Strasbourg, 4 August 2009

CDL(2009)116
Engl. only

Opinion no. 536 / 2009

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON NORMATIVE ACTS

OF BULGARIA

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The Venice Commission accepted to prepare an opinion on the Draft Law on normative acts of Bulgaria which was drafted on the basis of a previous document of the Bulgarian Government dealing with its conception and analysed by the Commission in CDL(2009)024. As a matter of fact the Bulgarian Government followed the basic suggestions offered by the Commission, but the draft law is obviously a completely new document which deserves special attention, even if the Commission cannot avoid referring to its previous opinion.

The draft regards preparation, adoption, issuance, promulgation, effects and application of the normative acts. In some way it touches matters which fall in the competence of the Constitution but its effects are necessarily different from the effects of the constitutional rules concerning the exercise of the legislative power. These constitutional rules have the prevalence on the ordinary laws adopted by the Parliament which are unconstitutional if they are not in compliance with the Constitution. The law on normative acts shall have instead the same hierarchical level of the legislative acts adopted by the Bulgarian Parliament and, therefore, the laws deliberated by the legislator will be valid even if the legislator does not comply with its provisions. The position of the bylaws is quite different as far as they have a minor hierarchical position in respect of the law on normative acts and are invalid if adopted in violation of its provisions.

In principle the provisions of the law interest the activities of the bodies which are entrusted with the task of the preparation of the drafts law to be submitted to the approval of the Parliament, but they also affect the behaviour of the State's bodies which have to provide for the adoption, issuance, promulgation and application of the normative acts after their approval by the Parliament, even if these matters are partially covered by specific constitutional rules whose implementation is provided for by the law on normative acts. A similar distinction of the relevant competences has to be kept in mind with regard to the normative acts of the European Union, whose adoption falls in the competence of the bodies of the Union: therefore the Bulgarian law is allowed to deal with the preparation of the participation of the Bulgarian State's bodies in the process for the adoption of the acts of the Union and with their internal implementation by Bulgaria.

On the basis of these remarks it should be advisable amending the text of the draft in view of a clear separation, on one side, of the activities of the bodies of the Government and the Parliament of the Bulgarian State and, on the other side, of the activities of the bodies of the European Union and of the State's organs of Bulgaria participating in the European decision-making process.

Special problems arise with regard to the rules dealing with the drafting of the legislative acts because it should be convenient extending their compliance to the parliamentary bodies. For instance, on one side, in Italy the legislative rules don't bind the activity of the Parliament in drafting the legislation which is required to comply, on the other side, with internal parliamentary rules concerning the legislative process and the drafting of the relevant acts. According to the Constitution, in view of preserving the independence of the Parliament, the matter is dealt with by specific "*regolamenti parlamentari*". Therefore it was necessary to provide with specific acts to bind the parliamentary bodies to implement the drafting rules. Apparently Bulgaria is following

very similar principles as far as, according to art. 73 of its Constitution, “the National Assembly shall be organised and shall act in accordance with the Constitution and its internal rules“. Exigencies of coherence and completeness would require that the parliamentary bodies take in consideration the rules concerning the planning, the conception and the impact assessment of the bills in dealing with the acts submitted to their approval by the initiative of members of the Parliament, but those rules are presently written having in mind the internal organization of the work in the Government and it is difficult to apply them to the Parliament: they are strictly connected with the implementation of the political programs of the Cabinet and their extension to the working of the Parliament is unthinkable while it would be convenient envisaging new ways to provide for the compliance with the technical drafting rules of the laws by the parliamentary bodies. Perhaps the National Assembly could establish an internal legislative body similar to the legislative council of the Government whose creation is provided for by the draft law which we are dealing with.

The matter of the drafting of the legislative acts is strictly connected with the problems of their interpretation and it is evident that a general compliance with the same rules in writing the texts of the laws by the Government and by the Parliament would guarantee an uniformity of drafting and of language which can be useful for a coherent interpretation of the legislation. The extension of the rules of drafting to the parliamentary bills cannot be seen as a violation of the independence of the members of the Parliament: it regards the technical aspects of the legislation and not the political choices which have to be reserved to the free exercise of the functions of the members themselves.

Having dealt with some general aspects of the draft, we turn our attention to its specific aspects following the order of the document.

The general provisions of the Chapter One regard the main features of the Bulgarian system of the sources of law underlining their hierarchy and stating the principle that “the authority to adopt or issue a normative act may not be transferred“ (art. 3.2). As a matter of fact, the Constitution does not provide for the delegation of legislative function by the Parliament to the Government, but does not forbid it. Therefore only if we conclude that the principle stated in the draft law is not the expression of an implicit constitutional principle, we can draw the conclusion that the legislator could delegate its legislative function bypassing the law on normative acts and avoiding the sanction of the unconstitutionality of its decision.

The provision of art.5.2 could be amended by adding the principle that “deviations from the general framework of a specific matter in an act of the same level“ have to comply with the principle of equality: in this way refining the reference to the requirement of the nature of the social relations governed by it shall be clarified.

Chapter Two is dealing with the types of normative acts, distinguishing codes, other legislative acts and by-laws, rules and ordinances. It is not clear if rules and ordinances are considered as types of by-laws or if they are a separate category of public acts. Chapter Three contains provisions concerning acts of the European Union with a binding force. These provisions evidently fall in the full competence of the Union and, therefore, the justification of their adoption in a Bulgarian legislative act is not clear. The definitions contained in articles 19 and 20 have certainly to comply with the European

rules, they are not necessary because the European rules are de *iure* effective in the internal legal orders of the member States of the Union and the possible differences between the articles of the draft law and the European rules shall be settled giving the priority to the European law. The following provisions are instead formally correct as far as they provide rules for the internal preparation of the choices which the Bulgarian delegations will make in the European bodies: they exactly distinguish opinions, framework positions and draft acts according to the different functions which are entrusted to the national authorities in the preparation of the European acts.

Planning the bills is the content of Chapter Four. It does not specifically regard the legislative process, but it is dealing with the adoption of the political legislative programme of the Government which provides for the legislative initiatives of the Government for a period of six month. Therefore the programme takes in consideration many possible bills whose inclusion in the document shall be adopted on partial assessments of the planned legislation. As a matter of fact this part of the draft law touches the general organization of the work of the Government and the relations between its bodies: it could find a place even in a draft law concerning the structure and the functioning of the Government.

Detailed rules concerning the preparation of the specific draft laws are the main subject of Chapter Five. At the beginning of the legislative process a conception is adopted and is followed by the preparation of the grounds for the bill. Apparently only a draft law prepared on the basis of the conception shall be submitted for the approval to the Council of the Ministers (art. 33.1): therefore we can think that the redaction of a conception and of the grounds in view of the drafting of the draft law falls in the responsibility of the individual Ministers, who have also the task of discussing them in advance with the concerned authorities and NGOs. This distribution of functions is reasonable if we take in consideration the fact that the legislative programme has to be previously approved by the Council of Ministers. All the provisions of the draft law have practical relevance and deserve positive evaluation: perhaps only art. 29 appears not to have any operational utility as far as it makes reference to very general principles without explicitly defining their content and providing for a clear yardstick to verify the compliance with them.

The following rules concerning the Impact Assessment have apparently to be applied only in some specific cases: according to art. 39 “the Council of Ministers in its programme under art. 28 may determine the specific normative acts, which should have an impact assessment made in accordance with the requirements of the law“. It is difficult to understand the reason of this provision, perhaps it implies a merely economic conception of the impact assessment. It is true that not all draft laws may have an economic impact, but impact assessment from social, organizational and legislative points of view could also deserve attention by the Council of Ministers. Perhaps it could be advisable providing for a deliberation of the Council only in cases which don’t require the assessment.

The rules concerning public hearing and coordination shall obviously be read in conformity with the principles of the freedom of expression and of organization and assembly which are at the basis of a democratic constitutional order.

The Legal expertise shall be provided for by the Ministry of Justice. Art. 47 is listing the possible content of the legal expertise: compliance with the Constitution and international treaties (also with ECHR), general characteristics of the content, legal and technical design, compatibility with national legislation and practice of the Constitutional Court. In this list a reference to the European Treaties and the jurisprudence of the European Court of justice is missing: it is a strange choice because art. 52 explicitly provides for the creation of a special section of the new body devoted not only to the international law but also to the Law of the European Union.

Chapter Six takes care of the Structure of normative acts. Its articles 57 and 60-61 are specially important because they apparently bind the legislator to amend or supplement normative acts by adopting explicit provisions only and, therefore, they forbid the implicit amending or supplementing of normative acts. It is a very wise choice which, if followed by the legislator, could avoid difficulties of interpretation which frequently derive from the adoption by the legislator of successive and conflicting provisions without explicitly amending or supplementing the previous legislation.

The language of the legislator should comply with the principles of art. 73 (Chapter Seven – Formulation of provisions of normative acts): the provision shall be formulated "briefly, precisely and clearly, in a logical sequence in the generally spoken Bulgarian language". Digressions from this language are acceptable "only if required by the subject of the act". But all the legislation is conditioned by the technicalities of the legal practice: therefore digressions should always be admissible to comply with the exigencies of a language which is the proper basis for a correct interpretation of the legislation. Perhaps the role and the place of the legal language should be underlined in the draft also to clarify the connection with the wise rules of art. 74 according to which, inter alia, the use of the legal language has to follow the principle that "words and phrases with established legal meaning shall be used in the same sense in all normative acts". This exigency is today specially relevant when the law and the practice of the European Union are at stake: the Bulgarian legislator should comply with the language of the bodies of the Union and avoid to introduce new expressions and terminologies which can create conflict with the practice of those bodies.

Art. 76 apparently requires that a referral to other provisions of the same or another normative act shall be explicit: we can guess that the rule implies not only an explicit referral but also a clear mention (number of the article, date and number of the legislative act) of the provisions which are interested by the referral.

In Chapter Eight (Authentication, promulgation and disclosure of normative acts) the word " promulgation " apparently means publication (art. 82: " Normative acts shall be promulgated in the State Gazette"): the author of these comments is not in the position to understand whether this choice is in conformity with the practice of the Bulgarian legal language or it depends of a mistake of the translator. Art. 86 which provides for the effect of the publication of acts in the Official Journal of the European Union is probably outside the scope of the competence of the Bulgarian legislator and the same remark probably interests art. 92.2 (in Chapter nine – Entry in force). On the other side art. 95 – 96 are probably repeating provisions of the Constitution as far as they touched the effects of the decisions of the Constitutional Court or the connection between by-laws and the laws which by-laws are implementing.

The provisions of Chapter Ten (application and interpretation of normative acts) are in conformity with the general legal doctrine requiring strict interpretation for penalties, exceptions, special rules or procedures, tax liabilities or benefits; allowing the use of the analogy when normative acts are incomplete ("*lacunae*"); extending the effects of a statutory interpretation to the day of entry in force of the interpreted act is correct (but statutory interpretation may be "valid only in the future" if it is necessary: we guess that an explicit provision is required to limit its effects in such a way).

The Subsequent impact assessment (Chapter Eleven) is explicitly provided for, but the relevant procedures will be ruled by the different departments when general rules are missing.

The draft deserves a positive evaluation. It can offer useful solutions to the problems of the legislative process. The remarks which are made in this opinion don't affect the basic appreciation of the document even if it is warmly recommended to take them seriously and to adopt the necessary amendments. In particular special attention has to be devoted to the relations between the law of the European Union and the internal Bulgarian legislation avoiding always possible normative conflicts.