05_The Criminal Assets Forfeiture against the Background of the Acquis Communautaire_KY[english]

The highly controversial Criminal Assets Forfeiture Act was promulgated in The State Gazette on 18 May 2012 and entered into force on 19 November 2012. Within the short time span between its promulgation and entry into force, the law was amended eight times and triggered two judgments of the Constitutional Court of the Republic of Bulgaria.

The main weaknesses of the law were pointed out to be its conflict of norms with the Constitution, as well as a number of international legal acts to which the Republic of Bulgaria is a party, including the provisions of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms and the draft EU directive on the confiscation of proceeds of crime. In its Judgment No. 13 of 13 October 2012 under Constitutional Case No. 6 of 2012, the Constitutional Court held that compliance with the draft directive could not be required. However, the Constitutional Court pointed out in its judgment that if such a directive was to be adopted and entered into force, a new legal situation would emerge and then the control under Article 149, paragraph 1, subparagraph 4 of the Constitution in conjunction with Article 249, paragraph 3 of the Treaty Establishing the European Community would be possible.

At present, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union is a fact. The Directive entered into force on the twentieth day following that of its publication in The Official Journal of the European Union (No. 127 of 29 April 2014). The Member States, including the Republic of Bulgaria, have the obligation to bring into force the laws, regulations and administrative provisions to comply with the Directive by 4 October 2015 and forthwith transmit to the Commission the text of those provisions.

The Bulgarian Criminal Assets Forfeiture Act is not in full compliance with the provisions of Directive 2014/42/EU.

The Directive envisages deprivation of property on the basis of an enforceable conviction for the commission of a criminal offence under Article 3 of the Directive: a criminal offence covered by the Convention on the fight against corruption involving officials, seven Council

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Framework Decisions, and three Directives of the European Parliament and of the Council on specific serious offences. Under the Bulgarian laws, a committed offence or administrative infringement constitutes the legal grounds for the opening of a procedure. The investigation begins when the person is accused, i.e. before the court rules on a final enforceable conviction or before the entry into force of an order on an administrative infringement capable of generating benefit. In other words, the Bulgarian law does not contain a requirement for the person to have committed an offence or to have this offence proven in accordance with the procedure laid down in the legislation by means of an enforceable conviction. It does not seek any connection between the availability of property and the commission of an offence.

The Directive provides for extended confiscation of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

The Directive makes it possible also to confiscate proceeds or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer of acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value. These provisions should not be construed to prejudice the rights of bona fide third parties.

Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union respects the fundamental rights and abides by the principles recognized in the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in accordance with their interpretation in the case law of the European Court of Human Rights. It has to be applied in compliance with those

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rights and principles. The Member States have to take the necessary measures to ensure that the persons affected by the measures provided for in the Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms safeguards the right to a fair trial. The law introduces the presumption of unlawfulness of the acquired property, which contravenes the principles of a fair trial and the presumption of innocence. What is subject to assessment is the value of the property rather than its origin as proceeds from crime. The right to a fair trial is violated also with the retroactive effect of the law and the failure to apply the principle of legal certainty.

In accordance with Article 1 of Protocol No. 1, every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one is to be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The ownership right is not absolute. The state may intervene in the exercise of the ownership right but this is allowed only when the intervention is in the public interest, the measure is proportionate, and the intervention is provided for by the law.

In this particular case, there is no precise, clear and predictable law. It is criminal assets that are subject to forfeiture. Criminal assets are considered to be the properties for the acquisition of which no lawful source has been identified, i.e. there is no clear legal definition of the term. There is no legitimate objective because the state is not interested whether the property has been acquired from or in connection with crime. It is not in the public interest for the persons affected, including the bona fide third parties, to be placed in a situation of uncertainty and insecurity as to what line of conduct they should adhere to so that to avoid the forfeiture of their property due to the lack of clear legal provisions. There is no balance between the public interest and the individual rights affected.

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