

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.07.2009
SEC(2009) 1074

SUPPORTING DOCUMENT

Accompanying the

**REPORT FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL**

On Progress in Bulgaria under the Co-operation and Verification Mechanism

BULGARIA: Technical Update

{COM(2009) 402 final}

TABLE OF CONTENTS

1. Benchmark 1: Adopt Constitutional amendments removing any ambiguity regarding the independence and accountability of the judicial system 4
 - *The National Assembly to adopt amendments to the Bulgarian Constitution*
 - *The National Assembly to make necessary changes to the Judicial System Act*
 - *The Inspectorate to be set up and functioning, first results to be published and evaluated*
2. Benchmark 2: Ensure a more transparent and efficient judicial process by adopting and implementing a new judicial system act and the new civil procedure code. Report on the impact of these new laws and of the penal and administrative procedure codes, notably on the pre-trial phase 5
 - *Adopt the new Civil Procedure Code*
 - *Adopt the new Judicial System Act reflecting the amendments to the Constitution and the recommendations of the peer review experts*
 - *Establish a monitoring system for all new codes*
 - *Report at regular intervals on the findings of this monitoring process, notably as regards the pre-trial phase, the execution of judgements and sentences*
 - *Amend the relevant codes and legislation if necessary*
3. Benchmark 3: Continue the reform of the judiciary in order to enhance professionalism, accountability and efficiency. Evaluate the impact of this reform and publish the results annually 8
 - *Establish a transparent and fully functioning decision making process on disciplinary investigations by the future Inspectorate with the Supreme Judicial Council (SJC)*
 - *Ensure complete and overarching application of the Code of Ethics for magistrates, especially procedures for review, investigation and dismissal/prosecution for violations*
 - *Monitor the application of the system of competitive examination for recruitment and performance evaluation of magistrates*
 - *Annually publish findings of the evaluation of the reform of the judicial system, in particular on how specific problems related to professionalism; accountability and efficiency have been addressed*
 - *Introduce random case handling software in the Prosecution services*
 - *Enhance the training on the implication of these new laws*
4. Benchmark 4: Conduct and report on professional, non-partisan investigations into allegations of high-level corruption. Report on internal inspections of public institutions and on the publication of assets of high-level officials 10
 - *Associate Member States' experts to provide assistance and guidance as regards improving the quality of investigations and reporting on this*
 - *Streamline and coordinate the institutional set-up of bodies empowered to fight corruption*
 - *Establish administrative arrangements to safeguard whistle-blowers*
 - *Implement fully the legislation on the independence of the inspectorates in the public administration and ensure more pro-activeness in their investigative role*
 - *Report on the implementation of measures taken to prevent and fight influence in the investigation and prosecuting entities, in particular sustain cases of suspension/dismissal/initiation of criminal proceedings against alleged corrupt law enforcement bodies*
 - *Ensure the establishment of a credible checking mechanism for asset declarations as well as effective sanctions in case of false or inaccurate declarations*
5. Benchmark 5: Take further measures to prevent and fight corruption, in particular at the borders and within local government 12
 - *Implement disciplinary sanctions and a policy of zero-tolerance, particularly in the Veterinary Service, customs, the Road Executive Agency and other relevant services*
 - *Establish electronic payment systems and a system of shifts at random for officers employed at the borders*

- *Conduct at regular intervals audits and checks, publish the findings and ensure their follow-up*
 - *Report on investigations into inexplicable wealth*
6. Benchmark 6: Implement a strategy to fight organised crime, focussing on serious crime, money laundering as well as on the systematic confiscation of assets of criminals. Report on new and ongoing investigations, indictments and convictions in these areas 13
- *Associate Member States' experts to provide guidance and assistance as regards improving the quality of investigations and reporting on this*
 - *Hand over an action plan to implement the strategy to fight organised crime and implement it with reports at regular intervals*
 - *Fully implement relevant legislation on confiscation of assets of criminals*
 - *Report regularly and audit internally the new and on-going investigations, indictments and convictions*
 - *Implement the new legislation to combat money laundering*

Note:

Under each of the six benchmarks, several issues of particular concern were mutually agreed when the Cooperation and Verification Mechanism was created in December 2006. These issues are listed above under each benchmark and have been addressed as far as progress has been reported. You may consult previous reports at: http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm

1. BENCHMARK 1: ADOPT CONSTITUTIONAL AMENDMENTS REMOVING ANY AMBIGUITY REGARDING THE INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIAL SYSTEM

In 2007, Bulgaria has created the basis for an independent and accountable judicial system with amendments to the Constitution and with the adoption of a new Judicial Systems Act.¹ As a result, a reformed Supreme Judicial Council was constituted and an independent Judicial Inspectorate was created. In the last 12 months, the Inspectorate to the Supreme Judicial Council has become fully operational and has achieved an encouraging track record in the investigation of individual disciplinary violations and of systematic weaknesses of judicial practice. Some of its findings have led to improved judicial practice or have provoked interpretative decisions by the Supreme Court of Cassation. The institutional position of the inspectorate was strengthened by amendments to the Judicial Systems Act at the end of April which recognised a right of appeal for the inspectorate to disciplinary decisions of the Supreme Judicial Council.

Since becoming fully operational at the end of May 2008, the inspectorate has continued to fulfil its plan of *scheduled inspections* with the judicial district of Veliko Turnovo and the judicial district of Varna. Together with the first scheduled inspection of the Bourgas district, the inspectorate has now inspected 3 out of 5 judicial districts in Bulgaria. The scheduled inspections have resulted in the opening of several individual disciplinary cases since June 2008 and in a large number of specific and general recommendations in order to improve judicial practice. At the same time, the inspectorate suggested the initiation of interpretative judgements by the Supreme Court of Cassation in two cases and by the Supreme Administrative Court in two cases, as a reaction to contradictory jurisprudence by courts.

Between August 2008 and May 2009, the inspectorate performed 126 *inspections on the basis of individual signals*² and 9 *ex-officio* inspections following media publications. On the basis of initial findings, the inspectorate has in several cases decided to extend the initial scope of inspections to cover additional aspects.

The inspectorate also continued to perform *thematic inspections*, e.g. into the reasons for the delays of high-level cases that generate particular public interest. As a follow-up to the first thematic inspection into the reasons for the frequent restitutions of cases by courts to the prosecution in the first half of 2008, the Supreme Cassation Court organised several regional conferences to discuss the findings and recommendations of the inspectorate. Comparative data of 2007 and 2008 suggest a decline in the number of restitutions.

The Supreme Judicial Council acts as the sanctioning body for *disciplinary violations*. Cases of such violations are submitted to the Council by the inspectorate and by the administrative heads of courts. In both cases, an analysis of the facts is accompanied by a proposal for a sanction. If cases are submitted by administrative heads of courts, additional checks are performed. An analysis of the disciplinary case law of the Supreme Judicial Council shows that sanctions proposed by the inspectorate are mostly confirmed by the SJC. In the majority of cases, the Inspectorate to the SJC initiates the proceedings. In some cases, disagreements

¹ Bulgaria passed the necessary amendments to the Constitution on 2 February 2007. The new Judicial System Act was adopted by the National Assembly on 24 July 2007 and entered into force on 10 August 2007.

² A total of 1642 signals were addressed to the inspectorate during the same period of time.

between the two bodies have emerged; in other cases inconsistencies of disciplinary case law between different disciplinary panels of the SJC have been identified.³

As a result of the inspections since July 2008, 44 disciplinary proceedings were launched including 4 requests for dismissal.⁴ By mid-June, the Supreme Judicial Council had taken a decision on 19 cases. In 10 cases, the proposal of the inspectorate was followed, in three cases, lower sanctions were imposed and 6 cases were dismissed by the Council. Overall, the Supreme Judicial Council should assure the systematic follow-up to the general and thematic inspections of the inspectorate and of weaknesses in the equal application of the law.

2. BENCHMARK 2: ENSURE A MORE TRANSPARENT AND EFFICIENT JUDICIAL PROCESS BY ADOPTING AND IMPLEMENTING A NEW JUDICIAL SYSTEM ACT AND THE NEW CIVIL PROCEDURE CODE. REPORT ON THE IMPACT OF THESE NEW LAWS AND OF THE PENAL AND ADMINISTRATIVE PROCEDURE CODES, NOTABLY ON THE PRE- TRIAL PHASE

Criminal justice continues to suffer from an outdated Penal Code and from an over-formalistic Penal Procedure Code. Whereas Bulgaria has reacted to the shortcomings of the Penal Code with a strategy for a new penal policy, recent amendments to the Penal Procedure Code do not address systematic procedural weaknesses such as excessive formalisation. The Penal Procedure Code has been subject to some technical amendments in December 2008. These amendments i.e. require first instance courts to apply a shortened trial phase in the case of an admission of the defendant of facts stated in the factual part of the indictment in order to reduce the important time delays in serious criminal cases (for more detail on these procedures see under benchmark 6). However, these amendments do not address the systematic flaws of the Bulgarian criminal procedures which have led to excessive delays and inconclusive trials, in particular in serious cases. The introduction of plea-bargaining and the possibility for a shortened trial in case of confession ("expedited procedure") cannot replace a thorough revision of penal procedures. Bulgaria's criminal procedures suffer from excessive formalism, do not encourage the taking of responsibility by judges and lead to an extremely restrictive administration of evidence during the pre-trial and trial phase.⁵ Since mid 2008, members of the prosecution have made detailed suggestions for a reform of the Penal Procedure Code to the government. However, these were not taken up by the legislator. Bulgaria should develop and implement a convincing monitoring system to assess the impact of the Penal Procedure Code on judicial efficiency.

The Ministry of Justice continued the development of a *strategy paper for a new penal policy and a new Penal Code*. A first draft of the strategy has been circulated within the administration and will have to be considered by the incoming government. External experts assisted in evaluating the strategy and provided recommendations for a new Penal Code. In parallel with the elaboration of a new penal policy strategy, only relatively minor amendments have been made to the Penal Code in the last 12 months: the criminal liability of *legal* persons

³ An important part of violations concern the delays in the hearing of cases in court. The Council tends to consider workload by magistrates as a reason for the exemption from disciplinary liability whereas the inspectorate, supported by case-law of the ECHR, considers this only a mitigating factor in the qualification of the disciplinary violation.

⁴ 29 cases concern judges, 3 cases concern prosecutors, 3 cases concern investigating magistrates and 9 cases concern administrative court heads.

⁵ Convictions in serious criminal cases appear to be achieved mostly on the basis of confessions together with *in flagranti* evidence (e.g. records of phone tapping, video surveillance).

in fraud-cases has been introduced; the penalty for fraud with EU funds has been increased. As reported by the Commission earlier, the efficiency of the judicial system is still constrained by a structurally outdated Penal Code which suffers from an inadequate level of differentiation between various crime-levels which require the same legal and administrative procedures.

With a *Law on Amnesty* entering into force on 22 April 2009, Bulgaria intends to reduce the workload of the justice system by terminating pending cases and releasing convicts for a large variety of offences for which the maximum sentence is up to 5 years of imprisonment and which were committed by act of negligence before 1 July 2008. Although a trail of concrete cases which would have been terminated in application of the amnesty law is not yet available for evaluation, abuse of public office, if committed by negligence, is not excluded from amnesty. At a time where systematic fraud with EU funds is under investigation, an amnesty act that may exempt public officials with financial control functions from criminal liability sends contradictory political messages.

Although the competences in the *pre-trial phase* between the different law enforcement authorities, in particular police and the State Agency for National Security (SANS) have been legally clarified, overlaps of competences continue *de facto*. Although SANS has no investigative role, evidence collected by SANS can formally be used in court if collected upon the request of a prosecutor and confirmed by a judge. In legal practice, courts however often do not recognize such evidence. In addition, any information collected before the opening of an official investigation cannot be used in court, even if it is compelling. Parliamentary control over SANS has not yet been effectively established. Recent legislative amendments restricting the access to telephone connection data has been reported as serious set-back to the efficiency of criminal investigations. The creation of joint teams under the guidance of the prosecution has seen first successes, in particular concerning the legal persecution of EU fraud (see benchmarks 4 and 6). Police reform, launched in the first part of 2008, continues. The merger of different police forces into a unified criminal police force, the recruitment of staff with diverse professional backgrounds, such as IT or finance and the reform of the investigative police is as such a positive development; substantial efficiency gains for the pre-trial process are however not yet visible. Staff numbers, training and equipment are not yet at optimal level. Lower salaries in police as compared to SANS have resulted in a move of qualified staff. The integration of the staff of the National Investigation Office into the prosecution services can be considered a step to improve the efficiency in the deployment of resources in the pre-trial phase. It has been confirmed by the Constitutional Court.⁶

There is still a considerable divergence in the application of the law between courts although progress has been made on *legal unification* with nine interpretative decisions by the Supreme Cassation Court (SCC), some of them on the initiative of the inspectorate of the Supreme Judicial Council. The number of interpretative decisions by the SCC has increased substantially compared to previous years. In addition to interpretative decisions by the SCC, the equal application of the law should be further promoted through a systematic follow-up of inconsistencies in the application of the law by the Supreme Judicial Council and the Supreme Cassation Court in the way of e.g. joint meetings with judges on district level.⁷

⁶ Ruling no. 5 of 9 July 2009.

⁷ Joint meetings on district level were organised by the Supreme Cassation Court as a reaction to the thematic investigation of the inspectorate into referrals of cases from court to prosecution on formal grounds. A substantial decrease of referrals is reported as a result.

Despite a legal requirement, judgements are still not generally published on the websites of courts.⁸ The lack of enforcement of this requirement impedes transparency and contradicts efforts for legal unification. The Supreme Judicial Council should issue guidelines to courts, provide technical assistance (e.g. standard software) and monitor the publication of judgements.

Bulgaria provides detailed and analytical data on the monitoring of the *Administrative Procedure Code (APC)*. Between August 2008 and May 2009, three monitoring exercises were carried out covering in each case the jurisprudence of several months of a number of administrative courts.⁹ Some monitoring was targeted according to risk criteria or past performance. Overall, the implementation of the law by courts is considered relatively satisfactory. Several delayed proceedings due to incomplete case files have also been detected. As a corrective measure, additional training needs have been identified. Overall, the monitoring system set up by Bulgaria in March 2007 for the implementation of the Administrative Procedure Code can be considered mature. The frequency of inspections has increased in the last 12 months compared to the previous period. As a result of the monitoring exercise during 2008 and following consultation of courts, legislative changes to the APC and secondary legislation on court fees are being prepared.

Monitoring of the new *Civil Procedure Code (CPC)* is carried out on the basis of new criteria since August 2008.¹⁰ Since then, the Inspectorate to the Minister of Justice has carried out 19 inspections; its main findings included incoherence in procedural standards. Bulgaria reports that corrective action has been applied at the level of courts. Two interpretative decisions by the Supreme Court of Cassation in the area of Civil Law have been requested. For the time being, the new CPC has not yet achieved the expected substantial gains in efficiency and speed of court procedures. The slow and ineffective enforcement of court orders, in particular payment orders, appears as a main weakness. A law to amend the Civil Procedure Code has been adopted in May 2009. The amendments intend to improve the enforcement of court decisions and will also allow the re-opening of civil cases following decisions of the European Court for Human Rights. Close monitoring of the impact of these amendments on transparency, speed and efficiency of court procedures are necessary. In addition, Bulgaria should urgently assure the electronic publication of all verdicts with due respect to data protection and privacy rules (see above). As the publication of verdicts by courts remains patchy and incoherent, it is still difficult to identify inconsistent jurisprudence with a view to lodge a cassation appeal in civil law. The value of cassation as a means of stimulating coherent jurisprudence in case of conflicting case law remains therefore limited.

The new draft *Statutory Instruments Act*, once adopted, should improve the general quality of lawmaking through a single codification of the different stages of the legislative process and through clear rules for transparency and public debate. The introduction of an ex-ante and ex-post impact assessment of legislation can be considered a positive step for the predictability of

⁸ A random check of the websites of several courts on 24 June 2009 showed inconsistency in the application of the requirement to publish verdicts. Information on sites varies and is not easily accessible. In most cases, only a single case record can be displayed at a time upon the introduction of the full name together with the case number. Out of five court websites, one court did not publish any cases, one court published short summaries without motivations, the remaining three courts published a selection of cases whereas the criteria for selection were inconsistent.

⁹ A first off-site monitoring covered jurisprudence of the first half of 2008 of 25 courts, a second exercise covered jurisprudence of the whole of 2008 of another 27 courts, other monitoring exercises targeted specific districts and courts following risk criteria.

¹⁰ The new Civil Procedure Code entered into force in March 2008.

laws and the quality of public debate. The impact of this law must be assessed upon its implementation.

3. BENCHMARK 3: CONTINUE THE REFORM OF THE JUDICIARY IN ORDER TO ENHANCE PROFESSIONALISM, ACCOUNTABILITY AND EFFICIENCY. EVALUATE THE IMPACT OF THIS REFORM AND PUBLISH THE RESULTS ANNUALLY

Over the last 12 months, the Supreme Judicial Council (SJC) has adopted an increasingly constructive role in accepting the Commission's analysis of the main weaknesses of the Bulgarian judicial process and demonstrated a pro-active and constructive attitude in following up to delays in high-profile cases. The SJC has established a list of recommendations to improve the celerity of *cases of high public interest*. These recommendations are based on an analysis of about 50 high-level cases which have been delayed to achieve prescription and avoid judgement. The analysis of the council identified considerable procedural delays and suggests extensive legal amendments (e.g. the introduction of residence registration) as well as substantial organisational and administrative changes. Recommendations of the SJC on specific cases are reported to have already resulted in the completion of 7 cases. The SJC has set-up a reporting mechanism with the administrative heads of court in respect of the particular cases under review. The legislator should follow-up quickly on the legal recommendations of the SJC and evaluate the general impact of its organisational and administrative recommendations on the celerity of the judicial treatment of cases.

At the same time, the Council has not yet adopted an unequivocal pro-reform agenda; it should use its powers more pro-actively in all areas where urgent action is needed. This concerns in particular the appointment of senior magistrates and the review of the appraisal system for magistrates which both still show weaknesses. Until the middle of June, the Supreme Judicial Council had carried out 48 selection procedures for *senior appointments* among the Bulgarian magistracy out of a total number of 150 vacancies for senior positions available this year. Four appointment decisions have provoked public criticism. In all four cases press and civil society suggested that the professional track record of the successful candidates was characterised by partisan decisions and influence and that the Supreme Judicial Council had not sufficiently taken these elements into account and had not sufficiently justified its appointment decision. Partisanship and a lack of objectivity and transparency were reported in these cases. For the progress of judicial reform in Bulgaria as for the establishment of public trust into the judiciary, the appointment of highly qualified court heads with an undisputed reputation in a non-partisan and objective manner is important. The standards of transparency and professionalism applied by the Supreme Judicial Council should be reviewed. In particular the opinion of the inspectorate to the SJC and the result of its inspections should be taken into consideration and the personal file of the candidates should be available for consultation to the SJC in preparation and at the day of the appointment decision.¹¹ In addition, the appointment decisions should in all cases be

¹¹ Currently, the reports of the inspectorate are not systematically - positively or negatively - considered in appointment decisions by the SJC. This is justified by equal treatment as not all Bulgarian courts have been inspected (3 out of Bulgaria's 5 appellate regions). The personal file of the applicant is not physically available to the JSC when an appointment decision is taken. This decision is mainly taken on the basis of the performance assessment drafted by a local appraisal commission.

objectively motivated according to the methodology set out¹² and the Council should adhere to its high standards of transparency and public information.¹³

The system of *annual appraisal of magistrates* is currently under revision. For this purpose, a working group to amend the respective implementing legislation has been established. The impending revision of appraisal procedures should ensure a more objective and fair evaluation of magistrates on the basis of actual performance than previously.¹⁴ The findings of inspections carried out by the inspectorate to the SJC should be properly taken into consideration in the revision of the appraisal procedures.¹⁵

A unified *code of ethics* for all magistrates was adopted on 20 May. The code was adopted on the basis of a proposal presented by a working group that included representatives of professional associations. The code of ethics covers the discharge of professional duties and the behaviour in private life; it will be used as a basis for disciplinary investigations and sanctions.

Bulgaria has not yet presented an *impact analysis of judicial reform*. The measures taken so far to reform the judiciary have not yet changed the critical perception of the judiciary among citizens, as reported by a recent study by civil society.¹⁶

With amendments to the Judicial Systems Act, Bulgaria reports the adoption of different conceptual approach with respect to setting up a *unified IT System for combating crime*. The SJC has been assigned with the overall coordination of this system within the judiciary and with the integration of the databases hosted by the different institutions which are to be interconnected. The Supreme Judicial Council should assure the respect of the legal requirement to publish all judgements of courts in a user-friendly manner and establish an implementation plan with precise benchmarks and deadlines for the IT development of the judiciary, in particular for the setting-up of a unified system for combating crime which the SJC coordinates.

¹² The methodology approved by the SJC sets out 10 selection criteria for candidates in three main areas of qualification: professional, business and moral.

¹³ The SJC has established high standards of transparency for this appointment process: all meetings can be observed in full via video in a separate room and the candidate's files should be publicly accessible on the web-site of the SJC. However, at an on-the-spot check, no information on the selection procedures could be found published as indicated on the council's web-site.

¹⁴ Two specific cases have been reported to the Commission as examples of considerable discrepancies between the annual appraisal reports and the professional track record of magistrates. In one case evidence of serious mismanagement was not taken into account for an annual appraisal (acquittal due to loss of material evidence and of case file in a homicide case), in a second case, serious miscarriage of justice did not influence the annual appraisal report.

¹⁵ The findings of the inspectorate are currently entered to only 5% into the annual performance evaluation of magistrates. The findings of the inspectorate are not yet generally entered into personal files.

¹⁶ On the request of the ministry of justice, an NGO presented an analysis of the government's programme for the implementation of judiciary reform which will provide input for a new strategy for the judiciary for the period 2009-2013. The analysis concludes that the measures taken so far to reform the judiciary have not yet changed the main shortcomings of the system felt by the citizens, such as difficult access and slow procedures. The analysis also concluded that justice reform and the fight against corruption are closely linked in issues such as judicial efficiency, transparency and control mechanisms: both could only advance together.

4. BENCHMARK 4: CONDUCT AND REPORT ON PROFESSIONAL, NON-PARTISAN INVESTIGATIONS INTO ALLEGATIONS OF HIGH-LEVEL CORRUPTION. REPORT ON INTERNAL INSPECTIONS OF PUBLIC INSTITUTIONS AND ON THE PUBLICATION OF ASSETS OF HIGH-LEVEL OFFICIALS

Although the successful reorganisation of the prosecution services for *fraud with EU funds* demonstrates that progress can be made where political will is present, the capacity of law enforcement authorities to deal with *high-level corruption* has not increased on a general scale over the last 12 months. The Penal Code and Penal Procedure Code continue to show serious deficiencies and only few court cases have demonstrated substantial progress. In August 2008, Bulgaria has reorganised the prosecution of EU fraud cases: Supervised by a central monitoring team at the Supreme Cassation Prosecution Office (SCPO), five joint teams have been created in Sofia and countrywide which each link up to a specially designated prosecutor in each district. The most important team has been created at Sofia city prosecution office. The team in Sofia regroups 6 prosecutors, 10 police investigators and 10 investigating magistrates which share common office space, common filing and a common IT system. Liaison persons have been identified in SANS and the State Fund for Agriculture. In addition there are operative policemen to assist police investigators. At the end of May, 516 case files on fraud with EU funds had been created, 86 pre-investigations (*proverka*) had been launched and 136 pre-trials had been officially initiated. A case may be started at any level by the SCPO or by a local joint team. Local prosecutors report on cases to the SCPO which has monitoring and coordinating functions, whereas local prosecution takes full responsibility for operational decisions. In Sofia, 60 cases are registered and pre-trial investigations have been opened for 30 cases.

Seven pre-trial proceedings were launched by Sofia city prosecution *ex-officio* on the basis of media reports. Most cases had been opened on the basis of information provided by OLAF. The discussion revealed that the prosecution acts mostly reactive and does not e.g. probe the involvement of public officials in fraud schemes, despite clear indications transmitted by OLAF.

According to prosecutors, effective controls at the *administrative level* that could prevent fraud are generally not performed and the quality of signals from the administration is low. The absence of proper administrative control procedures contributes to an overloading of the judiciary system.

Overall, the reorganisation of the prosecution office regarding the prosecution of EU fraud seems to have resulted in an efficient organisation with a central joint team and local teams in each region. The number of investigated cases and of registered indictments has increased considerably since autumn 2008. One *emblematic case* of corruption was decided by court at the end of June. Other important cases continue to suffer from procedural delays and advance only slowly.¹⁷ At the same time, the reorganisation of the prosecution of fraud with EU fund has not been extended to other areas dealing with corruption and fraud. It is not supported by the general reform process of law enforcement in Bulgaria, launched in early 2008 with the

¹⁷ The former director of the Sofia heating utility Toplofikatsiya, Valentin Dimitrov was sentenced in June; the fraud cases against the former head of the State Agriculture Fund Asen Drumev and against the former head of the National Road Authority Veselin Georgiev suffer from various procedural delays and progress only slowly. The SAPARD fraud case against Mario Nikolov was suspended and travel restrictions against all defendants were lifted after the one lawyer registered his candidacy for Parliament.

creation of the State Agency of National Security and with police reform as this reform process is still ongoing and has not yet consolidated.

The specific *legal environment* for the fight against fraud and high-level corruption has improved in the last 12 months. This relates to the prohibition of land swaps, the increase of the penalty for fraud with EU funds, the introduction of a criminal liability for legal persons in fraud cases¹⁸, the new regulation of political party financing¹⁹ and in particular to the adoption of the new law on the prevention and detection of conflicts of interest. It is however too early to assess the impact of the newly adopted legislation.

The Commission considers the prevention of conflicts of interest a key requirement for the protection of the financial interests of the EU and an important preventive element against fraud and corruption. The Bulgarian government has approached the Commission for advice on the *conflict of interest law* at the end of March. In this context the Commission considered that the definition of conflict of interest in the law required broadening to cover political, economic or any other shared interest²⁰. In addition, the Commission raised concerns as to the effective implementation of the law which required an appropriate standardised methodology for the risk assessment and control of the conflict of interest statements that are to be submitted under the law. Some of the points raised by the Commission were taken into consideration in the revision of the law; however provisions to assure an effective an equal application of the law are missing. The decentralised implementation of the law requires sufficient capacity and functional independence on the side of the control bodies. To assure the effective implementation of the conflict of interest law and to evaluate its impact, Bulgaria should develop implementation guidelines and design an appropriate central reporting system.

An effective protection against fraud and corruption requires a *horizontal screening of legislation* with a view to improve the enforcement capacity of the authorities, but also in order to reduce opportunities for fraud and corruption. A first series of useful legal amendments have been discussed in a public meeting in the beginning of February. Bulgaria should provide follow-up to these suggestions and continue involving public authorities and civil society in a public advisory process to improve prevention of corruption and law enforcement.²¹ In particular a prohibition of cash payments in some areas such as real estate and the introduction of loan contracts in tax declarations should be considered. As reported earlier, legislative changes have effectively reduced transparency regarding the ownership of company assets as the Commercial Registry Code no longer requires the registration of subsequent changes in the acquisition and transfer of shares after a first registration. This decrease in transparency has a negative effect on financial investigations. The recent adoption

¹⁸ With the introduction of a criminal liability for legal persons in fraud cases, Bulgaria complies with the European convention of the protection of EU's financial interests.

¹⁹ The revision of the Political Parties' Act on 13 January 2009 doubled the state subsidy for political parties; they can no longer accept anonymous donations. Donations from legal entities and natural persons are limited to 10.000 BGN/year.

²⁰ This definition of conflict of interest is based on article 52/2 of the Financial Regulation of the EC.

²¹ Changes in 13 legal acts were proposed for discussion during the meeting of the Public Advisory Council to deputy PM Plugchieva in the beginning of February. The changes aim to improve the measure for curbing and fighting corruption and organised crime. Part of them were prepared by representatives of executive, legislative and judicial branches. The changes concern namely: Penal Procedure Code, Penal Code, Trade Act, Law on Public Procurement, Tax and Insurance Procedure Code, Law on Obligations and Contracts, Private Person Income Tax Law, Labour Code, Law on Fiscal Appliances, VAT Law, Corporate Tax Law, Law on Credit Institutions and the Law on Concessions.

of an Amnesty Act covering i.e. the abuse of public office sends contradictory political signals.

The enforcement of the law cannot be left to the judicial authorities alone. To achieve substantial progress in both law enforcement but also in the prevention of fraud and corruption, it is important for Bulgaria to *improve the capacity of the various administrative control bodies* and to insist that these bodies start acting in a pro-active way. This must be assured for control bodies that manage of EU funds such as the State Fund of Agriculture or the National Road Authority but also for all other public bodies with important control functions such as the National Audit Office, the National Revenue Office or the Customs Board. As reported earlier by the Commission, insufficient capacity at the National Audit Office for instance continues to inhibit effective checks on asset declarations and an effective control of political party finances.²² The National Revenue Agency is not prepared to evaluate the market value of real-estate as part of an investigation into money laundering through real-estate transfers with inflated prices; as a matter of fact such checks are not systematically performed following an analysis of risks. Strengthening of the law, a pro-active mandate and sufficient resources for key administrative authorities such as the National Audit Office and the National Revenue Agency together with rigorous follow-up by the political level are necessary to achieve sustainable progress in the prevention of corruption.

5. BENCHMARK 5: TAKE FURTHER MEASURES TO PREVENT AND FIGHT CORRUPTION, IN PARTICULAR AT THE BORDERS AND WITHIN LOCAL GOVERNMENT

During the last 12 months, Bulgaria has implemented a number of *preventive measures*. These include an upgrade of the IT equipment by the National Revenue Agency at its 28 regional offices to allow more complex and efficient checks, a revision of the education act reducing corruption opportunities at schools and universities, the creation of a medical inspectorate under the ministry of health and the introduction of a "single fiche" system at 10 out of 11 land border points leading to a substantial increase in the report of collected fees.²³ The results of these measures must be evaluated in future.

At the same time, Bulgaria has taken steps to strengthen the *anti-corruption committee at the Council of Ministers*. The deputy Prime Minister now chairs the committee which coordinates anti-corruption efforts on a central level. The committee has also been engaged in preparatory work for a new anti-corruption strategy based on analysis of a review of the existing strategy and a consultation of stakeholders, including NGOs. The general inspectorate attached to the anti-corruption committee at the Council of Ministers coordinates, provides technical support and supervises the work of the inspectorates at line ministries. In addition, a central website to signal corruption offences has been set up with EU assistance. This site allows to lodge complaints against all public institutions and to later verify the status of the complaint. Qualitative data to evaluate the follow-up to signals received was not available. It should be noted that anonymous signals are not given follow-up.

²² In addition, the rules governing asset declarations show several deficiencies, e.g. artwork or jewellery does not need to be declared; only total amounts of bank assets must be provided, details on the amounts and accounts are not required. At the same time, fines for the failure to comply with the obligation to submit asset declarations are not sufficiently deterrent.

²³ The Bulgarian authorities announced in July that the use of the single fiche system would be discontinued for EU registered cars as of 1 July at Kalotina border crossing and as of 15 July at Kapitan Andreevo border crossing in order to reduce delays at the border.

However, effective prevention activities in vulnerable sectors such as the health and education sector and on local level have not yet been launched. In order to achieve systematic progress in curbing corruption opportunities in vulnerable sectors such as health and education and on the level of local government, an increase in staff of the general inspectorate and of the various inspectorates at ministries and agencies and a more pro-active approach is necessary.²⁴ Consequently, the political level should consider strengthening the capacity of inspectorates and mandate them legally and politically to take a more pro-active position towards the identification and mitigation of risk areas. Following-up to the recommendations of October 2008 of an EU-funded anti-corruption project, the general inspectorate should systematically advise the inspectorates of different government departments and the 28 local offices of the central inspectorate on the basis of risk assessments on the identification of vulnerable spots and in the design of remedial measures and control their implementation. The 28 regional anti-corruption public councils formed on a local level should be strengthened in cooperation with civil society. A strengthening of the legal mandate and of the administrative capacity of the General Inspectorate should be considered and accompanied by rigorous monitoring and, in cooperation with civil society, an evaluation of the impact of the measures taken by the Council of Ministers.

International evaluations by the World Bank and Transparency International show little progress with the perception of corruption in Bulgaria.²⁵ Several reports on vote buying have been recorded at the occasion of the European elections and the national elections in July, however, civil society engaged in a prevention campaign; the prosecution launched a number of ex-officio investigations.²⁶

The Bulgarian Parliament passed a law in January 2009 prohibiting land swaps. However, land swaps continued and even accelerated until the day of the entry into force of the law.

6. BENCHMARK 6: IMPLEMENT A STRATEGY TO FIGHT ORGANISED CRIME, FOCUSING ON SERIOUS CRIME, MONEY LAUNDERING AS WELL AS ON THE SYSTEMATIC CONFISCATION OF ASSETS OF CRIMINALS. REPORT ON NEW AND ONGOING INVESTIGATIONS, INDICTMENTS AND CONVICTIONS IN THESE AREAS

Following to the Commission's report of July 2008, Bulgaria reorganised the prosecution of organised crime and changed its methodological approach in targeting organised crime. In contrast to the re-organisation for the prosecution of fraud with EU funds, no *permanent joint teams* have been created on organised crime. Next to a standing team which is used for coordination purposes between the different authorities involved, individual cases are still prosecuted by teams assembled on an ad-hoc basis. The non-permanent character of the joint teams on organised crime is explained by Bulgaria by the complex and changing requirements of the investigations, the need to test the trustworthiness of staff and possible security concerns for staff. Operational information is shared at a central, not at a local level to respect confidentiality. However, it was also indicated that this set-up would have to be replaced by a

²⁴ The General Inspectorate at the Council of Ministers has a total staff of 5, the inspectorates of line ministries typically count a staff of 1 or 2 persons.

²⁵ TI reports that 76% of the Bulgarians questioned consider the measures taken by government as ineffective.

²⁶ A coalition between several NGOs was formed; the employers' association offered a reward for the detection of vote-buying.

permanent structure in the coming months to keep the current operational momentum. In future, proper security and protection for staff would also have to be introduced.

The *structural re-organisation* is coupled with an *adaptation of the methodology* by the prosecution in targeting organised crime. In a change to previous practice, the prosecution targets pro-actively since September 2008 a limited number of high-profile cases which are already known to law enforcement. Members of these groups are investigated for recent offences for which unspoiled evidence is available. This procedure promises achieving effective convictions by plea-bargaining and by applying the expedited procedure after confession by the defendant, thus avoiding a long and possibly inconclusive trial.²⁷ Once a first sentence is enforced, the prosecution of other offences such as money laundering and second convictions would be facilitated. Bulgaria reports that the structural and methodological changes at the prosecution had increased the dynamics of investigations, created mutual trust between institutions and achieved first results. As a result of the application of the expedited procedure and of plea-bargaining, Bulgaria reports that until now, 36 members of organised crime groups had been convicted in connection with the cases against Veselin and Hristo Danov and against Dimitar Zhelazhkov ("Mityo Ochite").²⁸ The first results of this pragmatic strategy are encouraging. However, its success will depend on whether first convictions on relatively minor offences can be followed up with convictions on more serious offences where plea bargaining would be excluded by law (as in the case of murder) or more difficult to accept for the public. In addition, this methodology is currently only applied to a small number of cases. Moreover, the prosecutor's decision to use plea-bargaining should be based on an in-depth analysis of cases and not be prompted by the state of the legal system. Eventually, the judicial authorities must address all cases of organised crime in Bulgaria in an efficient manner, including older and pending cases.

Judicial practice in organised crime cases needs to be strengthened. An important element in the judicial follow-up to organised crime is the systematic prosecution of money laundering. Bulgaria does not yet generally prosecute money laundering independently of the main (or predicate) offence despite a decision by the Supreme Court of Cassation²⁹ which is favourable to this practice. It was reported that courts generally require both evidence on money laundering and on a predicate crime as well as a proof of a direct link which is difficult to demonstrate in practice. For this reason, the prosecution often decides to prosecute for tax-

²⁷ The expedited procedure requires a sentence below the minimum fixed by law for the offence in question. It can be applied if all defendants in a case confess and agree to renounce certain rights, e.g. for a hearing of witnesses. The application of the expedited procedure allows reducing the trial period to a minimum against a negotiated and therefore relatively low sentence.

²⁸ The following convictions are reported by Bulgaria: In the case against Veselin and Hristo Danov 19 convictions had been obtained. Veselin Danov had been convicted to 3 years in prison, Hristo Danov had been convicted to 1 year in prison, both following plea-bargaining with the Prosecution, 13 members of this criminal group had been convicted to sentences between 1 and 3 years. In addition, the leader of the group, Ivan Slavkov and 4 other members were indicted. Altogether, 12 sentences were below the legal minimum (expedited procedure) and 7 above the legal minimum. In the case against Dimitar Jhelyazkov ("Mityo Ochite") convictions had been achieved against 17 persons, whereas Dimitar Jhelyazkov had been sentenced to 4 years and 6 months, 16 other group members to sentences between 1 and 5 years. In this case, altogether 12 sentences were below the legal minimum (expedited procedure) and 5 above the legal minimum. General data provided for the whole of Bulgaria suggests an overall three-fold increase in convictions since 2006. In 2008, 183 convictions for membership in an organised crime group and 345 indictments had been registered. Up to 2006 there were no convictions, in 2006, there were 28 convictions, in 2007 52 prison sentences and 11 acquittals. A qualitative analysis of the general data provided was not possible.

²⁹ Decision 34 of 10 March 2009.

evasion or other crimes which are easier to prove than money laundering. The systematic prosecution of money laundering, independent of the predicate crime should be promoted as best practice in Bulgaria as it is supported by jurisprudence of the Supreme Court.

Progress achieved by the *Commission for the forfeiture of criminal assets (CEPACA)* improved significantly since mid 2008. Over 130 requests of CEPACA for freezing assets have been followed by courts and 75 motivated proposals of CEPACA for seizing assets were sent to courts between 1 April 2008 and 7 May 2009. However, only three cases of forfeiture have been decided by courts in last instance.³⁰ At the same time, the legal framework for asset forfeiture and for financial investigation remains inadequate: a timely freezing of assets in organised crime cases has an important deterrent effect. To achieve this effect, the freezing of assets must be practiced as early as possible and as complete as possible. The current legal framework and judicial practice in Bulgaria satisfies neither: too few assets are frozen and too late. Although, the applicable legal framework seems to allow the freezing of assets at the time when an official investigation e.g. into money laundering is opened, freezing seems to be practiced only several months into the pre-trial phase or at the time of indictment. As a result, it loses most of its operational effect. In addition, legal restrictions do not allow the freezing of assets of legally not related persons (e.g. employees, friends, business partners) and of family members if the latter can prove that they have purchased the assets. At the same time, criminals channel funds preferably through such channels. Legal amendments to improve the efficiency of freezing and confiscation of assets, tabled in November 2008, were rejected by a wide majority across all parties.³¹

Well targeted ex-officio investigations into *unexplained wealth* can be a starting point for tax-fraud, money laundering and other offences that are connected to organised crime. However, too few such investigations are carried out in Bulgaria. Generally, the prosecution only acts upon specific signals from administrative control authorities. However, few such signals are received as the administrative control authorities are not sufficiently pro-active or do not have enough capacity such as the National Audit Office.³² Bulgaria should facilitate investigations

³⁰ Between 1 April 2008 and 7 May 2009, CEPACA opened 178 proceedings for identifying property acquired by criminal activity, which is a net increase of 83% compared to 97 cases opened between May 2007 and May 2008. During the same period, CEPACA brought 130 reasoned opinions to the court for freezing of assets of a total value of BGN 97.9 million, this represented an increase of 53% in value and 47% in numbers of cases. Concerning the confiscation of assets, 75 cases for BGN 62 million were opened since 1 April 2008 until 7 May 2009, which represented a 102% increase in numbers of cases and a 419% increase in value compared to the previous 12 months. Courts had decided in first instance two confiscation cases in June 2008, in May 2009, 18 such cases had been decided, to date 3 cases had become effective and assets of BGN 700.000 had been confiscated. In the two latest cases, a last instance court decision had established that confiscation could be carried out independently of the predicate offence.

³¹ The main concerns of the Commission include the lack of own investigative powers and therefore the impossibility to open a case *ex-officio*, the restrictive definition of art. 4 ("related persons") where only assets transferred to spouses, relatives in ascending line and underage children can be seized, not those purchased by them (often with the money of the person under review). The Commission cannot freeze in case assets have been transferred to not legally related or dependent persons (e.g. friends, employees). Such restrictive regulation seriously undermines the efficiency of CEPACA and allows a person under review to relatively easily avoid forfeiture of assets. The minimum value of the property to open a case by CEPACA (around EUR 30 000) is very high for Bulgarian circumstances and does not correspond to the economic reality. The threshold should be lowered. In addition there are no clear legal guidelines as to the method which should be used to value the assets. Therefore, the defendants often challenge the value of assets, forcing CEPACA to request for costly external expertise.

³² In one particular case ("Tycoon"), the prosecution had however launched investigations into unexplained wealth on the basis of a newspaper report of 110 Bentley cars registered in BG. On the

into unexplained wealth by a legal requirement to register active or passive loans in the tax declaration.

The *reporting of suspicious financial transactions* by the Financial Intelligence Department (FID) of SANS, the former independent Financial Intelligence Unit under the Ministry of Finance, has established a satisfactory track record. Most banks and non-banking institutions comply with the reporting requirement. Cash transactions are still considered as carrying the highest risk of money laundering and organised crime, in particular in real-estate transfers. With the merger into SANS, the FID has lost its capacity for on the spot checks. This important legal loophole should be closed urgently.

On a general level, the *weaknesses in judicial practice* both on pre-trial and on trial stage continue and important cases remain delayed or are suspended. Weaknesses with particular relevance for the prosecution of organised crime cases at pre-trial stage relate to the admissibility of evidence, the effective protection of witnesses and the need for more specialised equipment and skills. On trial stage, the weaknesses of judicial practice relate to long delays of cases on formal grounds, the reasons invoked by defendants are clearly abusive but still justifiable within the Penal Procedure Code.³³

The *reform of law enforcement authorities* for serious crime has not yet been consolidated. As discussed under benchmark 4, the full capacity of the newly formed criminal police and of the new police investigation service has not yet been reached. Legal contradictions in the mandate of SANS persist and overlaps in the division of competence between SANS and police remain. Member States report continuous weaknesses in the cooperation with Bulgarian law enforcement authorities such as e.g. on confidentiality of investigations and on assistance in cases involving influential persons. To date, the reform of law enforcement is ongoing and has not yet lead to higher efficiency of the investigative and pre-trial phase.

³³

basis of registration data provided by the road authority, raids had been carried out in a suburb of Sofia and as a result 10 cases on money laundering had been started.

Several important cases were suspended and defendants were released as they signed up as candidates for the parliamentary elections of 5 July and remained in freedom also after they had been unsuccessful in the elections.