions and entry into force (contained in the final provisions).

98. These comments on the structure of the future LSI, as set out in the draft concept paper, apply solely to the information that can be gleaned from the concept paper submitted for consideration. Clearly, an analysis of the draft LSI itself and its definitive structure would result in fuller and more detailed comments.

Conclusions

99. The Venice Commission welcomes the Bulgarian authorities' initiative to improve the quality of Bulgarian legislation as a whole.

100. The Commission is aware that the concept paper drafted with a view to the passing of a new law on statutory instruments reflects a Bulgarian legal drafting tradition and believes that this approach can prove to be of significant practical worth in achieving the objective pursued.

101. Nonetheless, the Venice Commission wishes to stress that the enactment of a law on statutory instruments is undoubtedly sensible and necessary, but should be viewed as only a partial contribution to the general aim of improving the quality of Bulgarian legislation.

102. Furthermore, some aspects of the concept paper and the future LSI should be clarified and reviewed. In this connection, the Commission recommends that the Bulgarian authorities:

- make explicit provision for the development of aids, such as handbooks and the setting up of exchange networks, not forgetting the organisation of training courses;
- make a clearer distinction between the preparation of documents relating to legislative policy and the stage leading to the drawing up and technical and legal verification of a draft law;
- make a clear distinction between (i) methods and (ii) organisational and procedural aspects;
- specify more explicitly the incorporation of the future LSI in Bulgaria's regulatory environment, with due consideration given to the recommendations made regarding the detailed substance of the law;
- ensure that the text of the future law contains exclusively provisions of a purely statutory nature;
- take care not to overload the LSI with provisions relating to purely administrative details which could easily be included in the implementing decree which has yet to be produced;
- indicate clearly that both the executive and the legislative must comply with the terms of the future LSI;
- describe more clearly the institutional collaboration processes envisaged in the concept paper and the future LSI;
- reconsider the whole external public consultation procedure, by making it significantly more flexible;
- adopt in a transparent and public way the positions decided upon following the public consultation and consider the possibility of a written report on their impact on the draft law;
- examine the comments made on the structure of the draft concept paper.

103. The Venice Commission remains at the disposal of the Bulgarian authorities for any further assessment.