Republic of Bulgaria
ECONOMIC
AND SOCIAL COUNCIL

OPINION

of

THE ECONOMIC AND SOCIAL COUNCIL

on

THE "BILL FOR CONFISCATION OF ASSETS ACQUIRED THROUGH CRIMINAL OR OTHER ILLEGAL ACTIVITY"
(developed by the Ministry of Justice of the Republic of Bulgaria)

(own-initiative opinion)

Sofia, December 2010

ESC/2/022/2010 - Elaborated at the proposal of ESC members of Group I and Group II - employers and trade unions.

Following the proposal of 21 members of Group I and Group II (employers and trade unions) of the Economic and Social Council (ESC) and pursuant to Art. 15, Paragraph 3, with respect to Art. 5, Paragraph 3 of the Economic and Social Council Act, the ESC President Council decided to elaborate an own-initiative opinion on the

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Ms Valentina Zartova, representative of the employer organisations, and Mr Chavdar Hristov, representative of the employee organisations, were appointed co-rapporteurs.

After consulting the draft opinion with members of Groups I and II, under Art. 33, Paragraph 6 of the Regulations of the ESC, the President of the Council submitted the draft of this opinion to be discussed and adopted at the Plenary Session of ESC.

At the Plenary Session held on 7 December 2010 the Economic and Social Council adopted this opinion.

I. INTRODUCTION

1. The members of the Economic and Social Council strongly and unconditionally support all adequate ideas, measures and actions against corruption, organised crime and the abuse of public power.

2. These negative phenomena pose a serious problem to the Bulgarian society and state. The proliferation of these types of offensive behaviour, including at the highest levels of state administration, is a major obstacle to the establishment of justice, the rule of law, as well as to the realisation in Bulgaria of each person's rights and freedoms in accordance with European democratic standards. Effective counteraction entails the implementation of a set of measures concerning the work of the public administration, the law enforcement agencies, the judiciary, as well as the election system and other mechanisms for gaining political representation.

The purpose of this opinion is to provoke serious public debate in the country and voicing the opinions of civil society structures to assess the present state, problems, and prospects for change in the existing model of civil confiscation.

3. The civil confiscation of assets acquired through criminal activity is a relatively new tool designed mainly for fighting against organised crime and corruption. Legislation to this effect was adopted first in the U.S. but over the past fifty years - in many other countries as well. It was adopted earlier in time in Ireland and the UK and therefore these countries have more experience in its implementation. At present it also makes part of the legal systems of other Member States of the European Union (Germany, Italy, France, and Switzerland) as well as The Republic of South Africa.

3.1. At the centre of the philosophy of civil confiscation is the idea that ownership of an asset is legitimised not only by an official document that evidences its acquisition, but also by the use of income that is not connected to illegal activity. The inability to prove that the income used to acquire the asset is legitimate provides a sufficient legal ground for the ownership of the asset to be declared illegitimate and the asset to be confiscated within the framework of civil procedure.

The main purposes of civil confiscation legislation is to forfeit any proceeds of crime and criminal activity, to reduce significantly the economic power of criminals, and ultimately to prevent organised crime and corruption. Civil confiscation also provides a relatively quick means of preventing the transfer of

ownership of the assets acquired through criminal activity, including its concealment, by imposing protective measures on the assets.

Civil confiscation is an effective tool for overcoming the obstacles to the confiscation of assets acquired through crime that are inherent in the criminal procedure, i.e. in the cases where due to formal reasons criminal prosecution is impossible.

3.2. Civil confiscation legislation creates a separate civil procedure for the confiscation of assets distinct from the criminal prosecution procedure. Nevertheless, civil confiscation is not a substitute for criminal prosecution but an additional tool that complements it. This is due to fact that civil confiscation requires the establishment of the criminal activity and its connection to the assets whose confiscation is sought. Only after the state has established the criminal origin of the assets (although a more simplified procedure is used) the burden of proof is shifted and the respondent is required to prove the legitimate origin of the means used for the acquisition of the assets and in case he fails to do this the assets are confiscated.

3.3. With respect to proving the criminal origin of the assets different approaches are adopted in different jurisdictions. The standard of proof may be the same as in the criminal procedure - "beyond reasonable doubt," or lowered - "balance of probabilities." As a rule, the countries of the continental legal tradition, such as Switzerland or Liechtenstein, require the state to provide a high degree of proof of the criminal origin of the assets, i.e. prove it beyond reasonable doubt. These proceedings entail less strict rules for the admissibility of evidence and the means of providing evidence. It is possible that evidence which would not be admissible in a criminal trial on charges of crime could be used in the proceeding for civil confiscation.

3.4. In all countries where legislation providing for the confiscation of proceeds of crime has been adopted questions concerning its constitutionality have been raised. The main issues being: a) Is there a violation concerning the presumption of innocence? b) Are there sufficient guarantees for a fair trial? c) Is the retroactive application of the law permissible? d) Is the right of ownership violated? It is generally accepted that such legislation does not violate the suggested legal principles by providing for civil confiscation proceedings, i.e. licensing the state to prove the legal origin of the assets within the framework of a lower standard of proof and a simplified evidencing procedure, and shifting the burden of proof

onto the respondent who has to prove the legal origin of the assets within a specified time period.

The European Court of Human Rights (ECHR) has also examined cases in which the confiscation of assets effected under such legislation is contested. So far the practice of the ECHR is limited due to the fact that in European countries civil confiscation of proceeds of crime is not yet practised on a large scale.

The wide variety of legislative measures, approaches and possible consequences in different countries, however, will inevitably lead to a significant elaboration of the practice of the court. At present it is not possible to give precise answers to many of the issues raised by the legislation providing for civil confiscation of proceeds of crime. However, several decisions of the ECHR in cases involving confiscation of criminally acquired assets, provide a sufficient basis for summarising the main issues that will be of central importance to the court: a) the extent to which the right to fair trial under Art. 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) is guaranteed, b) the ban on retroactive punishment under Art. 7 of the ECHR; c) the protection of property rights under Art. 1 of Protocol 1.

II. KEY FINDINGS

1. The current Confiscation of Assets Acquired through Criminal Activity Act provides for the confiscation of assets only if it is proven that owner of such assets is involved in criminal activity. This law was passed less than five years ago in accordance with the recommendations of the European Commission (EC) and its development and practical implementation has been monitored and evaluated by the EC. The political power under the government of which the law was passed expressed great expectations for the effect that would be achieved by the implementation of this law. Yet the facts show that this was not achieved in practice.

2. The Bill for the Confiscation of Assets Acquired Through Criminal or Other Illegal Activity proposed and published at the website *of the Ministry of Justice* is probably intended as a measure to increase the effectiveness of actions against persons who have acquired informal income and assets with a view to defending the interests of the public, including through the preventive effect of the law. As a result, the Bill expands the scope of the implementation of civil confiscation not only regarding assets acquired through criminal activity but also

regarding assets acquired through all kinds of illegal activity (pursuant to § 1, item 11 of the Additional Provisions of the Bill: "criminal or illegal activity shall be every activity, performed on the territory of the Republic of Bulgaria or abroad, which constitutes a criminal or administrative offence under Bulgarian legislation"). Most probably the expectation of the authors of the Bill is that in this way Bulgaria will demonstrate its active position in response to the criticism and recommendations of the European Commission to improve the mechanisms and means of fighting corruption, crime, and informal economy.

3. The principle proposed in the bill differs significantly from the institute of civil confiscation as regulated in other in EU Member States. The main differences are the following: a) the Bill proposes to expand the scope of implementation of civil confiscation with respect to assets acquired through "illegal activity," i.e. acquired through administrative offences under the Additional Provisions of the Bill) provided that the value of the benefit exceeds BGN 60,000 - Art. 24 (In contrast, legislators in other European countries concede that civil confiscation is only applicable to assets acquired through criminal activity.); b) the Bill creates the presumption that in case there is significant discrepancy (more than 250 minimum wages for the period under examination - Art. 86 of the Bill) between the value of acquired assets and the net income of the inspected person and his family members - the property must have been acquired through criminal activity - Art. 46, Paragraph 1, Item 2, Art. 48, Paragraph 2, Item 2, Art. 75, Paragraph 2, etc. of the Bill.

3.1. The exclusion of the premise for civil confiscation - the criminal origin of the assets - is contrary to established international standards, according to which the measure of confiscation (which seriously affects fundamental human rights) is permissible only in order to address the particular difficulties of combating organised crime - which is the sole justification of the special measures employed in such cases by the state. The absence of the condition of criminal origin of the assets facing confiscation has not received approval of the Venice Commission. This Commission states in its final opinion that only if the link between the proceedings for confiscation and the criminal proceedings is established, the Bill can use the phrase "assets acquired through criminal and illegal activity." The opinion of the Venice Commission does not discuss the implementation of confiscation to assets acquired through illegal activity in general.

Expanding the scope of the measure of confiscation to any illegally acquired assets, regardless of whether they are proceeds of crime or not, is unprecedented in

international law, EU law, or the laws of other Member States. All they require as an absolute prerequisite for confiscation - the establishment (either in civil or criminal proceedings) of the criminal origin of the assets.

The expanded confiscation procedure envisaged by the Bill (which does not seek to establish a link between the crime and the acquired asset) is inconsistent with the conditions for applying this type of measure in the EU. This can lead to the announcement of the law contrary to the ECHR. The requirement that the state prove the criminal origin of the assets, although using a simplified procedure and lower standards of proof, is perceived by the ECHR as an essential requirement which provides guarantees for safeguarding fundamental rights, respectively - pursuant to Art. 6, Paragraph 2 of the ECHR.

3.2. The valuation of the assets of benefit subject to confiscation provided in the Bill (Above BGN 60 thousand in case of administrative offences and above 250 minimal salaries in case of criminal offences) is not well grounded in the legal reasoning of the Bill.

Besides, the same provisions enable the confiscation of assets / benefits acquired by means of labour (in consideration for work) on which social security and health insurance contributions have not been paid. In such cases the examined persons could not, or could hardly, prove that the source of the assets is their labour.

3.3. The presumption created by the Bill that there is crime in all cases where there is a significant discrepancy between the value of the acquired assets and net income of the inspected person and his family members is not only unparalleled in European legislation, but also creates the risk of unforeseen consequences on the normal turnover of goods.

3.3.1. This presumption relieves the Commission for Establishing of Property Acquired from Criminal Activity (hereinafter referred to as the "Commission") of the obligation to establish connection between the investigated assets and the possible crime and imposes on the inspected person the obligation to prove that the property is not acquired through criminal activity.

The Commission prepares "a financial analysis of the economic activity and the subsistence of the investigated person and his family ..." (Art. 27). No obligation is imposed on the Commission to establish connection between the assets and the possible crime. Art. 28. (Art. 20 of the Bill provides that "proceedings before the

Commission under this Act shall be instituted to establish the origin of assets which are suspected to have been acquired or received as proceeds of crime or other illegal activity" but there is no obligation for the Commission to establish the existence of a crime by which the assets have been acquired). While this approach is somewhat justified in cases where the Commission initiates proceedings against a person indicted for a crime (where criminal proceedings have been fully completed or have been terminated by amnesty, etc., or stopped because of immunity, etc. (Art. 21), such legislative provisions have no logical explanation where the investigated person is not prosecuted for any crime and he has sold the assets to a third natural or legal person (in case of - resale) - Art. 22.

An even more striking fact is that the Bill allows the Commission to initiate proceedings against assets that have been sold/resold to third natural or legal persons by a perpetrator of possible crime against whom no criminal charges have been pressed, but does not provide for the initiation of such proceedings against such assets that have not been sold by a perpetrator of possible crime against whom no criminal charges have been pressed.

The institute of civil confiscation employed in other jurisdictions does not relieve the authorities of presenting to the court sufficiently convincing proof of the criminal origin of the assets that are subject to confiscation (Ireland, UK, USA, South Africa).

3.3.2. Moreover, the term "suspected," as used in Art. 20, paragraph 1 of the Bill, has no legal definition in the Additional Provisions and is too general in content. Defining this concept is extremely important because the presence of suspicion becomes a legal ground for the Commission to initiate proceedings and ultimately impose protective measures to secure future confiscation - since, as stated above, the Commission has no obligation to establish the existence of a crime.

3.3.3. Pursuant to the Bill, only after protective measures are imposed by the court (as requested by the Commission), respectively - by a judicial enforcement agent, may the investigated person provide evidence that the property is not acquired through crime (Art. 93, Paragraph 6).

The practice of international and national courts shows that shifting the burden of proof in the case of confiscation of assets acquired through criminal activity is not in conflict with fundamental human rights only where the following

principles have been observed: a) the state should first prove the criminal origin of the assets; b) the procedure should provide for the right to defence; c) the sanction should be proportionate. In the Bill in question some of these prerequisites are not addressed at all - thus making the shifting of the burden of proof legally unfounded.

4. Unreasonable adverse consequences of the implementation of the Bill to third parties.

4.1. The Commission initiates proceedings against assets that are sold by the person under investigation (the perpetrator) to another natural or legal person (respectively resold) - Art. 22.

4.2. The Commission is entitled to request and obtain from the court an order to impose protective measure on the sold (resold) assets. Following the imposition of the protective measure the court may authorise the disposal of property at the request of the concerned person only for a limited range of purposes (to pay of medical treatment, maintenance or alimony, public liabilities, etc. under (Art. 50).

4.3. The Commission may also request and obtain a court order to seal the premises, equipment and vehicles in which the assets subject to the inspection are kept, regardless of whose property such facilities, equipment, and vehicles are (Art. 49, Paragraph 4).

4.4. Where the assets attached under such court order are secured by a pledge or lien, the court orders that the person in whose possession the pledged property is should surrender it to the judicial enforcement agent who in turn conveys it for safekeeping to the relevant local subdivision of the Commission (Art. 56, Paragraph 4).

4.5. When the court has issued a writ of execution concerning the asset attached at the request of the Commission, the judicial enforcement agent is entitled to seize it from the person in whose possession it is and convey it for safekeeping to the relevant local authority. (Art. 56, Paragraph 6). In this case, the latter is entitled to request to be appointed to collect the receivables and to initiate separate executive proceedings against the debtor specified in the writ of execution (Art. 57).

4.6. Pursuant to the procedure for imposing protective measures to secure the assets subject to investigation, the Commission is entitled to press charges

against the person holding the assets or property in case of refusal to hand them over voluntarily (Art. 66).

4.7. The territorial subdivisions of the Commission may ask the buyers of the assets (the third parties - natural persons or managers of a legal person) to declare the assets possessed by them (including assets possessed by their family members), provide a list of their bank accounts, sources of funds and the reasons for acquiring the assets, and provide information concerning the transactions they have performed within the investigated time period as well as concerning their liabilities to third parties, etc. (Art. 71).

All of the above measures are implemented against the third party regardless of its integrity, knowledge or suspicion that property may be acquired by the person under investigation (the offender) by criminal or unlawful activity. The Bill does not give any opportunity (right) to third parties to participate, present their opinion, etc. following the imposition of protective measures on the investigated property possessed by them (Cf. Section III). Conversely, the bill does not regulate the procedure for removing the protective measures imposed on the assets purchased by a third party - natural or legal person - where it could not have been aware that the assets were acquired by the seller through criminal activity.

4.8. Concerning third parties who have purchased the assets from the offender and "were aware or could have assumed that the assets were acquired through criminal or other unlawful activity" (Art. 77), the Commission brings claims for establishing the criminal or illegal origin of the acquired assets and for annulment of any transactions with it, to which they may be a party (Art. 90):

4.8.1. Above all, due to its too general scope, the phrase "were aware or could have assumed that the assets were acquired through criminal or other unlawful activity" entails the risk of subjective interpretation and implementation which could lead to unreasonable restriction of the unalienable right of third parties to own property.

4.8.2. Moreover, by means of the quoted provision third parties are placed in the absurd position to prove as respondents in the proceedings that the property was not acquired through criminal activity.

5. The problems concerning the legal validity of the Bill arise also from the provision for the 20-year period of prescription after the expiration of which the

rights of the state to the assets are extinguished in conjunction with the provision for interruption of this period when proceedings have been initiated. A retrospective sanction is being introduced contrary to an express statutory provision of the Law on Normative Acts. The denial of the specific public right of the state to infringe upon the proprietary sphere of a natural or legal person is always a sanction. This sanction is introduced in 2010 but will apply to property acquired within the 20 years preceding the date of coming into force of the Act notwithstanding that at the time of acquisition the natural and legal persons could not have been aware of the possibility that the property may be confiscated in the future. This approach has an additional procedural effect - the persons have been unaware and could not have been aware of the fact that they will have to prove the legality of their income and purchases, so they have not demanded the preparation of official documents, or private documents, dated accordingly, or they have not organised the preservation of such documents due to the fact that they have not been informed timely that in the future this will be the only way for them to defend their rights before the court.

When the period of prescription is determined the good European practice for setting shorter periods should be observed, e.g. in Britain the period is 12 years), or differentiated according to the seriousness of the offence: longer periods for more serious crimes and shorter for less serious infringements (as in Germany). The Bill should explicitly state that the statutory prescription period starts after coming into force of the Act.

6. The Bill provides for the initiation of a unilateral administrative procedure for the establishment of assets acquired through crime or illegal activity without the participation (even without the knowledge) of the person under investigation. The participation of this person is envisioned for a much later stage - after the imposition of protective measures. There is no logical explanation for such legal decision, especially since the establishment of assets acquired through criminal activity in criminal proceedings (for the purposes of criminal forfeiture) is performed not only with the knowledge but also with the active participation of the accused.

7. Bulgaria is the only jurisdiction where the existing at the moment and envisioned in the Bill Commission for Establishing of Property Acquired from Criminal Activity is a separate and independent body. In other countries the specialised authorities entitled to execute civil confiscation are part of the system of law enforcement (police or prosecution). This allows the authorities in those countries: a) to carry out investigations on the origin of the assets in parallel to the

investigation of the crime through which it was acquired; b) to use all tools for investigation typical for law enforcement agencies, i.e. to achieve high efficiency in their operations.

No procedural rules and guarantees are envisioned for the carrying out of the proceedings before the Commission.

The legislative framework of the Commission and its functions/competencies bring it closer to the idea of a special jurisdiction. The scope of its competences and the anticipated final effect of its agency entail investigations and legal assessments of various types which result in a legal dispute on rights associated with the acquisition of property.

With respect to its powers and in view of higher guarantees of objectivity and legal soundness of the procedures for civil confiscation, it is imperative to discuss the idea of the jurisdiction of the Commission within the law enforcement system.

8. The Bill does not provide a sufficiently effective mechanism to control the operation of the Commission guaranteeing the lawful performance of its functions which poses a problem - especially given its broad powers.

With respect to this, there is an inexplicable conflict between Art. 15 (which provides that members of the Commission and its local subdivisions do not bear financial liability for damage caused by them in the exercise of their duties) and Art. 115 (under which any person injured by the unlawful acts or omissions of the authorities and officials acting under the proposed Act may bring an action for damages against the state).

This hypothesis should be regulated under the general provisions of the State and Municipal Liability Act as a guarantee that the Commission would not act *ultra vires*.

9. The time limit put forth by the Bill for completion of the proceedings initiated by the Commission - 10 months with a possible extension of another 6 months (Article 26) is unreasonably long.

In contrast, the lime limit for the court to decide on the Commission's motion for protective measures is unreasonably short - 48 hours (Art. 48). In such a short time the court could not examine in depth the documents collected by the

Commission (within a 10- or 16-month time period) and rule objectively (not formally) on the Commission's request.

10. The provision in the Bill stating that the Commission should on its own discretion determine the number and the staff of its territorial subdivisions is unacceptable. This should be regulated by an Act of the Council of Ministers.

11. The plan for disposing of the confiscated assets proposed in the Bill is unconvincing and wasteful (economically and organisationally). According to it confiscated assets are to be disposed of by: a) An Interagency Council for the Management of Confiscated Assets (as a consulting body) consisting of Deputy-Ministers appointed by the Minister of Justice and four more ministers; b) Management of Confiscated Assets Acquired Through Criminal and Other Illegal Activity Fund as a separate legal person at the Ministry of Finance with and Executive Board consisting of Executive, Assistant-Executive and three members appointed by the Minister of Finance.

11.1. Above all, the envisioned Interagency Council lacks the expert (organisational) personnel to fulfil the powers assigned to it.

11.2. There is no preliminary assessment of how effective would be the creation of a new administration (fund) for the management of confiscated assets, given that the currently existing management of state assets is inefficient.

12. The motivations accompanying the Bill do not contain preliminary impact assessment estimating the cost of the creation and maintenance of the envisioned structures, including the proposed Interagency Council and Management of Confiscated Assets Acquired Through Criminal and Other Illegal Activity Fund, as well as the expected revenue and benefit for the public. No analysis of the Bill's compliance with EU law is performed.

13. The motivations accompanying the Bill do not contain preliminary impact assessment on the business environment in case of unjustly attached assets, which constitutes a violation of the constitutional right to property, as well as lending opportunities and the image of corporations.

14. The possibilities offered by civil confiscation should not in practice reduce the possibilities offered by existing criminal proceedings (e.g. criminal forfeiture), tax, customs, and other regimes. It should be explicitly stated that the effective implementation of controls and sanctions in the aforementioned areas will

reduce (and in many cases will make redundant) the application of civil confiscation.

15. The bill is motivated by the Ministry of Justice also as a measure to combat informal economy and tax evasion. This duality of purpose of the Bill is problematic because in principle the measures to combat the informal economy are fundamentally different from the measures to combat organised crime and corruption. The legislation on civil confiscation of proceeds of crime in the EU has a clear focus. It is a tool to combat organised crime and corruption. Adopting such a radical instrument, unparalleled in the developed democratic countries, is a step that should be taken very carefully and following a detailed study of the possible scope of the law.

III. PROPOSALS AND RECOMMENDATIONS

The performed analysis concludes that due to the existence of major problems the adoption of the Bill proposed by the Ministry of Justice by the National Assembly in its present form is not advisable.

A public debate on this important matter should be held. The most appropriate and effective reform measures in the control, adjudicative and law enforcement systems of the state must be determined by means of a comprehensive and constructive dialogue with legitimate representatives various community groups.

In adopting legislation on civil confiscation Bulgaria should adhere to the established approach in the European Union. This stems both from the country's obligations within the EU legislative framework and the practice of ECHR to ensure the compliance of civil confiscation procedures with the guarantees of fundamental human rights.

Legislation on civil confiscation should guarantee:
a) the protection of the right to property that is not acquired through criminal activity, including the rights of third-party purchasers acting in good faith; b) the participation of implicated persons at all stages of the proceedings for establishing assets acquired through criminal activity.

The imposition of sanctions on persons that are found guilty by confiscating their assets acquired through illegal activity should be persistently and uncompromisingly conducted using the existing mechanisms of prosecution and confiscation, as well as the taxation, customs, etc. regimes.

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