Report from the Commission on progress in Bulgaria under the Co-operation and Verification Mechanism

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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL
On
Progress in Bulgaria under the Co-operation and Verification Mechanism
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1. INTRODUCTION - CONTEXT AND METHODOLOGY

1.1. Objective:

When Bulgaria joined the European Union in January 2007, a Co-operation and Verification Mechanism (CVM)(1) was set up to help the new Member State tackle the recognised need for far reaching judicial reform and the fight against corruption and organised crime. The CVM is an autonomous Commission decision based on the Accession Treaty. It enables the Commission to work closely at political and technical level with the Bulgarian authorities to monitor and evaluate progress, to provide technical advice, and financial support. The CVM enables all other Member States to follow and support developments in these areas in Bulgaria and to provide both expertise and financial support. The interim and annual reports prepared by the Commission under the CVM assess progress and identify remaining shortcomings to help Bulgaria set priorities for actions to be undertaken to fully meet the benchmarks set out at the time of accession.

This report sets out the Commission's assessment of progress in meeting the benchmarks since its last full report (23 July 2008). It also makes recommendations to Bulgaria based on this assessment. The accompanying technical update sets out the Commission's detailed assessment of progress in each of the benchmarks. .The report is based on regular input received from the Bulgarian authorities notably in response to detailed questionnaires from the Commission for each benchmark. The Commission has been assisted in its work by a number of high level experts from the Member States and has also drawn on documentation and input provided by a variety of other sources.

1.2. The benchmark methodology:

The Commission sees all the benchmarks as closely interlinked. In its dialogue with Bulgaria ample evidence has been given that progress under one benchmark contributes to progress under another benchmark. The rationale for the CVM is not to establish a check-list, but to develop an independent, stable judiciary which is able to detect and sanction conflicts of interests, combat corruption at all levels and deal effectively with organised crime. Therefore the Commission does not envisage removing the benchmarks one by one but rather working with Bulgaria to the point where the CVM in its entirety is ended.

2. STATE OF THE REFORM PROCESS IN BULGARIA

Achievements

As in previous years a detailed assessment by the Commission of progress in meeting the benchmarks set out under the CVM can be found in the factual update annexed to this report. The main report summarizes the key findings of the Commission and presents recommendations for action by Bulgaria. The CVM report of July 2008, and the report on the administration of Community funds in Bulgaria resulted in a change in attitude and a more open and frank dialogue at all levels with the Bulgarian authorities. The widespread existence of organized crime and corruption is no longer denied and some efforts are being undertaken by the prosecution and the judiciary to combat these problems. A number of steps were taken to follow up on the recommendations made by the Commission in its last assessment.

Fight against organised crime

Bulgaria has started to restructure its prosecution service in order to increase its efficiency, with particular focus on the prosecution of serious crime cases since September 2008. The setting up of joint teams between the prosecution, police, the National Investigation Service and the State Agency of National Security improved coordination and led to tangible progress regarding investigations in particular into EU fraud demonstrated by the growing number of investigations and indictments.

The establishment of a permanent Joint Team for the Suppression of Offenses against the EU Financial System is an excellent initiative, as it combines several functions, intelligence, specialised knowledge, and investigation concerning a specific type of criminality under one authority. The same efficient organisational set-up has not yet been established for organized crime where joint teams only operate on an ad hoc basis. Nevertheless these ad hoc teams have already shown more pro-active targeting of members of known organised crime groups. First convictions have been achieved through plea-bargaining and a shortened trial procedure ("expedited procedure"). However, this process often leads to sentencing below the legal minimum in cases where the defendant admits the facts. Both procedures are now proactively used against members of organised crime groups in order to counter the general inefficiency of criminal procedures in Bulgaria. For the first time, these procedures have led to the imprisonment of a few members of organised crime groups, which can be seen as an important message to the public that well-known criminals are no longer above the law. These convictions might facilitate asset freezing and investigations for money laundering leading to possible second convictions. Nevertheless, it should be considered whether the use of plea bargaining in cases of organized crime overall ensures sufficient deterrent effect. Moreover, this should not prevent Bulgaria to organize a proper trial system. These first successes have to be judged against the fact that killings linked with organised crime continue and known criminals are not apprehended. There is a need for clear evidence that the authorities and the political class are unequivocally committed to eradicating the root-causes of the problem. This situation causes unease and uncertainty in the administration, the police and the judiciary. They cannot be expected to conduct the fight against organised crime and corruption, when the signals coming from the authorities and the political leadership are not aligned and clear. It should be avoided that their laudable efforts cause exposure to threats and intimidation.

Police reform is continuing, although staff levels, structures and procedures within the newly formed criminal police and the re-organised police investigation service still need to be consolidated. Organisational overlaps continue in the new structure which has not yet led to increased effectiveness in the investigation of serious crime. The track record of the Commission for freezing and confiscation of criminal assets (CEPACA) has improved significantly since mid 2008, with over 130 cases now awaiting

court decisions. 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 and therefore looses most of its operational effect. In addition, the conditions of asset freezing fixed in the law are too restrictive and do not match the reality of crime in Bulgaria. Legal amendments to improve the efficiency of freezing and confiscation of assets, tabled in November 2008, were rejected by a wide cross party majority in Parliament. Faced with these difficulties, CEPACA has also developed a practice of obtaining civil confiscation orders in such cases. But overall, legal loopholes seriously undermine the efficiency of CEPACA's work.

Reform of the Judiciary

Any progress achieved at the prosecution, for example in the fight against EU fraud, will be limited, unless the judiciary is further reformed and shows more commitment to the efficiency of the judicial system. Serious concerns subsist regarding unreasonable delays in judicial proceedings. The delays are largely caused by the extreme formality of the criminal procedure, a certain passivity of the bench and the seemingly limitless possibilities offered by the criminal procedure law to defendants to stall the proceedings. In the absence of appropriate legislative initiatives to remedy this problem, a working group of the Supreme Judicial Council (SJC) has made a detailed inventory and analysis of specific cases. For each individual case, measures were proposed or adopted to try to accelerate proceedings, in the form of recommendations to improve the celerity of "cases of high public interest". These are cases against known emblematic figures which have been subject to multiple delays. The recommendations of the SJC suggest legal amendments (e.g. the introduction of residence registration) as well as substantial changes in the organisation of courts and in legal practice. The initiative of the SJC is commendable; the impact of the recommendations and their follow-up have still to be demonstrated.

The complexity and formality of the criminal procedure is in itself a major cause for the inefficiency of the judicial system. It forces investigation and prosecution to concentrate on simplistic methods to obtain evidence and to avoid complicated investigations. In addition, this formal approach does not even benefit the rights of defendants, because law enforcement authorities constantly use the most invasive investigative techniques because ‘softer’ evidence is not accepted in court.

Since June 2008, the Inspectorate to the Supreme Judicial Council has become fully operational and has achieved an encouraging track record in the investigation of disciplinary violations and of systemic weaknesses of judicial practice. Some of its findings have led to improvements in particular through interpretative decisions by the Supreme Court of Cassation.

Efforts have also been undertaken by the Supreme Court of Cassation to promote uniform jurisprudence through regular joint meetings with regional courts. Even more importantly, the Supreme Court made active use of its legal power to issue a series of interpretative decisions which are mandatory for each court and ensure uniform application of law.

Legislative action shows a mixed and sometimes contradictory approach: legislation was initiated to avoid abuses of defendants' rights (ordinance on sick leave) and to increase the penalties for EU fraud, but at the same time, an Amnesty Act exempted from criminal proceedings, acts of negligence punishable up to 5 years, including those committed in public function prior to July 2008. This sends a message which conflicts with the government's commitment to eradicate corruption at all levels, in particular regarding negligent acts performed in public office.

Likewise, some efforts were undertaken by the Ministry of Justice to draft a new penal policy, but at the same time numerous recommendations to simplify the over formalistic penal procedure adopted in 2006 were not followed up. The Penal Code itself is outdated. The legal system therefore continues to show substantial shortcomings in particular in relation to the basic penal legislation, but also in relation to other important legislation, e.g. on the forfeiture of criminal assets. The lack of initiative from the legislator regarding the basic criminal legislation represents an important shortcoming. Excessive formalism in judicial practice, the weakness and lack of accountability of public administration in general and the lack of initiative in a strictly hierarchical system must be corrected by a modernisation of the legal framework designed to avoid delays in decisions and increase their sense of responsibilities.

Fight against corruption

Steps have been taken since last summer at the level of the Council of Ministers to reinforce inter-ministerial coordination and to engage in preparatory work for a new anti corruption strategy based on an evaluation and a consultation of stakeholders. In addition, a central website to signal corruption offences has been set up (via an EUfunded project) which allows complaints to be lodged centrally against all institutions and to check the status of the complaint. Coordination, supervision, technical support for all regional anti corruption offices and a network of inspectorates at all ministries were provided.

At the same time, there is a need for a more pro-active approach in vulnerable areas and sectors such as health or education, for example through the provision of administrative guidelines on how to mitigate these risks and more rigorous control of compliance.

A general lack of initiative in these vulnerable areas is noticeable. Although indications of fraud and corruption (including collusion with organised crime) are abundant in the public domain, law enforcement agencies seem reluctant to take the initiative and seem to wait until some other administration formally reports irregularities before starting an investigation. There are far too few ‘ex officio’ investigations – meaning investigations started on own initiative and not on the basis of a complaint or administrative notice. This lack of initiative in law enforcement is to a large extent due to a passive attitude and the limited political support for a pro-active approach to tackle fraud and corruption.

This lack of support causes law enforcement personnel to feel insecure about starting an investigation, in case it threatens to expose high level corruption. Against this background, Bulgaria might consider setting up specialised structures for prosecuting and judging high level corruption and organised crime cases. Such structures would need to be functionally and politically independent of government and have a clear mandate for a pro-active agenda.

3. SAFEGUARD CLAUSES

In the light of the above assessment, the question arises whether the safeguard clause should be triggered. In public discussion of the CVM there is often confusion between the likely duration of the Mechanism and the time limited safeguard clauses contained in the Treaty of Accession. There is no automatic link between the CVM and the safeguard clauses enshrined in the accession Treaty for Bulgaria. Safeguard clauses are a standard feature included in accession treaties. The safeguard clauses were introduced to ensure the efficient functioning of the internal market and of the area of freedom security and justice. They can be triggered until the end of 2009 to allow for the temporary suspension of the application of the relevant Community legislation if that is necessary. The Commission is of the

view, based on the above assessment, that the conditions for invoking the safeguard clauses are not fulfilled.
The CVM has now entered its third year. It was not introduced for a fixed period as it should only be removed when all the benchmarks it set have been satisfactorily fulfilled. It is clear that meeting the objectives set in the benchmarks is a long-term task: for instance, tackling the root causes of corruption and eradicating organised crime will take time. The kind of deep seated changes that are needed can only come from within Bulgarian society. The CVM is a support tool in this endeavour; it is not an end in itself nor can it replace commitment that Bulgarian authorities need to make in order to align the judicial system and practice with general EU standards.

4. CONCLUSIONS AND RECOMMENDATIONS

The Commission has seen some new momentum in Bulgaria's efforts to improve the judiciary and combat corruption since its July 2008 report. This can be seen through efforts by individual actors in the prosecution service and the judiciary to tackle structural problems. They deserve support and recognition for their efforts. These pragmatic steps contribute to increased efficiency of the judiciary and a strengthening of the prosecution and, in some cases, have curbed opportunities for corruption.
However, these steps are confined to the technical level and have limited impact. While increased overall awareness and these individual initiatives are to be welcomed, they are not adequately backed up by a broad political consensus or a convincing strategy to make the fight against organised crime and corruption the top priority for Bulgaria. As a result, in the public perception, justice in Bulgaria is slow, sometimes inequitable and in some cases subject to influence and interference. At the same time, the measures taken are seen as piece-meal and as not systematically followed up at all levels. What is still missing is sufficient political commitment for broader initiatives which could form a more decisive, strategic approach.
Despite some encouraging pragmatic steps to render the judiciary more efficient and to address more actively the fight against corruption and organised crime, there are many shortcomings which need to be urgently addressed by the Bulgarian Government.

Based on its most recent assessment the Commission invites Bulgaria to take up action in the following areas:

regarding organised crime and the fight against corruption:

» develop an integrated strategy against organised crime and corruption;

» make the ad hoc structure of joint investigation teams on organised crime permanent ;

» set up specialised structures for prosecuting and judging high level corruption and organised crime cases with appropriate functional and political independence;

» promote proactive ex-officio investigations of corruption by all administrative authorities with control functions;

» ensure effective implementation of the recent conflict of interest law through the development of implementing guidelines and a central reporting system;

» on a horizontal level, monitor the impact of laws for the fight against corruption and organised crime and amend legislation where appropriate;

» improve the efficiency of the system to freeze/confiscate criminal assets;

» strengthen the capacity of the general inspectorate and of inspectorates to ministries and agencies and mandate them to act pro-actively in the identification and mitigation of vulnerable spots;

» strengthen the 28 regional anti-corruption councils in partnership with Civil Society;

» establish better administrative arrangements to safeguard whistle-blowers;

» monitor closely progress in the fight against corruption on central and local level through the inter-ministerial coordination group;

regarding the efficiency of the Judiciary:

» proactively detect and analyse non-uniform application of law and stimulate further interpretative decisions by the Supreme Court;

» pursue urgently the draft concept paper for a full redraft of the Penal Code

» consider a thorough reform of the Penal Procedures Code to simplify criminal proceedings and to reduce excessive formalism;

» implement urgently the recommendations of practitioners to improve practice under the existing Penal Procedures Code;

» implement all recommendations by the SJC regarding delays in important criminal cases and extend the monitoring systematically to all relevant cases

» monitor the use and impact of expedited procedures (lower penalty against confession) and plea bargaining;

» control the effective respect by all courts of the requirement to publish all judgements;

» ensure objective performance assessment of all magistrates and review the ordinance on rules and criteria for appointments by the SJC;

» analyse and address contradictory practice by the SJC in disciplinary proceedings;

» ensure a swift and effective follow up to the recommendations and findings of the inspectorate of the Supreme Judicial Council.

The Commission calls on Bulgaria to move on with its reform process and to implement the recommendations it has made. The Commission will support and monitor progress on this basis next year. Continuous pressure for delivery is needed and the Commission also invites the other Member States to continue assisting Bulgaria and help delivering progress. For its part the Commission will continue to support Bulgaria's efforts through political and technical dialogue and the provision of appropriate expertise, where necessary.

Outlook:

This report demonstrates that, at technical level, some steps have been taken to respond to the recommendations contained in the July 2008 report of the Commission. A momentum has been created which is yielding first results. However, more substantial results in investigating, prosecuting and judging cases of high-level corruption and organised crime are needed in order to secure lasting change in Bulgaria. A profound reform of the judiciary has still not started. This requires long term and unequivocal political commitment. In the view of the Commission, the Mechanism acts as a support tool which needs to be maintained until these reforms are achieved. The Commission will therefore reassess further progress in summer 2010.

(1)Commission Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the area of judicial reform and the fight against corruption and organized crime (OJ L 354, 14.12.2006, p.58)