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(VENICE COMMISSION)

COMMENTS

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

by

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The Venice Commission is required to give an opinion on the Bulgarian concept for a new law on statutory instruments. These comments are a contribution to the drafting of the required opinion and are based on the latest version of the concept, as it was approved by the Council of Ministers and presented to the Parliament for its adoption.

The concept draws inspiration from the necessity of updating and reforming the law on statutory instruments which is presently in force, taking into account not only the new exigencies of the Bulgarian State and society but also the rules of the new Bulgarian Constitution and the Bulgarian obligations following the adhesion to the European Union. As a matter of fact the draft of the concept does not only regard the organization of the State's bodies which are responsible for the preparation of the drafts of statutory instruments, but also the relations of these authorities with the participants in a procedure which they call public consultations (page 11).

The identikit of these public consultation reminds of the model of the public consultation which was adopted in the frame of the past popular democracies under the control of the old communist parties. The discussion is not left to the initiative of the interested parties, of the s.c. stakeholders, according to the principles of the free democratic political debate but it shall be organized as a special formal procedure by the concerned authorities: the proposals have to be publicly announced, hearings or round tables may be organized, comments notes and proposals shall be received, only non-anonymous positions shall be taken into consideration. The danger of this model is that the public consultation could be controlled and directed by the proceeding authorities which are in the position of conditioning the free development of the examination of the official documents. Moreover it could happen that remarks, comments and proposals elaborated outside the formal special procedure for public discussions are not taken into consideration or are not treated in the same way comments notes and proposals received in the formal procedure are treated.

The most interesting aspect of the draft is that it deals at the same time with documents concerning public policies in general (for instance, strategies and legislative programmes) (pages 3 and 7-8) and draft laws which are aimed at separately implementing the previously adopted strategies and legislative programmes.

Strategies and legislative programmes are not usually drafted as pieces of legislation. They are political documents which are aimed at presenting public policies to solve administrative, social or economic problems. They underline the purposes of the proposed policies and the way and the measures which have to be adopted to implement those purposes. Therefore they have an administrative, economic and social content whose preparation and examination require administrative, economic and social knowledge. It is true that their implementation requires the drafting of legislative proposals but this step implies a new and different passage in the overall elaboration of the public policies. Legislative proposals can be elaborated and drafted only on the basis of the previous adoption of the documents providing for strategies and legislative programmes. They usually require a different technical knowledge which can be offered by public bodies different from the public bodies competent in the social and economic matters. And they don't require specific, public consultation because of their technical relevance.

Legal experts cannot work without taking into account the social and economic documents and without the cooperation of the administrative, social and economics experts, but their intervention is required at a moment of the decision making process which is clearly different from the stage of the preparation of the strategies and legislative programmes. Therefore, if the yardstick for the evaluation of strategies and legislative programmes is different from the yardstick which has to be applied in the case of the draft laws, the procedure for the verification of the policy documents cannot be applied to the examination of the legal structure and formulation of the statutory instruments.

It could be advisable emphasizing these differences in the systematization of the concept and in keeping clearly separated the stages of the preparation of those that we call policy documents, whose examination requires not only administrative, economic and social knowledge but also political attention, from the stages aimed at the preparation, the drafting and the technical legal verification of the proposals of statutory instruments. Strategies and legislative programmes should be the starting point of the preparation of the draft laws. I mean that the content of the draft laws depends on the choices which are made at the level of the elaboration of the policies while the legal drafters are in charge of the writing of the proposals of the statutory instruments according to the drafting rules, the legal doctrine and terminology and the constitutional provisions.

Drafting rules are only mentioned at page 16 of the concept ("legal and technical formatting of the law") while they should deserve more attention. If the purpose of the document is a correct adoption of statutory instruments which are clearly written and can be interpreted in such a way that their implementation exactly complies with the will of the legislator, the stage of the drafting requires not only ad hoc administrative, economic and social choices but the adhesion to consolidated rules in conformity with the legal practice of the public administrations and of the judges. If making laws is *making things with rules,* laws should be drafted to make the things which the policy makers want to make.

The concept should provide for the preparation and the adoption by the concerned State's bodies of an handbook collecting the drafting rules presently followed in the practice, amending them when it is necessary and introducing new rules required by the recent legislative development. In Europe there are many examples of handbooks of this type because the bodies of the executive power and the legislative assemblies share the idea that some uniformity is required in the drafting of the statutory instruments in view of their coherent and constant interpretation, and that uniformity can be obtained only if the drafters generally and constantly follow the same rules. The concept provides for the adoption of detailed rules "related to the interpretation and enforcement of statutory instruments" (taking into account the practice of the Constitutional Court) (page 15 . Art. 46 of the Statutory Instrument Act presently in force contains some rules about the interpretation of the statutory instruments which follow the prevailing doctrine of the European civil law tradition in the matter. That article can be an useful basis for the new text but the rules concerning interpretation shall also be taken into account in preparing the handbook of the drafting rules: laws should be drafted keeping in mind the rules and practice of their interpretation, that is the ways which are followed for their interpretation.

Adopting the mentioned handbook does not require a statutory instrument. It shall be a collection of technical guidelines which are complied with by the public authorities which are in charge of drafting the legislation in view of a correct interpretation/implementation of the laws. A legal sanction for the failure to comply with them is not necessary and probably impossible: as it happens with all the technical rules, when they are not complied with, the statutory instruments which were imperfectly and incorrectly adopted don't get their purposes and this is a sufficient sanction.

Therefore it is important that the drafting rules and all other legal guidelines are complied with during all the stages of the parliamentary, legislative decision making process between the first drafting of the proposal of law and its approval by the Parliament. The exigencies of a correct drafting of the legislation should be taken into account also at the stage of the parliamentary procedure. This point is not clearly emphasized in the concept which, at page 18, quotes decisions of the Bulgarian Constitutional Court according to which "the Constitution does not restrict the possibilities available to the legislator to amend or supplement draft laws between readings" and "it is perfectly natural and legally compliant vis-à-vis the provision laid down in the Constitution for submitted draft laws to be amended and supplemented in the course of their deliberation". It would be a mistake if these statements of the Constitutional Court were

interpreted to exempt the members of the Parliament from the compliance with the drafting rules and the other technical guidelines. The constitutional rules concerning the legislative initiative of the members of the Parliament guarantee the power of modifying and supplementing the content of the proposed legislation according their political will and choices, but there is no justification in reading those rules as authorizing the legislative assembly and its members not to comply with the exigency of a correct drafting of the laws in view of an implementation of them coherent with the policies and strategies preferred by the legislators.

If this conclusion is correct, we can draw from it two important consequences.

First of all, the drafting guidelines should be binding not only the authorities of the executive power but also the parliamentary bodies in the legislative decision making process. Therefore they should be adopted with the cooperation of the legal experts both of the executive authorities and of the parliamentary offices. The promotion of this cooperation could be entrusted to the Minister of Justice who will be in charge of the overall implementation of the law on statutory instruments. Correctly at page 17 the concept underlines that “the law on statutory instruments will lay down the general requirements for the drafting of draft laws by the Council of Ministers and Members of Parliament”. It has to be taken seriously:

Moreover the last three pages of the concept should provide not only for the organization of the executive authorities in view of the preparation of the statutory instruments but also for the autonomous creation by the Parliament of the necessary parliamentary structures entrusted with specific functions in the matter. Bodies responsible for the control of the quality of the draft laws have to be present both in the executive power and in the legislative assembly. It is not necessary that the law on statutory instruments steps into the shoes of the Rules on the organization and activities of the National Assembly. It can stimulate an active and coherent intervention of those Rules in the field by providing for a cooperation. In any case useful suggestions can be provided for in the concept which has to underline the necessary connection between the drafting of the legislative proposals by the executive authorities and the adoption of the legislation by the Parliament.

For instance, it could be advisable introducing a last expert control of the text of the laws before their final parliamentary approval as the concept at page 16 suggests a final expert control of the draft laws before their adoption by the Council of Ministers. The final expert parliamentary control cannot certainly be allowed to stop the parliamentary vote of approval but its suggestions and recommendations should be conveyed to the members of the Assembly requiring their attention. It would be coherent with our design requiring, possibly, an explicit vote of the Assembly to bypass or not those remarks and suggestions.