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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT ACT ON FORFEITURE IN FAVOUR OF THE STATE OF ILLEGALLY ACQUIRED ASSETS

OF BULGARIA

On the basis of comments by

Mr Johan HIRSCHFELDT (Substitute Member, Sweden)
Mr Guido NEPPI MODONA (Substitute Member, Italy)

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I. Introduction

1. By a letter dated 16 November 2009, the Permanent Representative of Bulgaria requested an opinion on the draft Law on Forfeiture in Favour of the State of Illegally Acquired Assets (CDL(2010)), hereinafter "the Draft Law".

2. Mr Neppi Modona and Mr Hirschfeldt were appointed as rapporteurs.

3. The Venice Commission received a revised version of the Draft Law on 1 February 2010.

4. A meeting between the representatives of the Bulgarian authorities, Ms Petrova, the Vice Minister of Justice and Ms Nikolova, Head of the International Programmes and Projects Division (Ministry of Justice), Mr Hirschfeldt and Mr Seger from the Organised Crime Division of the Council of Europe took place in Strasbourg, on 5 February 2010.

5. The following opinion was drawn up on the basis of the rapporteurs' comments and of the information gathered during the meeting; it was adopted by the Venice Commission at its … Plenary Session (Venice,).

II. Background information

6. In its Resolution 1211 (2000) on Honouring of obligations and commitments by Bulgaria, the Parliamentary Assembly decided to close the monitoring procedure for Bulgaria and initiate a dialogue with the Bulgarian authorities on, among others, the issue of independence of the judiciary and efforts to combat corruption[1].

7. Meanwhile, Bulgaria became a full member of the European Union on 1 January 2007. Upon accession to the European Union (EU), the fight against corruption and organized crime was identified as one of the areas where a set of specific measures was required by the EU within the framework of the post-Accession cooperation and progress measurement procedure. Under the Cooperation and Verification Mechanism set up by the EU Commission, Bulgaria is required to, *inter alia*, "Implement a strategy to fight organised crime, focusing on serious crime, money laundering as well as on *the systematic confiscation of assets of criminals /…/*"[2] (emphasis added).

8. The Council of Europe has accompanied Bulgaria in its efforts to fight against corruption and organized crime notably, through its Group of States against Corruption (GRECO) and MONEYVAL. In its Second Evaluation Report on Bulgaria, GRECO welcomed the preparation of the draft Law on the Forfeiture to the State of Proceeds of Crime. However, it recommended to extend the scope of application of the said draft Law in order to also cover the proceeds of crime held by legal persons. It also recommended to *"analyse the practical application of the provisions on forfeiture of proceeds of crime with a view to its enhancement and to focus attention on forfeiture as an integral and equally important part of the criminal procedure*"[3].

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[1] PACE Resolution 1211 (2000) on Honouring of obligations and commitments by Bulgaria, Paragraph 4.
[2] EU Commission Decision of 13/12/2006 on establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime (C(2006)6570 final, Annex, benchmark No. 6.
[3] Second Evaluation Report on Bulgaria, GRECOEval II Rep (2004) 13 E, §§ 28 and 29.

9. In 2005 Bulgaria adopted the Law on the Forfeiture to the State of Proceeds of Crime (hereinafter: the 2005 Law), which complements the confiscation and forfeiture of objects regime existing under the general Criminal Code[4].

10. The 2005 Law introduced the concept of criminal asset recovery within the framework of the civil legal proceedings. It regulates the terms and procedure for imposition of seizure[5] and forfeiture to the State of any assets derived, directly or indirectly, from criminal activity which has not been restored to the victim or which has not been forfeited to the State or confiscated under other laws. The proceeds of crime can be forfeited not only from the examined person but also from third parties, including legal persons. The body in charge of the procedure is the Multidisciplinary Commission for Establishing of Property Acquired from Criminal Activity (CEPACA). The investigation procedure run by the CEPACA runs in parallel with the criminal proceedings. The CEPACA can bring motivated requests to the courts to apply freezing orders to the property in question, but it cannot request deprivation of the criminal assets, unless the criminal proceeding is concluded and a suspect convicted.

11. During the period 2005 to 2008, the CEPACA only analysed 10 forfeiture procedures under the 2005 Law initiated against 10 persons who had committed bribery offences. The CEPACA claimed that this lack of efficiency in the implementation of the Law was due to the restrictions placed on its functioning by the law itself. On this basis, in 2008 the CEPACA prepared proposals for amendments to the 2005 Law aimed at strengthening the powers of the CEPACA.

12. In its addendum to the Compliance report[6], GRECO invited the Bulgarian authorities to "*take due account to proposals for amendments to the 2005 Law put forward by the CEPACA in order to ensure the effective application of the forfeiture proceedings*".

13. In its latest report on progress in Bulgaria under the Cooperation and Verification Mechanism, the EU Commission considered that the lack of progress in the work of the CEPACA under the 2005 Law was largely due to the fact that freezing of assets derived from crime is practiced only several months into the pre-trial phase or at the time of indictment and therefore loses most of its operation effect. In addition, the conditions of asset freezing provided for in the 2005 Law were seen as too restrictive and not adequate to tackle the reality and extent of organised crime in the country by the EU Commission[7].

14. In response to this criticism, the Bulgarian authorities prepared a new draft Law on Forfeiture in favour of the State of Illegally Acquired Assets, under consideration (hereinafter: "the draft Law").

15. The draft Law preserves the philosophy of the existing law but introduces certain substantial changes. The new Identification of Illegally Acquired Assets Commission (hereinafter: "the IAA Commission") is given the power to initiate investigations into suspicious assets deriving not only from criminal activities in connection with specific crimes under the Criminal Code listed in the draft Law, but also from other "*illegal activities*". It was also given rather large investigative powers. The most innovative change regards the possibility for the Commission to request forfeiture of the property even in cases where no

[4] In Bulgarian legal system, confiscation and forfeiture are two different mechanisms used for the deprivation of instrumentalities and proceeds of crime. *Confiscation* is a sanction, usually facultative, the imposition of which depends on the criminal responsibility of the offender (Art. 37 of the Penal Code). Confiscation is provided for in a number of offences specified in the Penal Code. It can be imposed only in respect of the current assets of the perpetrator, i.e. assets possessed at the time the sentence is pronounced. *Forfeiture* is a deprivation measure applied notwithstanding penal responsibility ; it is mandatory in respect of instrumentalities and proceeds of crime. Both measures apply only in respect of natural persons.

[5] It should be noted that the 2005 Law does not use the term "seizure", but speaks instead of "securing measure".

[6] Second Evaluation Round. Addendum to the Compliance Report on Bulgaria, GRECO RC-II(2007)4E, of 2 July 2009, §7.

[7] Report from the Commission to the European Parliament and the Council, on Progress in Bulgaria under the Co-operation and Verification Mechanism, Brussels, 22/07/2009 (point 2).

criminal conviction had been made. In the proceedings for injunction and forfeiture the burden of proof is on the examined person who has to demonstrate that the source of the funds used to purchase the assets in question is legal.

III. General observations on forfeiture as a tool for criminal assets recovery

16. Assets forfeiture, i.e. the government taking of property connected to criminal activity, is increasingly seen as a critical tool for combating corruption and organized crime. Its main purpose is preventive: restricting the funding of criminal activities - by interrupting the reinvestment of such resources in the economic turnover - and thus discouraging the criminal conduct. In continental Europe (the civil law countries) forfeiture or confiscation element is generally part of the criminal procedure. It requires a criminal proceedings and conviction, and is often part of the sentencing process.

17. The forfeiture is used not only to confiscate tools for or fruits of the specific crime (basic confiscation). There is an ongoing trend in Europe accepting more far-reaching measures of forfeiture in the form of extended confiscation. Different assets owned by a person convicted of an offence related to organized crime can be confiscated in certain situations[8].

18. There appears to be a recent trend to use a non-conviction based civil proceedings as a means of recovering the proceeds of crime (e.g. Australia, Ireland, Italy, United States, UK and South Africa). This is notably the case in common law countries.

19. Non-conviction based forfeiture enables States to recover illegally obtained assets from a person through a direct action against his or her property without the requirement of a criminal conviction. The State is generally required to prove within the balance of probabilities that the examined person's assets derive, directly or indirectly, from criminal activity.

20. The trend towards civil forfeiture has been prompted by the tendency of organized criminal groups to use their resources to distance themselves from the criminal activity and to hide the illicit origin of their assets. In some instances, the influence of corrupt officials and other practical realities may prevent criminal investigations entirely or for a long time. In such cases, civil forfeiture may be the only tool available to recover the proceeds of crimes and to exact some measure of justice.

21. The Bulgarian draft Law is strongly inspired by the Irish Proceeds of Crime Act. This transplant from a common law context to a civil law context seems an innovation which needs to be studied with care.

22. Given the situation in Bulgaria, the choice of its authorities to use a non-conviction based forfeiture as a tool in fighting corruption and organized crime in a country cannot be criticised in itself. The draft Law can also be seen as an answer to requests from international organisations for Bulgaria to reform its legislation in this field.

23. Whilst the purpose of this mechanism is to be strongly encouraged, it should not have the effect of reducing the guarantees contained in the European Convention on Human Rights (hereinafter: the ECHR).

[8] *Cf.* European Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property.

IV. The relevant international law instruments

24. The use of non-conviction based forfeiture is explicitly allowed in the UN Convention against Corruption[9]. The EU Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property also provides for this possibility[10].

25. The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS 198) does not explicitly mention non-conviction based forfeiture. However, some of its articles can be interpreted as allowing this possibility, on condition that it regards assets related to criminal activities or acts connected therewith. Thus, according to Article 3 §1, "*Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property"*. "Confiscation" is defined as *"a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property* (Article 1.d).

26. The Explanatory Report to the ETS 198 points out that the definition of "confiscation" includes also, where applicable, "forfeiture"; the fact that confiscation in some states is not considered as a penal sanction but as a security or other measure is irrelevant to the extent that the confiscation is related to criminal activity. It is also irrelevant that confiscation might sometimes be ordered by a judge who is not a criminal judge, as long as the decision was taken by a judge in the sense of Article 6 ECHR[11].

V. Analysis of the draft Law

27. According to Article 5 of the Bulgarian Constitution, the ratified international agreements are considered part of the domestic law. They supersede any contradictory domestic legislation.

28. The present opinion is formulated in the light of the Council of Europe standards, especially Article 6 of the European Convention on Human Rights (ECHR)and Article 1, Protocol 1.

29. The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, the EU Council Framework Decision 2005/201/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property was also taken into account as well as the relevant documents of the Council of Europe GRECO and MONEYVAL.

30. It is important to mention that the English translation of the text submitted to the Venice Commission for consideration is occasionally unclear and seems not correct in all its details.

A. The scope of the Law

31. According to Article 1 of the draft Law, the forfeiture procedure will not be limited to property obtained, directly or indirectly, from criminal activity as it is currently the case under the 2005 Law, but will also apply to any "*illegally acquired assets*". These are defined as

[9] UNCAC, 2004, Art. 54.§1.c "*Consider taking such measure as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases*".
[10] EU Council framework decision 2005/212/JHA of 24 February 2005. OJEU, L 68/49, Art. 3 §4.
[11] Paragraphs 39 and 40.

"*assets not corresponding to the income of the owner and his/her family, and for which no legitimate source of origin has been established*" (§1, Supplementary provisions of the draft Law).

32. This provision, in conjunction with Article 9 §§ 3 to 5 reveals that the State wishes to use civil forfeiture procedure not only in the fight against corruption and organized crime, but also in the aim of recovering assets derived from certain offences under the Customs Act, the Prevention and Disclosure of Conflict of Interests Act, as well as under the Publicity of the Property of Persons Occupying High State Positions. Extending the scope of application of the draft Law was said to be necessary for a State to be able to successfully fight the "inexplicable enrichment"[12].

33. As mentioned earlier, assets forfeiture may be a critical tool in fighting corruption and organized crime. The European Court of Human Rights approves forfeiture in principle, including non-conviction based forfeiture where the general interest is strong enough and where the rights guaranteed under the ECHR are respected[13].

34. Confiscation or forfeiture is an interference with the right to peaceful enjoyment of possessions (Article 1, Protocol 1 to the ECHR). As long as this measure is preventive in the sense that it prevents the affected party using its property, the Court applies Article 1 §2, Protocol 1 ECHR. The measure will be regarded as justified if a) provided by law; b) serves the general interest and c) is proportionate to the aim pursued.

35. In the *Phillips v. UK*, the ECtHR considered that a confiscation order issued after criminal conviction constituted a "penalty" within the meaning of Article 1.§2 Protocol 1 ECHR, and operated "*in the way of a deterrent to those considering engaging in drug trafficking and deprive a person of profits received from drug trafficking*" (p. 52). Thus, given the importance of the aim pursued, the Court did not consider the interference suffered by the applicant disproportionate.

36. In *Arcuri and others v. Italy*, there were no criminal proceedings directly related to the confiscation order issued. The ECtHR pointed out that "*even though the measure in question led to a deprivation of property, this amounted to control of the use of property within the meaning of the second paragraph of Article 1 Protocol 1, which gives the State the right to adopt "such laws as it deems necessary to control the use of property in accordance with the general interest".* It also stressed that the impugned measure forms part of a crime-prevention policy. "*The confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established"*. It therefore considered that "*the aim of the resulting interference serves the general interest and was proportionate to the legitimate aim pursued".*. In this case, the Court took into account the specific situation in the respondent State and the difficulties it encountered in the fight against the Mafia and other criminal organisations.

37. In all relevant cases, however, the confiscation was only available for alleged proceeds of *criminal activity.*

38. The Venice Commission is aware of the gravity of corruption and organised crime in Bulgaria, and welcomes the efforts of the authorities to find new methods for effective counteraction against these phenomena. However, in view of the Commission it remains questionable whether the very broad application of this law, particularly in relation to cases which do not involve organized crime is wholly compatible with ECHR standards. In particular, the possibility to initiate proceedings against high public officials allowed under Article 9 §5

[12] Communication by the Bulgarian authorities during the Strasbourg meeting on 5 February 2010.
[13] E.g. ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001; ECtHR, *Butler v. UK*, Decision of 27 June 2002.

may risk putting under examination a person on the ground of his or her professional position, without any presumption or proof of illegal activity. It may thus be preferable to limit the scope of application of the law to "criminal activities". Different kinds of corruption in the public sector, if still not regarded as crimes, should primarily be met through reforms within criminal law. To such reforms an efficient application of forfeiture could be usefully added.

39. The Venice Commission acknowledges the fact that the extension of the scope of the draft Law and the corresponding change of its title is the result of the wish of the Bulgarian authorities to address the phenomenon of "inexplicable enrichment" of public servants widely spread in the country. Should the Bulgarian authorities decide to keep the extensive scope of application, they should ensure that the relevant procedures are devised and carried out in compliance with the Constitution, the ECHR and the European standards concerning the rule of law and respect for human rights.

40. Further, it would be important to formulate the general and public interests, the aim and purpose of the draft Law in a precise and exhaustive manner. This would serve as a basis for the "proportionality-test" that must be undertaken within the administration of justice by the national courts dealing with cases of forfeiture.

41. Besides the examined person, the draft Law also encompasses a wide range of categories of third persons. Articles 25 and 26 list, among others, "*assets acquired by the underage children or the spouse", "assets transferred by the person under examination to the spouse, a cohabitee, a former spouse, lineal relatives up to any degree of consanguinity and to collateral relatives up to the forth degree of consanguinity, /…/ persons of acquaintance, of intimate, friendly, official, financial, economical and any other relation /…/*". Are also covered "*assets, which are incorporated into the assets or acquired by a legal entity controlled by the person under examination*" (Article 29). According to Article 28 of the draft Law, assets onerously transferred to third persons will only be subject to forfeiture "*provided that they knew or had to suspect the illegal origin of the assets in question or that they are acquired in order to avoid the forfeiture or conceal the source or the real rights on them*".

42. The requirement of the link between the assets of the third parties and the examined person was accepted by the ECtHR. In *Arcuri v. Italy*, the Court considered that the analysis of the financial situation of the concerned third parties and the nature of their relationship with the examined person clearly indicated that "*all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Arcuri's unlawful profits and were* de facto *managed by him /…/*"[14].

43. In this regard, the Venice Commission recalls that a civil forfeiture system should balance the will to recover assets deriving from illegal activities - and which have been deliberately transferred to third parties as part of the laundering process - with appropriate safeguards for the protection of third parties rights (who may be genuinely innocent property owners). The criterion of a personal, official, financial, economic or "any other relation" with the examined person (Article 26 of the draft Law) is not sufficiently precise and it may be questioned whether it would be sufficient to justify the forfeiture of a third party's assets under Article 1, Protocol 1 to the ECHR. As to the requirement of the (supposed) knowledge of the origin of the acquired assets by the third parties (Article 28), the Commission was informed that it applies to *all* third parties mentioned in the draft Law. This should be clearly stated in the relevant provisions of the draft Law.

[14] Cf. also ECtHR, *Riela v. Italy,* Decision of 4 September 2001.

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

44. Article 2 of the draft Law establishes the Identification of Illegally Acquired Assets Commission (hereinafter: "the IAA Commission") as a specialised State body responsible for carrying out civil forfeiture investigations and instituting civil forfeiture proceedings.

45. The IAA Commission is an administrative collegial body, composed of five members: the President, appointed by the Prime Minister, the Deputy President and two members, elected by the National Assembly, and one member appointed by the President of the Republic (Article 2 §3). Such composition of the IAA Commission aims at guaranteeing its independence and impartiality.

46. In this regard, the Venice Commission considers that introducing 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 would allow to avoid direct involvement of the governmental political parties and thus ensure the independence of the IAA Commission.

47. The IAA Commission shall have local units enjoying the status of territorial directorates. These shall play a significant role in the investigation procedure as well as in the forfeiture proceedings insofar the IAA Commission request for seizure and forfeiture of assets will be based on the report prepared by the Director of the respective territorial directorate. (Article 34 §1, see bellow).

48. Given the role the directors of territorial directorates in the forfeiture proceedings, the Commission recommends that the same criteria for eligibility for membership of the IAA Commission provided for in Article 2 §5 apply also to eligibility for the office of director of a territorial directorate.

49. The obligation of the Commission to submit an annual report of activities to the National Assembly, the President of the Republic, and the Council of Ministers provided for in Article 5 § 5 is to be welcomed.

C. Decision-making powers of the IAA Commission

50. According to Article 5, the Commission shall make decisions on, among others, "*the conclusion of a settlement*" (§ 1.5). During the Strasbourg meeting, the Bulgarian authorities pointed out that such a settlement agreement must be submitted to the Court and approved by it, in accordance with the requirements provided for in Article 54 of the draft Law. The Commission strongly recommends to reword the relevant provisions of Article 5 in this sense and introduce an explicit reference to Article 54.

D. Investigation proceedings

51. Articles 9 to 16 give the grounds for instituting investigation procedure by the IAA Commission (see *supra*, paras. 33-34). The proceedings can be triggered by, amongst others, criminal charges or a criminal conviction but also by "*criminal way of living*" of a given person derived from the fact that a person was convicted for certain crimes within a period of five years or that two or more pre-trial proceedings for certain crimes have been instituted against him or her (Article 9 §2).

52. In view of the Venice Commission, the first case seems to be more adequately dealt with in a criminal procedure (as a criminal forfeiture), while the second case could be more appropriately tried as a civil forfeiture. The mixing of criminal and civil forfeiture in provisions in the same act could be problematic. The draft Law is silent as to criteria according to which the

IAA Commission should decide upon which procedure should be applied and under which conditions will there be necessary to change procedure. Article 53 §8 empowers the IAA Commission to request the Court, in charge of deciding upon the actual forfeiture of presumably illegally acquired assets, to suspend the proceedings until conclusion of the criminal proceedings against the person. Such a provision entails the risk of becoming the ordinary relationship between criminal and civil proceedings thus limiting the advantages of non-conviction based forfeiture.

53. The Commission welcomes the fact that the draft legislation is intended to apply to proceeds of crimes which are committed outside Bulgaria: the investigation can be triggered by criminal proceedings instituted in another State or by a foreign sentence for crimes such as those listed in Article 9 § 1.1 (Article 10 §1.3). Further, according to Article 10 §1.4, investigation can also be initiated with regard to assets derived from the illegal activity carried out in a country other then Bulgaria when such activity is unlawful under the criminal law of that country.

E. Investigation powers of the IAA Commission authorities

54. Articles 18 to 23 provide for the far-reaching investigative powers of the "IAA Commission's authorities", i.e. the directors of territorial directorates and the inspectors at the territorial directorates. Some of them are problematic. Article 18 §2 gives the Commission's authorities the right to "*request assistance and seek information from all State and municipal authorities, traders, banks, credit institutions, other legal entities, notaries and private enforcement agents*". According to Article 58 of the draft Law, should these persons not submit the requested information within one month, they may be fined up to 5 000 BGN (cca 2500€), if the act does not constitute a criminal offence. As to the authority which will decide on this, Article 3 seems to indicate that it is the Chairperson of the IAA Commission[15].

55. Information is the necessary material from which successful asset forfeiture cases are built and legislation need to ensure that investigators have lawful access to such information. This provision of the draft Law however, goes very far. While it may not be necessary to require investigators to obtain every piece of information by means of court orders, the institution or a person concerned should have the right to a judicial review.

56. Further, Article 20 §2.1 of the draft Law provides that, for the purpose of investigation, the Commission authorities can "*require explanations from the person under examination, from his/her spouse and from third parties*", and "*can require from natural persons information, explanations and documents in view of identification of the source and value of the assets*" (§2.4).

57. The information and documents obtained through examination can result in seizure and forfeiture of the assets. Without some protection these provisions are likely to engage the right to defense under Article 6 §1.c ECHR, as well as under Article 56 (the right to be accompanied by legal counsel when appearing before a State agency) of the Constitution of Bulgaria.

58. In the Commission's view, the requirement to obtain a court order for requesting certain information and documents may be an adequate safeguard to provide reasonable protection for the concerned persons, as the court would have to assess the proportionality of the order. It would also be useful to explicitly providing for the right to a legal counsel during examination by the Commission's authorities.

[15] « *The Chairperson of the Commission shall /../ 5. Issue penalty decrees on violations committed under this Act*".

59. The wording of Article 20 §7 requiring the IAA Commission to perform search or seizure in accordance with the Penal Code procedure and with assistance of the bodies of the Ministry of Interior seems compliant with the principle of the inviolability of the home without judicial warrant (Article 8 ECHR and Article 33 of the Bulgarian Constitution). However, such a provision does not seem consistent with the main purpose of the draft Law, which is introducing civil non-conviction based forfeiture (see also *supra*, para. 54). The Venice Commission recommends to keep distinction between the civil and criminal procedures, and introduce the obligation of the IAA Commission to obtain a court order for performing search or seizure.

F. Seizure and forfeiture proceedings before the court

60. Articles 34 to 50 provide for the terms and procedure for the imposition of an injunction order on presumably illegally acquired assets. Based on a report provided by the director of the respective territorial directorate, the IAA Commission shall request the seizure of the illegally acquired assets. The Court is due to decide within 48 hours; the court decision is subject to immediate enforcement. Article 36 §2 guarantees the right to judicial review of the court's decision before an appeal judge.

61. The Venice Commission welcomes the introduction of the provision which imposes the time limit for the duration of the injunction order. It provides (Article 51 §2) an important procedural safeguard: the injunction order will stay in force until the expiration of three months from the date of its making and shall then lapse unless the IAA Commission claims forfeiture of the assets in favour of the State. It is however, regrettable that it is up to the examined person to request the court to revoke the injunction order (Article 51 §3).

62. Following the imposition of injunctions on the property of the examined person, the IAA Commission can decide to claim actual forfeiture in favour of the State "*of the monetary equivalent of the illegally acquired property*" (Article 51 §1). The court shall conduct an adversarial hearing, with the participation of a prosecutor (Article 53). The court decision is subject to appeal by the general procedure.

63. As previously mentioned, seizure and forfeiture procedure can proceed independently of any criminal proceedings (see above, paras. 33-34). This possibility may affect the applicability of the presumption of innocence under Article 6 §2 ECHR.

64. Article 6§2 ECHR applies only where someone is "charged with a criminal offence". In this regard, the Venice Commission notes that this term has a partially autonomous meaning in the case-law of the European Court on Human Rights. When deciding whether someone is so charged, the Court takes into account: a) the classification adopted by the national legal system: If the case is classified as non-criminal, the Court further considers b) the essential nature of the proceedings. In *Philips v. United Kingdom,* the Court held that proceedings for a confiscation order after conviction are not within Article 6 §2 ECHR insofar as their purpose was not to punish the appellant; the procedure of forfeiture was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender[16]. However, in the civil forfeiture proceedings under the draft Law under consideration, the examined person may not have been charged for with a criminal offence at all or may even have been acquitted of it. As in such a case, the forfeiture proceedings will be founded on an allegation that the examined person holds "illegally acquired assets", bringing such proceedings seems likely to involve an allegation of criminal conduct of which the person will not have been convicted.

[16] ECtHR, *Phillips v. UK*, Judgment of 5 July 2001, p. 34.

65. The third criterion used by the Court is the type and severity of the penalty to which the examined person would be liable in the forfeiture proceedings. The amount of money involved in such proceedings is likely to be substantial (a minimum amount being fixed at 20 000 BGN/cca. 10 000 €), which could possibly lead to consider the proceedings as amounting to a "criminal charge" in the sense of Article 6§2 ECHR.

66. In conclusion, the Venice Commission is of the opinion that clearly stating the general interest and purpose of the law, elaborating in more detail the procedural safeguards contained in the draft Law, particularly the applicable evidentiary and standard of proof rules, and safeguards for the protection of third parties' rights would, in principle, be capable of ensuring that a fair balance is maintained between the rights of those involved and the general interest.

G. Standard of proof and rebuttable presumption

67. Civil forfeiture systems are designed to ensure that the central issue, i.e. whether the property amounts to criminal proceeds, is to be proved to the civil standard of proof of the "balance of probabilities" rather than the criminal standard of "beyond reasonable doubt". Some countries also provide for rebuttable presumptions in their civil forfeiture regimes. The underlying thinking under a rebuttable presumption is that it is easier for a person to establish that his or her property was lawfully acquired, than it is for the authorities to establish the contrary.

68. The Bulgarian draft Law requires the IAA Commission to make "*a reasoned motion, supported by evidence*" to obtain an injunction order on the illegally acquired assets from the competent Court (Article 34 §2). The court must decide within 48 hours. The draft Law is silent as to the way in which the court should apply the statutory assumptions so as to avoid a possible ground of incompatibility with human rights standards, when deciding whether to grant an asset injunction order or not.

69. The Venice Commission welcomes the fact that the draft Law provides for the necessary procedural safeguards, i.e. a non-suspensive right of appeal, the ability to release funds under controlled circumstances to cover legal and living costs of the examined person and the three months time limit beyond which the assets cannot be restrained.

70. Once the IAA Commission establishes that it can be reasonably assumed that assets have been illegally acquired, the burden of proof shifts to the examined person. "W*hen no legitimate source has been proven, the monetary equivalent of any assets whose value exceeds the income of the person and his or her family shall be forfeited*" (Article 24). The presumption also applies to assets in possession of the listed categories of third parties "*until the reverse is established by evidence*" (Articles 25 to 29).

71. The possibility for a State to require a examined person to demonstrate the lawful origin of assets liable to forfeiture ("reversal of proof") is provided for in a number of relevant international instruments[17], including the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[18]:

[17] UNCAC, Article 31 § 8, UNTOC, Article 12 § 7, Vienna Convention, Article 5 § 7.
[18] *Cf*. Article 3.4.

3 §4. Each party shall adopt such legislative and other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law".

72. While this obligation clearly relates to the kind of "reversal of proof" provided for in the draft Law under consideration, the CoE Convention explicitly refers to "an offender", i.e. at least the suspected perpetrator of the offences generating the proceeds, even if not convicted.

73. As for the other, more distant parties covered in the draft Law under consideration, the Venice Commission recommends introducing an explicit reference to the requirement for the IAA Commission to establish, to the civil level of proof, that the individual either knew or should have known or suspected the illegal origin of the assets in question, provided for in Article 28 of the draft Law.

74. The ECHR does not explicitly regulate the allocation of the burden of proof; in this regard, the ECtHR considered that "*the Convention does not prohibit presumptions in principle*"[19]. The fairness of a trial "*is not vitiated on account of the prosecution's reliance on presumptions of fact or law which operate to the detriment of the accused, provided such presumptions are confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*"[20] . Another important safeguard is the obligation for the court to evaluate all provided evidence carefully and objectively, and base the forfeiture order on that evidence[21]. In the *Arcuri v. Italy* case, the Court considered "*whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicants a reasonable opportunity of putting their case to the responsible authorities*". It found that "*the Italian courts were debarred from basing their decisions on mere suspicions. They had to establish and assess objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily*"[22].

75. Specifying evidential thresholds the authorities should meet in order to obtain actual assets forfeiture in the legislation is therefore 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.

76. The Commission also recalls the relevance of judicial discretion. According to Article 53, if the defendant (or the other affected party) fails to prove the lawful origin of his or her property the court must move to making a forfeiture order. There may be a range of (justified) reasons why such an inability to prove might arise and the court should have a residual power to nevertheless decline to make an order if the interests of justice so require. In the *Phillips v. UK* case, the ECtHR thus emphasized the competence of the judge to use a discretion "*not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice*" (para. 43).

[19] ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001.
[20] ECtHR, *Butler v. UK*, Decision of 27 June 2002, p. 8.
[21] *Ibidem*.
[22] ECtHR, *Arcuri v. Italy*, Decision of 5 July 2001.

77. The draft Law under consideration does not specify in sufficient detail the evidential threshold required for obtaining the actual forfeiture of presumably illegally acquired assets. According to Article 51 of the draft Law "*based on a reasoned conclusion made by the director of the territorial directorate, the Commission shall decide to claim forfeiture /…/*". It is not clear whether such a "reasoned conclusion" is the same which served for requesting the injunction or not.

78. Equally, the draft Law is silent as 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 actual asset forfeiture.

79. The Commission recommends to elaborate in more detail the evidential threshold for requesting both the imposition of injunction on presumably illegally acquired property and the actual forfeiture of that property, and the standard of proof.

H. <u>The role of the prosecutor in the forfeiture proceedings</u>

80. Article 53 §1 of the draft Law provides for the participation of the public prosecutor in the forfeiture proceedings before the court. Also, the prosecutor's approval is necessary for concluding a settlement agreement with the person under examination (Article 54 §3, see also above para. 52).

81. In Bulgaria, like in some other Council of Europe member states, the prosecutor's office also have some non-penal law responsibilities: the Bulgarian Constitution provides that the Prosecutor's Office shall "ensure that legality is observed" by, *inter alia*, "taking part in civil and administrative proceedings whenever required to do so by law" (Article 127.iv).

82. Opinion No 3 (2008) of the Consultative Council of European Prosecutors (CCEP) on "The Role of Prosecution Services outside the Criminal Law Field" does not exclude a role of the prosecutor's office outside the criminal law field. It states that "*The variety of functions of prosecution services outside the criminal law field results from national legal and historical traditions. It is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests, respecting the rule of law principle and its international obligations*" (para. 31)[23].

83. However, where the prosecution service is entrusted with functions outside the criminal law field, these functions should be carried out in accordance with the number of principles:

> *" a. the principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field and the role of courts to protect human rights;*
> *b. the respect of impartiality and fairness should characterize the action of prosecutors acting outside the criminal law field as well;*
> *c. these functions are carried out "on behalf of society and in the public interest", to ensure the application of law while respecting fundamental rights and freedoms and within the competencies given to prosecutors by law, as well as the Convention and the case-law of the Court;*
> *d. such competencies of prosecutors should be regulated by law as precisely as possible;*
> *e. there should be no undue intervention in the activities of prosecution services;*
> *f. when acting outside the criminal law field, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (equality of arms);*

[23] Adopted by the CCPE at its 3rd Plenary meeting, Strasbourg, 15-17 October 2008.

g. the action of prosecution services on behalf of society to defend public interest in non criminal matters must not violate the principle of binding force of final court decisions (res judicata) with some exceptions established in accordance with international obligations including the case-law of the Court;
h. the obligation of prosecutors to reason their actions and to make these reasons open for persons or institutions involved or interested in the case should be prescribed by law;
i. the right of persons or institutions, involved or interested in the civil law cases to claim against measure or default of prosecutors should be assured;
j. the developments in the case-law of the Court concerning prosecution services' activities outside the criminal law field should be closely followed in order to ensure that legal basis for such activities and the corresponding practice are in full compliance with the relevant judgments (para. 34)".

84. These principles were reconfirmed in the Joint Opinion of Consultative Council of Judges of Europe (CJCE) and CCPE on the relationship between judges and prosecutors[24].

85. Similar considerations can be found in the PACE Recommendation 1604 (2003) on Role of the public prosecutor's office in a democratic society governed by the rule of law (para. 7.v).
86. The Venice Commission therefore recommends to reconsider the role of the prosecutor in the civil forfeiture proceedings, and ensure that the above mentioned principles are respected.

I. Management of seized and forfeited assets

87. Creating an effective non-conviction based asset forfeiture system requires not only the enactment of a comprehensive legislation, but also an organisational infrastructure to cope with the many practical issues that occur when handling seized and forfeited property, including the custody, safe storage, management, and disposition of such property. The choice of the body in charge of seized and forfeited asset management is important for the success of the forfeiture process as duties of the asset manager can be complex, requiring familiarity with law, finance, business and real estate issues.

88. The Bulgarian draft Law is rather weak in this respect. In fact, it entrusts the Minister of Finances with the power to appoint, on a case-by-case basis, "*a public enforcement agent*" in charge of managing seized and forfeited assets (Articles 38 §1 and 56 §2). The money deriving from the selling of the forfeited assets will go into the State budget (Article 56 §4).
89. The solution adopted by the draft Law under consideration does not seem appropriate insofar as it makes difficult to ensure integrity, accountability and transparency in a forfeiture process.

90. In this regard, the Venice Commission notes the G-8 "Best Practices for the Administration of Seized Assets"[25]. Among the principles advocated by the G-8 are the following:

a. There should be a clear separation of duties such that no single person has authority over all aspects of asset administration or if one person does have authority over all aspects of asset administration, he or she should be fully accountable for its actions to a higher body;
b. Assets administration should be subject to an annual examination by independent auditors, similar experts or otherwise in accordance with national law. The examination may include the certification of financial records, and the findings should be made available to the public, where appropriate;

[24] Opinion No. 12 (2009), CM(2009), 15 December 2009, in particular §§ 64-66.
[25] G-8 Lyon/Roma Group. Criminal Legal Affairs Subgroup, 27 April 2005, p.2.

c. No one should receive a personal benefit or use seized property for personal purposes.

91. The Bulgarian authorities have informed the Commission about the intention to introduce a new paragraph in Article 56 providing for the establishment of a special fund for the deposit of seized and forfeited assets. Such a fund would serve to encourage the development of small and medium enterprises in the country.

92. The establishment of a special asset seizure and forfeiture fund would be welcomed. Such a fund can facilitate the effective disbursement of assets after they have been forfeited, and has additional advantages related to the administration of seized assets. Liquidated assets would be deposited into an interest-bearing account pending the outcome of the forfeiture proceedings. Such a procedure may be particularly useful for the administration of seized currency, which would not otherwise earn interest or would incur unnecessary storage risks or costs.

93. In this regard, the Venice Commission also notes the Final Declaration of the G8 ministerial meeting in 2009[26], which mentions the option for a State to allocate resources diverted from organized crime for the sake of *social utility*. It stresses that such an option would have a significant impact on gaining social acceptance of legal rules ("culture of legality") and in restoring the citizens' confidence in the state institutions.

94. The Venice Commission therefore strongly recommends to introduce relevant provisions ensuring the establishment of an asset seizure and forfeiture fund as well as of the adequate structures for control and auditing of asset administration. Further, a particular attention should be made to ensure that property offered for public sale is not purchased by exponents of organized crime or by a man of straw of a the very person from whom the property in question has been forfeited.

V. Conclusion

95. Corruption and organized crime are a threat to national security and stability; they undermine the rule of law and negatively affect the state economy. Today, the threat from organized crime is more spread out and more complex than in the past. As a result, it is even more necessary to strengthen appropriate national measures for an effective fight against these phenomena.

96. The Venice Commission is aware of the fact that the need for an effective seizure and forfeiture of assets derived from criminal activities is one of the crucial questions in Bulgaria. The issue is also topical in many other countries, which have also introduced or envisage to introduce non-conviction based civil forfeiture.

97. The Venice Commission recalls however that, despite their justified purpose, non-conviction civil forfeiture proceedings must be devised and carried out in compliance with the Constitution and taking into account European standards concerning the rule of law and respect for human rights.

98. The new draft Law is an expression of the will of the Bulgarian authorities to introduce a new means of combating corruption and organized crime. As such, the Venice Commission welcomes and encourages the efforts of Bulgaria in this direction.

[26] Final Declaration, 30 May 2009, p.5.

99. However, extending the scope of application of the draft Law also to "illegal activities", i.e. certain offences under the Customs Act, the Prevention and Disclosure of Conflict of Interests Act, and under the Publicity of the Property of Persons Occupying High State Positions, may raise some concerns. In the Venice Commission's opinion, different kinds of corruption in the public sector, if still not regarded as crimes, should primarily be met through reforms within criminal law. To such reforms an efficient application of forfeiture could be usefully added.

100. Should the Bulgarian authorities decide to keep the extensive scope of application, the draft Law should include appropriate safeguards ensuring that a fair balance is maintained between the rights of those involved and the general interest.

101. 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. In this respect, the Venice Commission makes the following key recommendations:

- formulate the general and public interests, the aim and purpose of the new law in a more precise and exhaustive manner;
- 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;
- keep clear distinction between the civil and criminal forfeiture procedures;
- introduce the obligation of the IAA Commission to obtain a court order for requesting certain information and documents from the examined persons, and for performing search or seizure;
- provide for the right to a legal counsel during examination by the Commission's authorities;
- clarify and strengthen the procedural safeguards contained in the draft Law, particularly the applicable evidential threshold, standard of proof and safeguards for the protection of third parties' rights;
- reconsider the role of the prosecutor in the forfeiture proceedings and ensure it complies with the European standards concerning the rule of law and respect of human rights;
- introduce relevant provisions ensuring the establishment of an asset seizure and forfeiture fund as well as of the adequate structures for control and auditing of asset administration.

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