Communication to
Århus Convention Compliance Committee
Copy To: DG Environment of the European Commission

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II. State concerned

Bulgaria

III. Facts of the communication

1. **Aim of the communication**

1. The aim of the communication is to address a general failure of Bulgaria to implement Article 9, par. 4 of the Århus convention to meet its injunctive relief provisions with respect to access to justice cases concerning environmental permits issued under the EIA, the SEA and the Habitats Directives. The communication directly concerns implementation shortcomings of Art. 10a of the EIA Directive as well as the proposal of the European Commission for a Directive on access to justice in environmental matters (24 October 2003).

2. Basic facts of the communication

2. According to national law, all projects and plans which fall within the scope of the EIA Directive, the SEA Directive or Art. 6 (3) of the Habitats Directive are being authorized by the environmental authorities on basis of **development consents** issued by the environmental authorities (the Ministry of Environment and its substructures) under the Environmental Protection Act and/or the Biodiversity Act in compliance with the authorization regime stipulated by these Directives.

3. These decisions constitute administrative acts which are subject to administrative and/or judicial review procedure[1] under the Administrative Procedure Code (APC). The administrative/judicial review is the last step in the environmental authorization procedure where the public and the interested parties are able to submit *objection* against development consents[2]. If such an *objection* (i.e. appeal) is based on facts indicating severe legal shortcomings of the act (e.g. improper public participation) and/or unforeseen/underestimated by the competent authority environmental risks, then such an *objection* can prevent irreversible damages to the environment.

4. By virtue of art. 90[3] and art. 166[4] of the APC, where an appeal or a protest has been lodged, **the contestation shall stay the enforcement of the administrative acts** (incl. the development consents under the Environmental Protection Act (EPA) and the Biodiversity Act (BA)). Actually, this provision is intended to serve as **an automatic injunction** what, at first glance, goes even beyond the requirements of Art. 9 (4) of the Aarhus Convention. This automatic injunction remains in place until the final court decision, and, since the injunction actually directly refers to the administrative acts rather than to economic activities enabled by such acts, there is no bond requirement, and no possibility of a defendant lawsuit for damages, and does not allow litigants to prolong cases without justification.

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[1] **Article 99** (6) of the EPA: *The interested parties can challenge the EIA decision under the Administrative procedure Code within 14 days from the date of its publication.*

[2] In this regard, we can claim that the administrative and judicial review procedures have proved to be a crucial mechanism in the implementation of EU environmental law concerning development consents or other environmental permits since such procedures guarantee that, in the light of the precautionary principle, projects and plans are authorized and later realized on the basis of objective information (incl. information provided in the form of appeals or protests) it is excluded that the plan or project will have a significant effect on the environment (C-127/02, C-98/03, C-6/04).

[3] **Article 90.** (1) of the APC: *The administrative acts shall not be enforced prior to the expiry of the time limits for the contestation thereof or, where an appeal or a protest has been lodged, until resolution of the dispute by the relevant authority.*
(2) This rule shall not apply where:
1. all parties concerned request in writing an anticipatory enforcement of the act;
2. an anticipatory enforcement of the act is admitted by a law or by a direction under Article 60 herein.
(3) In the cases referred to in Item 2 of Paragraph (2), the superior administrative authority, acting at the request of the contestant, may stay the anticipatory enforcement if this is required by the public interest or would inflict an irreparable detriment on an affected person.

[4] **Article 166.** (1) of APC: *A contestation shall stay the enforcement of the administrative act.*
(2) During any stage of the proceeding until the entry into effect of the judgment, acting on a motion by the contestant, the court may stay the anticipatory enforcement admitted by an effective direction of the authority which has issued the act if the said enforcement could inflict a significant or irreparable detriment on the contestant. An enforcement admitted by a direction may be stayed solely on the basis of new circumstances.
(3) The motion referred to in Paragraph (2) shall be examined in public session. The court shall immediately render a ruling, which shall be contestable by an interlocutory appear within seven days after the delivery of the said ruling at the hearing.

5. Under Art. 60 of the APC[5], however, the administrative authorities and the courts are entitled to issue a **direction on the anticipatory enforcement (DAE)** (also called *order for preliminary execution*) of an act, whereby **the automatic injunction of the act is discharged.** Such a direction can be issued as long as one of the following conditions under Art. 60 (1) of APC is met:

- (1) to ensure the life or health of individuals,
- (2) to protect particular State or public interests,
- (3) to prevent a risk of the frustration or material impediment of the enforcement of the act, or
- (4) where delay in enforcement may lead to a significant or irreparable detriment, or
- (5) at the request of some of the parties in protection of a particularly important interest thereof (in the latter case, the administrative authority shall require a relevant guarantee).

6. The directions on the anticipatory enforcement of acts can be challenged before the court within three days after the date of their publication. If, in such a case, the direction on the anticipatory enforcement of an act is cancelled by the court, the injunction relief is restored.

7. In general, we have to note that the question of interim injunctive relief proved to be an important one in the field of environmental cases in Bulgaria: often a decision with environmental consequences cannot be revoked once it was executed. This is often the case of planning and construction projects, decisions concerning water use, nature conservation or waste (see case-law). **In such cases the only way that a remedy can ensure complete relief is to prohibit these activities.** Unless the developer's construction activities are stopped while the lawsuit proceeds, the ultimate court decision may be rendered meaningless. Therefore an effective injunctive relief procedure will ascertain that the principal

[5] **Article 60.** (1) of APC: *The administrative act shall include a direction on the anticipatory enforcement thereof, where this is required in order to ensure the life or health of individuals, to protect particularly important State or public interests, to prevent a risk of the frustration or material impediment of the enforcement of the act, or where delay in enforcement may lead to a significant or irreparable detriment, or at the request of some of the parties in protection of a particularly important interest thereof. In the latter case, the administrative authority shall require a relevant guarantee.*
(2) Anticipatory enforcement may be admitted even after the act is rendered.
(3) A second request by a party under Paragraph (1) may be submitted solely on the basis of new circumstances.
(4) The direction whereby anticipatory enforcement is admitted or refused shall be appealable through the agency of the administrative authority before the court within three days, regardless of whether the administrative act has been contested.
(5) The appeal shall be considered immediately in camera, and transcripts of the said appeal shall not be served on the parties. Any such appeal shall not stay the anticipatory enforcement as admitted, but the court may stay the said enforcement until final adjudication in the appeal.
(6) When revoking the direction appealed, the court shall adjudicate in the case on the merits. If the anticipatory enforcement is revoked, the administrative authority shall restore the status quo ante the enforcement.
(7) The ruling of the court shall be appealable.

decision can still have an impact on the actual situation and not be limited to the finding that the decision should have been different, without entailing material consequences.

8. In the period 2010-2012, the Ministry of the Environment and Waters (MoEW) and its regional substructures Regional Inspectorates for Environment and Waters (RIEW) have given consent to a number of development projects and plans of high environmental interest with EIA/SEA decisions which were provided with *DAE*. The provision of DAE was either **without any motivation/reasoning supported by facts** or **with a blanket reference to "the protection of a particularly important interest of the developer "** stating nothing other than its general economic interest from speedier realisation of the project.

9. In all cases where the EIA/SEA had severe ecological and/or legal shortcomings and the relevant EIA/SEA decisions were appealed before the court by various NGOs, the appeal was against both the EIA/SEA decision and **also** the DAE thereof as per Par. 9 (4) of the Aarhus Convention. NGOs argued that the environmental authorities have allowed *the anticipatory enforcement* of the referred EIA/SEA decisions (thus eliminating the automatic injunction) either without any motivation at all or with a blanket reference to Art. 60 of APC without making proper balance of interests in the light of the precautionary principle.

10. The court, on its turn, usually examines to what extent the arguments for the issuance of the appealed DAE fall under the headings in Art. 60 of APC.

11. In all cases but one the court upheld the DAE of the competent authorities finding that the arguments of the appealed DAE meet the criteria under Art. 60 of APC. In those cases, the court confirmed that lowering the development costs can be considered as "*a particular interest of the developer*", while creating jobs can be considered as "*a particular public interest.*"

12. Most absurdly, the court did not reject the argument of the competent authorities that *the appeal* of the primary act itself can be considered as "*frustration or material impediment of the enforcement of the act*" [6]. One can claim that as all administrative acts are potentially subject to appeal on this reading all of them should be provided with DAE.

13. Further, the court disregarded the arguments of NGOs that without the injunctive relief the developer may start with the construction activities and potentially cause

[6] Case-law A2. Gold mine "Ada tepe" in the Rodopi Mountain

irreversible damages to the environment before the resolution of the dispute in the court**.**

14. Actually, the court systematically does **not even consider whether the projects or plans authorized by the appealed environmental decision will have an irreversible impact on the environment** unless that is specifically discussed in the appealed DAE. The reason therefore is that such an examination is not explicitly required by Art. 60 of APC.

15. In our view, this legislative gap is obviously in violation of the Aarhus convention: the damages to the environment are generally irreparable while the damages to the financial interests are not, and the need to consider this trade-off should be made clear to the Bulgarian courts by the law.

16. Further, we would like to draw your attention to three cases which are particularly good illustration of the practical issues originating from the application of the current text of Art. 60 of APC (see for details the section on case-law below).

17. In two of them[7], the developer caused irreversible impacts before the resolution of the dispute in the court. In those cases, the access to justice in relation to the permit procedure was not effectively available until after the construction has finished. **One can expect that such cases will become more frequent since the current court practice clearly encourages the unrestricted application of Art. 60 of APC with respect to environmental permits.**

18. In another case[8], the MoEW repealed EIA decision No. VA-4/2011 of Varna RIEW finding that the EIA decision was issued in violation of the environmental law (on basis of improper public participation procedure and incomplete EIA report), while the DAE of the EIA decision was upheld by the court despite all facts provided by the complainant proving the illegality of the EIA decision. It is only because of circumstances contingent to the development process that the developer did not start any preparatory work for the wind park on basis of the DAE before the date of the repeal of the EIA decision, and no irreversible damage to steppe habitats and migrating bird species was done. Should he had, there would be no way to restore them. According to the Bulgarian law he would not be liable for such damages as preparatory works would have been legal.

[7] Case-law A1. Two ski lift projects in Pirin NP

[8] Case-law A5. Wind turbine parks

19. Lastly, we have to note that DAE under Art. 60 of APC have been also applied with respect to orders for the suspension of illegal and/or harmful activities[9]. In those cases, the DAE were issued by the environmental authorities on the ground of the criterion under Art. 60 of APC concerning the protection of particularly important State or public interests, namely the protection of the environment. The directions were appealed by the developers, however, the court found in all cases that the protection of the environment, in particular national parks, Natura 2000 sites, natural habitats or protected wild species, meets fully the criterion under Art. 60 of APC concerning the protection of particularly important State or public interest.

20. These cases illustrate that the courts can, if they wish, take into consideration the damages done to the environment and they routinely do so to upheld interdicts but do not with regard to authorizations. The latter in our view is a failure to implement the requirement of Art. 9, par. 4 of the Aarhus convention.

3. Case-law - details and facts:

3.1 Case-law regarding the DAE of development consents

A1/ Two ski lift projects in "Pirin" National park

21. In 2010, NGOs filed action against EIA decisions No.25-ПР/2010 (App.1) (later replaced by No. 33-ПР/2010 - App.2) and No.31-ПР/2010 of MoEW (App.3) and their DAE concerning the construction of two new ski lifts in "Pirin" National Park (also SCI and SPA). As foreseen in the EIA decisions the construction activities include the logging of several hundreds of trees in the National Park for both lifts. NGOs claimed that the EIA decisions were suffering substantial legal shortcomings which have lead to underestimated environmental impacts. The directions on the anticipatory enforcement of MoEW were not supported by facts, relevant guarantees and proper balance of interests in the light of the precautionary principle.

22. The appealed directions were reviewed in 5 cases of SAC (case 9280/2010 (App.4) concerning the DAE of EIA decision No.25-ПР/2010 of MoEW, case 11150/2010 (App.5) and cassation case 14241/2010 (App.6) concerning the DAE

[9] Case-law B. DAE of orders for the suspension of illegal activities

of Decision 31-ПР/2010, and case 12385/2010 (App.7) and cassation case 14251/2010 (App.8) concerning the DAE of Decision 33-ПР/2010 of MoEW).

23. In case 9280/2010 the court upheld the DAE of decision No.25-ПР/2010, even though NGOs provided evidences that the developer started the construction of the lift causing illegal cutting of tens of trees which was not foreseen in the EIA decision of MoEW. Despite the fact that the referred EIA decision of MoEW has been later withdrawn[10] and replaced by Decision 33-ПР/2010, the court disregarded the arguments and the evidences provided by NGOs that the on-going construction activities already cause irreversible damages to the environment. Quite the contrary, instead of examining whether the project will have an irreversible impact on the environment the court simply referred to the conclusions of the appealed EIA decision that no significant environmental impacts are expected. It is a legal absurd to justify the decision to uphold the DEA on the basis of the very claim which is appealed in the main proceedings, which makes the procedure for DEA appeal redundant. When balancing the interests, the court weighed only the economical aspects of the private and public interests while the public interest in the protection of the environment was ignored. The lack of the relevant guarantees required from the investor by Art. 60 (1) was not discussed at all. Such an approach and reasoning was applied by the court also in cases 11150/2010, 14241/2010 and 12385/2010.

24. **In case 14251/2010, however, the court revoked the DAE of decision No. 33-ПР/2010 of MoEW taking into account the precautionary principle and performing detailed review of all the facts concerning the appealed DAE. In this exceptional case, the court stated that:**

- The DAE of administrative acts is allowable only if the anticipatory enforcement of the acts would not lead to similar or more significant detriments than the detriments which could result from the delay of the enforcement. Since the administrative acts in the field of environmental protection have precautionary character, the enforcement of environmental decisions and permits should be allowed only in particular cases where the potential environmental impacts are clearly smaller than the detriments resulting from the delay of the enforcement.

- In the referred case, the MoEW has allowed the anticipatory enforcement of the EIA decision without providing evidences for the claimed by the developer economical detriments which would result from the delay of the enforcement. No evidence is provided with respect to the urgency of the authorized project.

[10] The MoEW acknowledged that the construction activities were causing unassessed environmental impacts.

- Having in mind that the project foresees the cutting of 82 forest trees, the detriments of the anticipatory enforcement of the project, consisting in the costs of the replanting of the trees and the missed environmental benefits in case the EIA decision is revoked would be incomparable with the undefined detriments which result from the delay of the investment.

A2/ Gold mine "Ada tepe" in the Rodopi Mountain

25. NGOs filed action against EIA decision No.18-8,1/2011 of MoEW (App.9) and the applied DAE concerning the exploitation of a gold mine in the area of Ada tepe Mount in "Rodopi-Iztochni" SCI (BG0001032). As foreseen in the EIA decision the exploitation would affect tens of hectares of natural habitats and habitats of protected species. NGOs claimed that the EIA decision were suffering substantial legal shortcomings which would lead to unforeseen and underestimated environmental impacts, while the DAE was not supported by proper balancing of interests in the light of the precautionary principle.

26. In this case the MoEW issued the DAE of the EIA decision referring to **three** of the criteria under Art. 60 of APC:

- Protection of a particular interest of the developer – lowering the financial risks of the mining company;
- Protection of a particular State and public interest – economical development of the region, reduced unemployment and enhanced concession incomes in the state budget;
- To prevent a risk of the frustration or material impediment of the enforcement of the act – any delay in the enforcement of the EIA decision will lead to significant delay in the investment process.

27. Obviously, none of these justifications (even if they corresponded to the facts) concerns the huge irreversible damages to the environment which were not considered by MoEW at all.

28. The appealed DAE was reviewed in case 354/2012 (App. 10) and cassation case 3550/2012 of SAC (App.11).

29. In case 354/2012 the court upheld the DAE of decision No.18-8,1/2011 of MoEW on basis of the following arguments, which were later confirmed in cassation case 3550/2012:

- The DAE is issued in compliance with the criteria under Art. 60 of APC, especially with respect to the criteria for the protection of the public interests since the realization of the investment project would lead to the sustainable economical development of the region.

- The environmental concerns of the applicants should not be examined in that case but in another case concerning the review of the EIA decision. Within the meaning of Art. 60 of APC, the court is not obliged to examine the potential environmental aspects of the development project with regard to the legal review of the appealed DAE. *The legal review of the DAE requires exclusively examination to what extent the arguments of the appealed DAE meet correctly the criteria under Art. 60 of APC. Nevertheless, the expected environmental aspects can be considered as insignificant given the conclusions of the EIA decision.*

30. Note that with this holding the court stated that the environmental damages should not even be considered in the DEA proceeding, in clear contradiction to the clear statement of Art 9(4) of the Aarhus convention and to the texts of the APC which is supposed to implement it.

31. In case 3550/2012, the applicants submitted a request for **a referral to the European Court of Justice for a preliminary ruling under Article 267 TFEU**. The reference raised the question whether the EU law allows the actual commencement of a project under Art. 6 (3) of Directive 92/43/EEC before expiration of the preclusive terms for legal review of the authorization acts. Instead of analyzing the legal issue, the court rejected the request of the applicants for a preliminary ruling without any grounds.

A3/ A national storage depot for radioactive waste

32. NGOs filed action against EIA decision No.21-9/2011 of MoEW (App.12) and the applied DAE concerning the construction of a national storage depot for radioactive waste.

33. NGOs claimed that the DAE of the EIA decision is in violation of the precautionary principle, arguing that the MoEW adopted the EIA decision on basis of incomplete EIA report which leads to unassessed environmental risks for human health.

34. In this case the MoEW issued the DAE of the EIA decision referring to the criterion under Art. 60 of APC concerning *the protection of a particular State and public interest,* namely the proper and timely implementation of the national laws,

strategies and programs on the storage of nuclear waste in order to protect human health.

35. The appealed DAE was reviewed in case 14109/2011 (App. 13) and cassation case 1880/2012 of SAC (App. 14).

36. In both cases the court restricted its examination of the legality of the DAE strictly to their formal conformity with the provisions of Art. 60 of APC:

- *The DAE is issued in compliance with the criteria under Art. 60 of APC, especially with respect to the criteria for the protection of the public interests since the realization of the investment project would lead to the sustainable economical development of the region.*

- *The environmental concerns of the applicants should not be examined in that case but in another case concerning the review of the EIA decision. Within the meaning of Art. 60 of APC, the court is not obliged to examine the potential environmental aspects of the development project with regard to the legal review of the appealed DAE. The legal review of the DAE requires exclusively examination to what extent the arguments of the appealed DAE meet correctly the criteria under Art. 60 of APC. Nevertheless, the expected environmental aspects can be considered as insignificant given the conclusions of the EIA decision.*

37. Apparently, the text of this decision is virtually identical to that of case 354/2012 in the preceding section: the court has established **as its regular practice** in the DAE proceedings to consider only the economic interests in DEA, in violation of the clear requirement of art. 9, par. 4 of Aarhus convention to take into consideration the damages of the Environment. (The reference to the insignificant environmental impact made in the last sentence is apparently a fig leaf as it is seeks to justify the decision in the DEA proceeding with the conclusions of the EIA decision which is appealed in the main proceedings.)

A4/ **A public highway through "Bulgarka" Nature Park (also SCI/SPA)**

38. NGOs filed action against EIA decision No.4-2/2012 of MoEW (App. 15) and the applied DAE concerning the construction of a public highway co-financed by the EU. As foreseen in the EIA decision the exploitation would affect tens of hectares of natural habitats and habitats of protected species in "Bulgarka" Nature Park (also SCI/SPA). NGOs claimed that the EIA decision was based on incomplete EIA report which could lead to unforeseen and underestimated environmental

impacts, while the DAE was not supported by proper balance of interests in the light of the precautionary principle.

39. In this case the MoEW issued the DAE of the EIA decision referring to the criterion under Art. 60 of APC - "*protection of a particular State and public interest"* without any further arguments, while the developer has requested the DAE on basis of the criterion "*To prevent a risk of the frustration or material impediment of the enforcement of the act"* what in their view would lead to significant delay in the realization of the highway constructions and loss of the EU co-financing.

40. The appealed DAE was reviewed in case 6182/2012 of SAC (App. 16). The court upheld the DAE of decision No. 4-2/2012 of MoEW on basis of the following argument:

- The DAE is issued in compliance with the criteria under Art. 60 of APC since the highway project is of high public interest, while the environmental concerns of the applicants can be considered as unfounded given the conclusions of the EIA decision.

41. Here the court took for granted that the construction of a highway is of high public interest (despite huge resistance of two local initiative groups) and that this absolves the authorities and itself from the need to consider any other interests, despite the contrary requirements of the Aarhus convention and Art. 60 APC. It did not even bother to repeat its own formula that environmental concerns are to be discussed in the main proceedings.

A5/ **Wind turbine parks**

42. NGOs filed action against the directions for the anticipatory enforcement of numerous EIA decisions of the Varna RIEW, e.g. EIA Decisions VA-4/2011 (App. 17), VA-7/2012 (App. 18), VA-8/2012 (App. 19), VA-13/2012 (App. 20), etc., concerning the construction of the wind turbine parks on the second biggest bird migration route in Europe – Via Pontica. NGOs claimed that the EIA decisions were based on incomplete EIA reports which would lead to unforeseen and underestimated environmental impacts, while the DAE was not supported by proper balance of interests in the light of the precautionary principle.

43. On the basis of the arguments that the EIA decision foresees no negative impacts and that the investment project should be realized within reasonable time frames,

the Varna RIEW issued the DAEs of the EIA decisions without stating any reasons but a mere reference to the criteria under Art. 60 of APC:

- "*to prevent a risk of the frustration or material impediment of the enforcement of the act*" as result of any appeal procedures,
- "*where delay in enforcement may lead to a significant or irreparable detriment*" such as increased development costs.

44. The administrative court in Varna found[11], however, that the DAEs of the referred EIA decisions are issued on basis of the last criterion under Art. 60 of APC concerning *"the protection of a particular interest of the developer",* while the competent authority referred to other criteria. With regard to this, the court, without any further consideration, concluded that any potential detriments to third interested parties would be backed up by the financial guarantees[12] which the developers deposit in the competent authority as required by the last sentence of Art. 60 (1) of APC. The court dismissed the argument that when the resulting damage is to health or to the environment is irreversible monetary compensation is usually inadequate. This is a different interpretation than that in the cases discussed above, but the common thing is that the environmental damage was not taken into account by the courts in violation of the international and national law.

45. Lastly, the ineffective implementation of Art. 9 (4) of the Aarhus convention by Art. 60 of APC can be exemplified by case 3758/2011 of the Administrative court in Varna. On its first session the court is required to consider (and possibly repeal) the DAE yet it did not without any justification. Fortunately, on the second session it closed the case as the main EIA decision had been recently repealed by the MoEW (see App. 30) because of severe violations of the environmental law[13] which the court refused to see. The case is exemplary because the court denied to examine the allegations of NGOs on the substance of the main EIA decision failing to exercise even *prima facie* review.

[11] See cases 3758/2011 (App.21), 1079/2012 (App.22), 1083/2012 (App.23) and 1776/2012 (App.24) of the Administrative court in Varna.

[12] In those cases the developers proposed the amount of money for financial guarantees to be 10 000 Euro without any justifications or expert preassessments.

[13] Violation of the public consultation procedures, the EIA is made on basis of incomplete information for the project proposal leading to the authorization of unassessed activities under the project, lack of assessment of the cumulative effect, etc.

3.2 Case-law regarding the DAE of orders for the suspension of illegal activities

46. In some cases, developers filed action against the directions for anticipatory enforcement of orders of the MoEW for the suspension of their construction activities in protected areas. The developers claimed that the anticipatory enforcement of the suspension orders of the MoEW would cause to them significant financial detriments as result of the suspension of their projects.

47. In all cases the MoEW issued the DAE of the orders for the suspension of the projects referring to the criterion under Art. 60 of APC concerning *the protection of a particular State and public interest,* namely the protection of the conservation areas.

48. The appealed DAE were reviewed in cases 8792/2009 (App.25) and 1396/2010 (App.26)[14], 241/2010 (App.27)[15], 12009/2008 (App.28)[16], 11796/2006 (App.29)[17] of SAC. In all cases the court restricted its examination of the legality of the DAE strictly to the formal application of the legal provisions of Art. 60 of APC finding that the DAE is issued in compliance with the criteria under Art. 60 of APC. In those cases the court, found that the interests of the developers are subordinate to the public interests for protection of the conservation areas. What is more, in case 8792/2009 the court points out that if the developer has run financial losses as result from the application of the DAE, he can hold the MoEW responsible for the losses in a lawsuit for damages.

49. Further, in cases 12009/2008 and 11796/2006, the court concluded that any arguments of the appellants concerning the appealed primary act should not be examined in that case but in another case concerning the review of the primary act.

IV. Nature of alleged non-compliance

50. On 2 October 2003, the National assembly of Bulgaria ratified the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Århus, Denmark, 23 - 25 June 1998). On 16 March 2004, the Convention enters into force in Bulgaria.

[14] Construction of a hydro-power plant in "Kocherinovo" SPA.

[15] Construction of a wind turbine park in Kavarna.

[16] Construction of a village complex in Rila SCI/SPA.

[17] Construction of a village complex in "Irakli" pSCI.

51. The communication refers to a general failure of Bulgaria to implement Art. 9, par. 4 of the Convention to meet its injunctive relief provisions with respect to access to justice cases concerning environmental permits issued under the EIA, the SEA and the Habitats Directives.

52. While the EU environmental Directives still lack provisions clearly requiring the public concerned to be provided with effective remedies such as injunctive relief in order to achieve the goals of the Directives, the requirement of the Aarhus Convention on the injunctive relief and other remedies to be "adequate and effective" means actually that the injunction measure should prevent irreversible damage to the environment.

53. In this regard, the EU courts evaluate whether an activity causes a particular risk to the environment and whether it is necessary to issue injunctive relief. This implies that the courts have to examine whether the project for which the permits have been issued will have an irreversible impact on the environment. **Thus, injunctive relief acts to prevent the alteration of the ecological status quo while legal requirements are being scrutinized.**

54. It is settled EU case-law that the judge hearing an application for interim measures may order interim relief only if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved (C-404/04, C-76/08, T-85/05). The conditions thus imposed are cumulative, so that an application for interim measures must be dismissed if one of them is not met.

55. This **standard** guarantees that, when an injunction is employed, the risk of economic harm to the party ordered to cease its operations will be greatly outweighed by other important factors and therefore can be tolerated. It provides a consistent and transparent test by which the legal system can determine when an injunction is appropriate. Consistently implemented, this standard thus enables the effective application of injunctive relief in all appropriate instances without imposing unreasonable financial burdens on those plaintiffs seeking it.

56. The review of the national case-law with respect to injunctive relief procedures demonstrates, however, that the legal framework of art. 60 of the Administrative Procedure Code (APC)[18] concerning the injunctions does not correspond with the

[18] As mentioned above, filing an action under APC has the automatic effect of suspending all administrative decisions, whereby the competent authority may discharge the injunction by the issuance of a direction for the anticipatory execution (DAE) of the administrative

common EU practice and actually bars the *effective* application of interim measures, especially with respect to environmental permits.

57. **First, neither the law, nor the judicial practice requires the competent authority to examine whether the project for which the permit has been issued will have an irreversible impact on the environment.** The case of Pirin National Park illustrates that suspending the injunction through the application of Art. 60 of APC could alter the ecological *status quo* to the worse before a decision is reached in the main action. This would not be the case if the competent authorities issuing the DAE and the court reviewing the DAE perform evaluation of the risk of irreversible damage of the authorized activity.

58. The court's established practice, in a series of appeals against such DEA, is not to consider the potential environmental harm in the DAE proceedings, or to dismiss the claims with an absurd reference to the conclusions of the EIA which is disputed in the main proceedings in the same court.

59. **Second, Art. 60 of APC is interpreted by the courts to allow them to review the DAEs only for a formal correspondence of the reasons given with the grounds listed in Art. 60 (1) of APC, and no examination of the actual facts is made.** This is even made explicit by the court in cases 354/2012, 3550/2012, 14109/2011 and 1880/2012 of SAC.

60. There is no obligation of the competent authority to perform the objective standard test performed in the EU jurisprudence with regard to the applications for interim measures. Just the opposite, Art. 60 (1) of APC allows the competent authority to suspend the automatic injunction as soon as the competent authority subjectively refers to one or more of the conditions under this article. **As the cases discussed above illustrate, the authorities routinely allow DAE making only a formal reference to these conditions without providing any reasons to show that the actual situation satisfies the conditions for DAE.**

61. What is more, the case-law indicates also that the court does not consider itself obliged to take into account any argument or request for restoration of the injunction relief submitted by the appellants. Instead, the typical line of argumentation of the court is that "*the environmental concerns of the applicants*

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decision as stipulated in Art. 60 of APC. In such cases, "*the application for interim measures*" as known in the EU jurisprudence will have in Bulgaria the form of an "*appeal against the DAE of the referred administrative act*". Thus, if one seeks for injunctive relief in a procedure against an environmental permit accompanied by a DAE he has to appeal the DAE of the permit instead of submitting a standard application for interim measure.

should not be examined in that case but in another case concerning the review of the EIA decision" or that "*the expected environmental aspects can be considered as insignificant given the conclusions of the EIA decision*".

62. Actually, the developing judicial practice to exclude environmental damage for consideration in the DEA proceeding is of growing concern, not only because it is a violation of Art. 9 (4) of the Aarhus convention but also because it prejudices to a great extent the latter decision on the legality of the EIA in the main proceedings. By the time the court delivers its final judgment on the substance the development project is well under way, and the irreversible damage already done; this is made known to the court and it biases it in favour of sustaining the EIA and the project as a *fait accompli*. The damage done also discourages the NGOs and the supporting citizens to continue the main proceedings and the public campaign.

63. As a matter of fact, the Art. 60 of APC proves to be appropriately applied only with regard to orders which **ban** rather than permit an activity. Evidence therefore is the case-law of SAC under cases 8792/2009, 1396/2010, 241/2010, 12009/2008 and 11796/2006, where the court argues that, founded on ecological justifications, the public interest in protecting the common heritage of the Community (in protected areas and protected N2000 sites) is considerable in itself and definitely superior to the private economical interests.

64. **Third, besides these legal issues, the adequate and effective application of the injunctive relief is even more impeded by the numerous cases referred above where the reasoning of the court behind decisions upholding DAE seems to be rather inadequate or even incompetent.**

65. For example, in most cases referred above when examining the balance of interests, the court discusses solely the economical aspects of the private and public interests while the public interest in the protection of the environment, the risk for irreparable harm to the appellant's interests and the lack of relevant guarantees is not discussed at all. The only judgment which can be distinguished with a proper reasoning in the light of art. 9 (4) of the Aarhus convention is taken by SAC in case 14251/2010.

4. Conclusion

66. As demonstrated by the case-law of the administrative courts and the legal analysis the application of art. 60 of APC cannot guarantee that irreversible damage to the environment can be prevented since the competent authorities

issuing DAEs of environmental permits and the courts reviewing the referred DAEs do not examine whether the projects for which the permits have been issued will have an irreversible impact on the environment or the balance of interests is taken into account properly. In addition, the judgments of the court suffer adequate quality of their reasoning. This means that the requirements of article 9, par. 4 of the Aarhus Convention are not adequately implemented and the goals of the EU directives cannot be effectively achieved[19].

67. In this regard, we can assume that art. 9 (4) of the Convention would be properly implemented as long as:

- DAE of environmental permits are issued only if the competent authority can prove and/or guarantee that **the permitted activity would not have irreversible impact on the environment**, regardless of its conclusions concerning the significance of the environmental impact of the activity;

- the law prescribes an objective standard test such as the ones performed in the EU jurisprudence with regard to the applications for interim measures.

V. Provisions of the Convention relevant for the communication

Article 9 *ACCESS TO JUSTICE*
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

VI. Use of domestic remedies or other international procedures

68. We consider that all domestic remedies are exhausted during the legal proceedings referred in the case-law above. In the communication it is demonstrated that national remedies proved to be ineffective since the court failed to understand and implement correctly Art. 9 (4) of the Aarhus Convention.

VII. Confidentiality

69. No.

[19] The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the Directive itself.

VIII. Supporting documentation

App. 1. EIA screening decision No.25-ПР/2010 of MoEW
App. 2. EIA screening decision No.33-ПР/2010 of MoEW
App. 3. EIA screening decision No.31-ПР/2010 of MoEW
App. 4. Decision of SAC on case 9280/2010
App. 5. Decision of SAC on case 11150/2010
App. 6. Decision of SAC on case 14241/2010
App. 7. Decision of SAC on case 12385/2010
App. 8. Decision of SAC on case 14251/2010
App. 9. EIA decision No.18-8,1/2011 of MoEW
App. 10. Decision of SAC on case 354/2012
App. 11. Decision of SAC on cassation case 3550/2012
App. 12. EIA Decision No.21-9/2011 of MoEW
App. 13. Decision of SAC on case 14109/2011
App. 14. Decision of SAC on cassation case 1880/2012
App. 15. EIA decision No.4-2/2012 of MoEW
App. 16. Decision of SAC on case 6182/2012
App. 17. EIA Decisions of No. VA-4/2011 of RIEW Varna
App. 18. EIA Decisions of No. VA-7/2012 of RIEW Varna
App. 19. EIA Decisions of No. VA-8/2012 of RIEW Varna
App. 20. EIA Decisions of No. VA-13/2012 of RIEW Varna
App. 21. Decision of Varna AC on case 3758/2011
App. 22. Decision of Varna AC on case 1079/2012
App. 23. Decision of Varna AC on case 1083/2012
App. 24. Decision of Varna AC on case 1776/2012
App. 25. Decision of SAC on case 8793/2009
App. 26. Decision of SAC on case 1396/2010
App. 27. Decision of SAC on case 241/2010
App. 28. Decision of SAC on case 12009/2008
App. 29. Decision of SAC on case 11796/2006
App. 30. Decision No. 135/2012 of MoEW

Signature:  25.07.2012

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