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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

FINAL OPINION

**ON THE THIRD REVISED DRAFT ACT
ON FORFEITURE IN FAVOUR OF THE STATE
OF ASSETS ACQUIRED THROUGH ILLEGAL ACTIVITY**

OF BULGARIA

**Adopted by the Venice Commission
at its 84th Plenary Session
(Venice, 15-16 October 2010)**

on the basis of comments by

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TABLE OF CONTENTS

II. General comment to the draft law 3

III. Analysis of the draft law..... 3

A. The scope of the Law..... 3

C. Decision-making powers of the CEPAIA..... 5

D. Investigation proceedings 5

E. Investigation powers of the CEPAIA authorities 6

F. Collaboration between the CEPAIA and other public authorities..... 6

G. Seizure and forfeiture proceedings before the court 6

H. Standard of proof and rebuttable presumption 7

I. Management of seized and forfeited assets 7

IV. Conclusion..... 8

I. Introduction

1. In late 2009, the Bulgarian authorities prepared a new draft Law on Forfeiture in favour 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 presented a certain number of shortcomings and its implementation might result in the infringement 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. In its second interim opinion adopted in June 2010 (CDL-AD(2010)019), the Commission recommended that further changes be made to this draft Law.

3. On 7 September 2010, a second revised version of the draft Law (CDL(2010)074) was submitted to the Venice Commission. This text had been prepared with the intention of meeting the concerns expressed by the Commission in its second interim opinion. From 13 to 14 September 2010, a delegation of the Commission travelled to Sofia to discuss this new version of the draft Law with the representatives of the Bulgarian authorities. Further to this meeting, a new, third revised version of the draft Law was sent to the Commission for its legal assessment (CDL(2010)082).

4. The present final opinion was drawn up on the basis of the comments by Messrs Neppi-Modona and Hirschfeldt, and the results of the September meeting in Sofia; it was adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010).

II. General comment to the draft law

5. The present Opinion has to be seen as a follow-up to two interim opinions given on the previous versions of the draft Law (CDL-AD(2010)027 and CDL-AD(2010)019). It will thus focus mainly on issues where the Commission had expressed critical views in its previous assessments.

6. As a general comment, the Commission commends the fact that the third revised draft Law on Forfeiture in favour of Assets acquired through Illegal Activity (hereinafter: the third revised draft Law) has followed most suggestions previously expressed by the Commission. It also 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 of other countries while respecting fundamental rights and freedoms.

III. Analysis of the draft law

A. The scope of the Law

7. One of the main observations of the Venice Commission expressed in its second interim opinion related to the more limited scope of application of the second revised Draft Law, i.e. its application to “criminal activities” only (see second interim opinion, §10). In the Commission’s opinion, 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.

8. The Bulgarian authorities have responded to this observation by extending the grounds for initiating the examination and identification of assets deriving from criminal and illegal activities.

¹ See interim opinion, paras. 96-99.

9. In relation to the revised article 20, the Venice Commission welcomes that the Commission for Establishing Property Acquired through Illegal Activity (hereinafter: “the CEPAIA”) can now start the examination proceedings aiming at identification of *both criminal and illegal* assets. Such proceedings can be triggered by criminal charges against a person (article 20§2.1) but also by certain offences under the Customs Act, the Prevention and Disclosure of Conflict of Interests Act, as well as under the Public Disclosure of Senior Public Official’s Financial Interests Act (article 20§2.2 to 4). Furthermore, the CEPAIA can also decide to initiate the examination proceedings *ex officio* upon “*its own estimation or upon a signal which contains sufficient data for the illegal acquisition of the assets*” (article 21§4).

10. However, in conformity with article 23§1.2, the CEPAIA can formally start the injunction proceedings before a Court only when a criminal procedure is opened for one of the crimes listed in Article 20§2.1. While the current wording of Article 20§2.1 uses the term “*the person is constituted as accused*”, the Bulgarian authorities explained that it does not require that a criminal proceeding before a Court has actually started but that it is sufficient that a pre-trial investigation is initiated by a Prosecutor. In practice, this means that while the CEPAIA can start the examination proceedings also in the absence of criminal procedure, it cannot initiate seizure and forfeiture proceedings before the court if there is not, at least, a pre-trial 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.

11. On the other hand, Article 22 requires the CEPAIA to demand a joint examination of a given person with the State Agency for National Security, the Ministry of Interior, the Prosecution office and the National Revenue authorities. Furthermore, according to new Articles 34 – 47, during examination proceedings the CEPAIA’s bodies can ask from and share information with other public authorities, i.e. the Police, the State Agency for National Security, the National Revenue Agency, the Customs Agency authorities and the Prosecution office. This mechanism can allow other public authorities engaged in the fight against corruption and organised crime to gather necessary information and evidence to initiate the respective administrative or criminal proceedings. A pre-trial investigation opened against the examined person will thus enable the CEPAIA to initiate civil proceedings for injunction and forfeiture of assets deriving, directly or indirectly, from criminal activities.

12. The Venice Commission acknowledges the efforts of the Bulgarian authorities to respond to its observations. It welcomes this amendment, which represents an improvement. While new legislation with a broader scope of application, drafted in compliance with the ECHR would have been accepted as a means for ensuring an effective seizure and forfeiture of assets derived from criminal and illegal activities, the Commission commends these new provisions and the mechanism described above, which has the potential to strengthen national measures for an effective fight against corruption and organised crime in Bulgaria. In this respect, it also wishes to point out the importance of a timely and smooth co-operation between the CEPAIA bodies and other public authorities for this mechanism to function in practice in an effective manner.

13. Considering the link between the forfeiture proceedings and criminal proceedings and for the sake of coherence, the third revised draft Law could use the expression “assets acquired through criminal and illegal activities” in its title as well as throughout the text.

14. The Commission also notes that the third revised draft law modified Article 2, which now better specifies the aim and purpose of the Law, as recommended in the Commission’s second interim opinion.

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

15. The Venice Commission notes that this last version of the draft Law follows its recommendation to introduce the requirement of a qualified (two-third) majority for the election of the Deputy Chairperson and two members of the CEPAIA by the National Assembly. This change is strongly welcomed as such a requirement will contribute to ensuring its independence. It is also hoped that different political parties will see this change as an opportunity to co-operate and engage with each other in the fight against corruption and organised crime.

16. In this regard, the Commission also acknowledges the willingness of the Bulgarian authorities to start the procedure for the constitutional amendment² in this regard, mentioned during the Sofia September meeting.

17. Also, the third revised draft Law changed the eligibility criteria for the directors of territorial directorates and the inspectors at the territorial directorates (Article 13.2). The same criteria as those applicable for eligibility for membership of the CEPAIA provided for in Article 5 are now also applicable for eligibility of the directors, as recommended by the Venice Commission.

18. The procedure for dismissal of a CEPAIA member is regulated by Article 6: he or she can be dismissed before the term of office in case of, *inter alia*, “*serious breach or systematic failure to discharge his or her obligations*” (paragraph 6). It is “the respective authority” that has nominated or appointed the member in question (i.e. the Prime Minister, the National Assembly or the President) that has the power to decide on a CEPAIA’s member dismissal.

19. The Commission welcomes the introduction of a new provision requiring the “respective authority” to demand the CEPAIA’s statement on dismissal of one of its member for reasons indicated under Article 6§6, as agreed during the September meeting in Sofia.

C. Decision-making powers of the CEPAIA

20. According to Article 8§2, the decisions of the CEPAIA will be adopted by a majority of more than one half of the members and “*shall be reasoned*”. This third revised draft Law usefully specifies what should be in such a “reasoned” decision. This change is welcome as it further clarifies the level of proof that is required to sustain the CEPAIA’s decision.

D. Investigation proceedings

21. As mentioned above, in conformity with the third revised draft Law, the investigation proceedings by the CEPAIA can now be triggered by criminal charges and by administrative proceedings for certain serious offences (see above, para. 10). In addition, the CEPAIA can initiate the investigation proceedings ex-officio upon its own estimation or upon a signal “*which contains sufficient data for the illegal acquisition of the assets*” (Article 21§4). The same article continues by saying that “*anonymous signals cannot serve as grounds for the initiation of an examination*”. The Executive Summary appended to the draft Law under consideration specifies that “*the express prohibition for anonymous signals to serve as legal grounds for the initiation of examination is a warranty for the protection of a person’s human rights*” (page 3). In the opinion of the Venice Commission, the blanket prohibition of the use of anonymous signals may not be necessary; it could have been sufficient to specify that such signals cannot be used as the *only* ground for the CEPAIA’s decision to start the investigation proceedings.

² According to Article 81§2 of the Bulgarian Constitution “*the National Assembly shall pass laws and other acts by a majority of more than one-half of the present Members, except when a qualified majority is required by the Constitution*”.

E. Investigation powers of the CEPAIA authorities

22. Article 26§2. al. 1, 4 and 5 of the third revised Draft Law now provides for the right of the CEPAIA's authorities to "invite" the examined person, his or her spouse and third parties to give explanations, information and documents regarding the source of income. In the same manner, under article 27§1, the person under examination can be "invited" to submit a written declaration regarding its assets and income. According to explanations given by the Bulgarian authorities, the purpose of these provisions is to give the concerned persons the possibility to prove the legal origin of their assets; in case of refusal to provide information demanded, the person in question shall not bear criminal responsibility.

23. The Commission notes that the right to a legal counsel during examination by the CEPAIA's authorities is now provided for by Article 82§3. The same article also specifies in paragraph 4, that statements obtained from the examined person shall not be used in criminal proceedings in a way to incriminate him or her. Such clarification contributes to protecting the right not to incriminate oneself, as guaranteed by the ECHR³. The Commission recommends to further specify that also statements obtained during the examination phase before the CEPAIA are covered by this provision.

24. The new Article 26§2.7 now correctly specifies that it is up to a judge "*of the respective court of first instance*" to issue an order for assistance from the bodies of the Ministry of Interior for search or seizure under the procedure of the Penal Procedure Code, as recommended by the Venice Commission (see second interim opinion, para.23).

F. Collaboration between the CEPAIA and other public authorities

25. A new Chapter III, section IV of the third revised draft Law introduces rather detailed provisions on interaction and collaboration between different public authorities dealing with various aspects of forfeiture of criminal and illegal assets. Such provisions aim, according to the terms of the Executive summary given by the Bulgarian authorities, at facilitating the CEPAIA's work as well as contributing to a better application of the draft Law in practice.

26. Investigating and forfeiting criminal assets can be and is often a long, difficult, and complex process. Timely, open and systematic co-operation and co-ordination between law enforcement agencies (police, customs and other national forces), judiciary (both prosecutors and judges) as well as tax authorities and government officials dealing with corruption and organised crime is indeed key to making the seizure and forfeiture of criminal and illegal assets effective in practice. In particular, the Prosecution office should demonstrate the willingness to start investigations on the basis of signals and information given by the CEPAIA and to pursue complex and time-consuming investigations. As for judges, the fact that insufficient results were achieved, concerning organised crime and corruption, indicates the necessity to improve the judicial practice in high-level fraud and corruption cases in line with best practices in other Member States

27. The Venice Commission thus urges the relevant Bulgarian authorities to systematically cooperate with each other to the benefit of the implementation of the third revised Draft Law.

G. Seizure and forfeiture proceedings before the court

28. Chapter IV, Section I provides for the terms and procedure for the imposition of an injunction order on assets presumably deriving from "illegal activity". Based on a "report" provided by the director of the respective territorial directorate, the CEPAIA shall request the seizure of the assets presumably acquired through criminal activity. The Court is due to decide within 48 hours; the court's decision is subject to immediate enforcement. Article 60§4 guarantees the right to judicial review of the court's decision before an appeal judge.

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

29. The Commission appreciates the introduction of a new article 84§3 requiring the CEPAIA to revoke *ex officio* the injunction order imposed if within three months from the date of its making the CEPAIA does not claim forfeiture of the assets in favour of the State, as recommended by the Venice Commission.

H. Standard of proof and rebuttable presumption

30. The Venice Commission reiterates its positive assessment of the elaboration in some more detail, on the standard of proof required from the CEPAIA and its authorities to sustain a forfeiture action.

31. Article 47§2 now more precisely defines "*reasonable supposition*" as "*present where sufficient data has been collected to reasonably conclude that the assets have been acquired through illegal activity*".

32. With regard to the proceedings for injunction order, the Venice Commission's concerns regarding evidential threshold have been addressed by introducing a new Article 60§2 which now specifies that the injunction order will be granted "*where the request of the Commission is backed with persuasive documentary evidences establishing the lack of correspondence between the assets and the net income of the person and proving his illegal activity*".

33. With regard to third parties, the Venice Commission reiterates its high appreciation of the introduction of an explicit reference to the requirement for the CEPAIA to establish that the individual either knew or should have known or suspected the criminal origin of the assets in question, provided for in Articles 53 – 54 of the third revised Draft Law. This should, in principle, ensure that a fair balance is maintained between the rights of those involved and the general interest.

34. As to the procedure for actual forfeiture, in its previous opinions the Venice Commission had expressed its concern as to the way in which the Court should ensure the respect of the human rights standards, when deciding whether to order an actual asset forfeiture. In reply to these concerns, a new Article 83 now elaborates with some more detail the contents of a "*special reasoned report*" made by the director of the respective territorial directorate, which shall serve as a basis for claiming forfeiture in favor of the State. Also, Article 88 further specifies the kind of evidence the CEPAIA should produce in order to obtain assets forfeiture.

35. The Venice Commission also welcomes the new Article 88§6, which now more correctly requires the same evidential threshold for proving that the assets in question have or do not have legal origin for both the CEPAIA and the examined person.

36. The new article 89 introduces a possibility for the court not to apply the assumption that the assets in question derive from criminal activity if "*it can conclude from the circumstances of the case that there is a serious risk of breach of justice*". This change is welcome as it allows the judge to decline to make an order of forfeiture when the interests of justice so require.

I. Management of seized and forfeited assets

37. According to the second revised draft Law, the "management and use" of the property under injunction were given to the examined person (former Article 81). The Venice Commission welcomes the removal of the term "*and use*" of the seized property from new Article 93, as recommended in its second interim opinion (§§ 40-41). The use of property before the entry of a court order of forfeiture can indeed diminish its value and may delegitimize the system in the eyes of the public.

38. As concerns the management of proceeds from the sale of the movables, revised Article 97 entrusts this task to the public enforcement agent. Proceeds from the sale of the movables will be deposited on a bank account of the CEPAIA, "*opened on special conditions and procedure*".

39. The Venice Commission notes that according to Article 103§3, immovable and movable property "*cannot be sold at a price lower than the initial sale price. If the sale is not made in the course of two proceedings, it can be made through direct negotiations or the assets could be granted for humanitarian purposes*". Introducing this safeguard provision is strongly welcomed, as particular attention should be made to ensure that the property offered for public sale is not again purchased directly or indirectly, by exponents of organised crime.

40. As for the assets actually forfeited, the Venice Commission reiterates its positive assessment of the establishment of the Management of the proceeds from forfeited assets acquired through illegal activity fund ("the Fund"), and of the fact that the proceeds of assets forfeiture will be allocated for law enforcement. As pointed out in its second interim opinion, this 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 (see § 47).

41. The Commission also welcomes the new Article 109§2, which now specifies that the excess of the revenues diverted from organised crime shall be transferred "*to the Fund for Social Assistance under the Ministry of Labour and Social Policy or for financial assistance to small and medium enterprises*", as mentioned by the Bulgarian authorities during the first meeting in Strasbourg, in February 2009 (see the interim opinion, para. 91). Indeed, allocating resources diverted from organised crime for the sake of social utility would have a significant impact on gaining social acceptance of legal rules and in restoring citizens' confidence in the state institutions.

IV. Conclusion

42. The Venice Commission welcomes the efforts made by the Bulgarian authorities to respond to its observations and recommendations. Indeed, the third revised draft Law addresses most of the main concerns previously expressed by the Venice Commission. It also 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.

43. The Venice Commission hopes that this Draft law will soon be adopted by the parliament of Bulgaria. It stresses that timely, open and systematic co-operation and co-ordination between law enforcement agencies (police, customs and other national forces), judiciary (both prosecutors and judges) as well as tax authorities and government officials dealing with corruption and organised crime is indeed key to making the seizure and forfeiture of criminal and illegal assets effective in practice. In particular, the Prosecution office should demonstrate the willingness to start investigations on the basis of signals and information given by the CEPAIA and to pursue complex and time-consuming investigations. As for judges, the fact that insufficient results were achieved, concerning organised crime and corruption, indicates the necessity to improve the judicial practice in high-level fraud and corruption cases in line with best practices in other Member States

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