41the Compliance Committee

Communication 76/2012

Written statement, adding to our oral pleas made on ACCC,

sitting on 25.6.2013, Genève

I. Introduction

Further to the statements of facts and the analysis of the national law made in the complaint, we would like to emphasis the following issues, presented herewith.

The complaint concerns misapplication of the access to justice principle of the Aarhus Convention with regard to all kinds of Environmental authorisations, such as decisions for approval of Environmental Impact Assessments (EIA), decisions for approval of Strategic Impact Assessment (SEA) and of appropriate assessments (AA, issued with regard to Natura 2000 sites), as well as all screening decisions, related to the assessments mentioned hitherto (i.e. EIA, SEA and AA screening). Such authorisations are required for most projects for development, and the scope of the requirement is, as a matter of law, sufficiently broad.

Of all projects for development, we would like to stress on the construction projects and the particular harm to nature done by them. Why we are concerned on developments project in Bulgaria, rather then on pollution or industrial accidents? Cases of construction on new sites while destroying previously existing habitats pose the main environmental threat in Bulgarian for the past decade. First of all, one cannot build a dwelling or industrial building on a new site without cutting the trees on the spot beforehand, or by removing the previously existing non-forest habitats and replacing them with buildings, devices or artificial vegetation (as in cases of golf-playgrounds and luxury dwellings). Second, in deciding on this complaint, the ACCC should bear in mind what the construction practices in Bulgaria are. Once a project is authorised, and regardless of any prescriptions in the EIA report, the construction companies and workers in Bulgaria would rarely make any efforts to minimize the harm on the environment. For example, if there are any trees at the site, they would be all cut beforehand. It is more likely that the construction works will destroy parts of the environment in the neighbouring sites rather than protect anything within.

II. The APC's automatic injunctive relief and the exception thereof

As explained in the complaint, the national Administrative Procedure Code (APC) *prima faciae* provides injunctive relief to all appellants against all acts of public authorities; indeed, the

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appeal itself automatically suspends the entry into force of the act. However, its Art. 60 creates an exception to this rule that should be applied only in extraordinary circumstances. It is however rather easily and widely used by the authorities for instigation of the developers to an extent that the exception is turned into a general rule. This exception, as applied in practice, is in our view in violation of Art. 9(4) of the Århus Convention.

III. Exception (the need to balance)

Pursuant to Art. 60 of the APC, the authorities may give a 'direction for anticipatory enforcement' (hereinafter referred to as the 'DAE') the act, only if the case presents a necessary for protection of public health or particularly important public interests, or other such interests as *"the protection of a particular interest of the developer",* yet again out of common circumstances as a rule. In such cases the individual administrative act (e.g. Environmental approval decisions) can be implemented before its entry into force regardless of any pending appeals.

The text of Art. 60 specifies the circumstances which can justify a DAE, and the list is exhaustive. Yet the authorities rarely bother to verify whether any such circumstances are actually present; in most cases they satisfy themselves to make a blank reference to some of the listed circumstances by just copying respective piece of the legal text of Art. 60. This clearly violates the law and the intention of the APC and makes any subsequent judicial review of the act redundant. Yet, this administrative practice has been encouraged by the Bulgarian courts, which in almost all cases would accept a *statement* about the availability of circumstances allowing anticipatory enforcement, without any check whether such circumstanced are *actually available* indeed.

We appreciate that some projects may require urgent implementation, and the judicial review in Bulgaria is often time consuming. We also appreciate that in some circumstances, the interest for protection of the environment advocated by the appellants in such cases is outweighed by other important public interests. But in our view, the list of circumstances which can justify anticipatory enforcement should be interpreted narrowly (as appropriate for an exception from a general rule) and, more importantly, both the administrative authorities and the reviewing court should decide taking into account the actual circumstances in each particular case rather than solely the statement of one of the parties about those circumstances. In our view, the authorities and the courts should delve into the merits of each case, in order to decide the issue by balancing the interests of the parties, while taking into account established facts, the probabilities of the harm to other public and private interests and the plausibility of the claims of the parties.

It is hardly necessary to elaborate that such balancing of the two publicly protected interests is required by the principle of proportionality, enshrined in the *acquis communautaire* as well as by the ECHR and many other international law instruments. It is worth mentioning that it is required by the national legislation too. Most pertinently, Art. 6 of the APC itself stipulates that the principle of proportionality (*съразмерност*) is a general principle of the national administrative law.

The ACCC should take note that on this point the Bulgarian Government stays in agreement with us. In their written response to our complaint they explicitly state that proportionality principle applies (p. 4) according to which the administrative authorities and the courts should decide by balance of the interests of the parties,. What is more, the party concerned provides a very good summary of what "should" be done on such cases (note that the wording!). Unfortunately, it rarely is what happens. It is a well-established practice of the national courts, to use the conclusions from the EIA – i.e. a statement of the issuing authority, the same that is to be contested within the main proceedings, as grounds to reject our request for injunctive relief. There is an example of such circular reasoning even in the response of the government to our present complaint. In the last paragraph on p. 5, they assert that the EIA ensures that the negative impact on the environment is not significant, therefore the authorities do not have to provide effective injunctive relief. Then again, on p. 7 it goes on to assert that the examination of the public interest in prevention of irreversible harm to the environment should be decided *"only and solely on the basis of the findings exposed in the EIA…"* (bold and underlined by the party concerned). This absurd insistence that the decision on the question about the injunctive relief should be decided on the basis of the very same act which is contested shows that the government does not even understand what is the point of Art. 9 (4) of the Convention and our complaint. This would be akin to deciding on the detention measures in a criminal case only and solely on the basis of the indictment. In our view, the flawed reasoning exhibited by the government's response is a good evidence of the problem we face with the entire national administration.

The Government recognises the possibility that the assessment of the potential harm contained in the environmental decision under review can be flawed only in the last page of its response (p. 9), only to dismiss it because the effect of the decision would not be immediate. But often the physical constructions (and the subsequent destruction of nature and habitats) starts soon after the court decision, and with the motion for injunctive relief denied, it can start legally any moment, without the appellant even being aware of this. As was pointed out several times so far, we have two lifts currently in operation, and the subsequent court decision that they should not have been built is of little help (A1/ Two ski lift projects in "Pirin" National park; paras 21-24; App. 4-8 and 31).

The courts for their part also sometimes recognise that they have to balance the conflicting interests, but they also show the same circular reasoning. Usually they "balance" by taking for granted the importance of the development project and weigh it against the potential harm to environment determined on the basis of the environmental decision, which, of course is contested in the main proceedings. This can be seen in the Shipka case (bottom of p. 5 of the government response), the *only* one that the Government could find in support of their elaboration what the courts 'should' do. The court does mention balancing, yet again it adopts the position of one of the sides asserting together with the environmental decision that no significant harm can be expected.

We appreciate that in the summary proceedings in which a DAE is considered, which are to be speedy and uncomplicated, there are very limited opportunities for either party to prove interests and damages. Indeed, many of the facts are not available at this stage, they are the very subject of the main proceedings. Yet, this does not require the courts to satisfy

themselves with a statement of one of the party. The court should consider the probability that the respective assertions of each party turn out to be true, the plausibility of the alleged harms and also consider the typical damages caused by the typical construction project.

V. Imparity of the parties

In analysing the national court jurisprudence, we find several flaws to be repeated in all court rulings on DAE matters, which violate by far the Århus Convention standards:

- All merits of all those court rulings are grounded solely on the statements (and not on the facts!) in the appealed IAA;

- Thus, merits are grounded solely on the statements of the administrative authority;

- The courts reason such approach explicitly on the authoritative nature of the one of the parties in the court proceedings, that it is an entity of authority;

- Thus, the courts are always biased, it is clearly visible from their own reasoning and often explicitly stated from; the court always defers to the authorities;

- That situation is recognised and accepted by the Party concerned (through their representative MOEW, which is at the same time the very authority that controls the environmental approvals) in their response of 28.03.2013, on page 7, underlined and bolded (sic!):

> *"...we find that consideration/examination of the public interest in the prevention of possible irreversible effects on the environment, [...]could be performed objectively, impartial, "prima facie, in fact and in law" and in compliance with the right of public concerned to participate in the decision making process only and solely on the basis of the findings exposed in the EIA/SEA/AC report..."*

We believe the court cannot and should not ignore all other facts in a DAE case, just because such facts are not included in the EIA/SEA/AC report. In other words, the Party Concerned 'pleaded guilty' on that issue.

VI. Real damages vs. potential ones; past damages vs. future damages

Instead of referring to the logic and common sense, the national courts stick to the black letter law in a very formal way, narrowing its interpretation to an absurd extent (*reductio ad absurdum*).

The national court require evidence for actual damages and harm to the environment, which is tricky when such harm is precisely what we are trying to prevent from happening in the future through that same judicial review procedure. Thus, in effect the court implicitly excludes any potential damages from consideration.

The court fails in distinguishing a couple of logical antipodes:

- Real damages vs. potential one: the national courts never considers any probability of damages to nature or habitats to happen in reality; in denying injunctive relief the courts reasoning usually steps on the lack of real damages;

- Past damages vs. future damages: the courts usually deny injunctive relief on the grounds that there are no existing damages to the nature; usually, there is no assumption for future damages; any such assumption in the courts reasoning usually contents itself by a blank short statement that future damages are not likely without any reasoning, fact analysis or going in the merits;

The examples include all national case-law, with the exception of the Shipka case (the second DAE proceedings, presented with the present response by the communicant as Appendixes 34 and 35).

VII. Flawed logics: circular reasoning; formality logics

In view of all those examples of fails in the national case-law on DAE matters, the circular reasoning and formality logics presented *supra* in section III. of the present written statement may be summarised by the term 'formalism' in its literal meaning:

> *"Formalism: excessive adherence to prescribed forms; […] the basing of ethics on the form of the moral law without regard to intention or consequences."*[1]

In our view, such formalism as demonstrated by the national courts cannot ensure proper application and respect of neither the national legislation, nor the Århus Convention.

VII. Statistics (more often then not)

On one hand, the Party concerned have not contested the list of exemplary cases, enclosed in support of our communication.

One the other hand, the sole example provided by Party concerned clearly supports our communication (bottom of p. 5 and Appendix 34 – again referring to the conclusions from the EIA itself, which are subject to the contestation in the main proceedings) it is really an example of a court attempt to balance the two contradictory public interests as expected in such a cases; yet, the attempt proved to be futile, as it resulted again in copying the statements of the governmental authority with some minor alterations.

Note: A further new development of Shipka case is presented by the communicant, concerning a new procedure for appealing the DAE granted and for requesting an injunctive relief by the court. Presented as Appendixes 34 and 35 to our communication.

In addition, there is new development in Pirin case (A1/ Two ski lift projects in "Pirin" National park; paras 21-24; App. 4-8 and 31). Almost two years after denying injunctive measure, the Supreme Administrative Court concluded the case in substance by declaring the EIA and the AA of that lift replacement project as unlawful. Meanwhile, however, that

[1] Oxford dictionaries of various editions.

construction had not only started even before the court confirmation of the DAE, but also had finished based on the DAE granted by the administrative authority and confirmed by the court. Around 0,5 - 1 ha of white fir aging up to 130-years old had been already cut and one apparently illegally constructed lift had been operating for more then three years. At present, neither the national authorities, nor the public concerned have any idea what is to be done with that particular illegal project in solving such legal stalemate.

Note: Recently enclosed as Annex 31 to the complaint.

VIII. Varna cases:

Communication: **A5/ Wind turbine parks**, paras 42-45.

Appendixes: 17, 18, 19, 20.

Note: Recently presented new development as Appendixes 32 and 33 to our communication.

The court, favourably for the environmentalists, and in contrast with the bulk of the caseload, found that it is a matter of private interest, instead of public one; however, we see some serious concerns, as follows:

- that means everyone who claims private interest and requests paying a small deposit could easily be awarded a direction of anticipatory enforcement (DAE); thus, private interest is bound to prevail, in violation of the Århus convention;
- the amount of the deposit has been determined by the court to be too low (€ 6000). The court does not consider such amount of the guarantee as being paltry and token only, doesn't consider the damage/costs of cultivation, nor the deterrent effect on the developer.

Warranty of 12000 BGN (equals € 6000 euro), even for Bulgaria this is a paltry amount. A park with 85 wind turbines with total capacity of 200 mW costs about € 200 million euro; There is no legal requirement for the warranty to be proportionate to the project; instead it must account for the cost of eventual recultivation (which usually is many millions over many years of efforts). Yet if the warranty is to have any deterrent effect at all, apparently the amount here is so tiny that it may not need even to be reported to the CEO of the developer company.

Even the few decisions where the NGOs apparently won are problematic – the Varna Administrative court ruled for the applicant only because there was no warranty at all. The court dismisses the alleged public interest from the anticipatory enforcement, rather replacing it with a private one. Thus, the message to the investor even there is clear – provide a deposit, and you are exempt form any requirements of the environmental legislation. We think that such interpretation, which would allow anticipatory enforcement to preserve any private interest if certain deposit is paid, is clearly in violation of the Århus convention (it might be acceptable, if at all, only in cases of conflicts between different non-environmental interests). To accept the opposite, would allow to any private party to circumvent Art. 9 (4) of the Convention.

IX. Shipka case & ECJ Krizan case:

In the ECJ Krizan case (C 416/2010, Slovakia) the ECJ held that the Århus Directive is only effective if there is an injunction (Decision of January 2013);

As the Aarhus committee itself noticed in the case of Lithuania (No. 16/2006), the commencement of the project discourages public participation:

> *"Once an installation has been constructed, political and commercial pressures may effectively foreclose certain technical options that might in theory be argued to be open but which are in fact not compatible with the installed infrastructure [...] effects on the grounds have effective eliminated the alternative options" (para. 74)*

The same applies for Shipka case (the Party Concerned response of 28.03.2013, on page 5, Decision SAC 1098/8.9.2012). The construction had started during the first court proceedings for appealing the DAE granted, and it was widely covered in the media. In theory the project can be changed (the tunnel), or removed (the lift), but it is very unlikely to happen in the real world (as in the Pirin case, *supra*).

X. Conlcusion

In some particular cases the national courts actually did know that the cutting/construction/damages to nature had actually started, in reality:

- even while the DAE review procedure were still pending;
- even before the DAE review appeal had been submitted, i.e. before even starting of the DAE review procedure before a court of law.

Exemplary cases:

- Pirin lifts (Appendixes 1, 2, 3 and 31), at the end the environmentalist won the case, EIA approval was found unlawful, everything had been already cut and constructed; damages: around 0,5 - 1 ha of white firs were cut, or 50 fir trees aged 120-130 years of age;
- Shipka tunnel (the Party Concerned response of 28.03.2013, on page 5, Decision SAC 1098/8.9.2012, Appendix 34); the media had covered widely the first construction works, as well as that the local population prefers the alternative (the so called 'Musman Plan').

How the court knew about the damages to nature? There were always two ways:

- media (notoriously known information);
- the authority notified the court, claiming there shall be no sense stopping the DAE anymore.

While in clear view of those facts of damages, the national courts still blatantly ignored any possibility of potential or future damages to the nature. Therefore, the national courts, while

following the national case-law, were overwhelmingly involved in circular reasoning and formality logics, while turning a blind eye to a well established facts. In other words, according to the national jurisprudence, the governmental authorities shall be always right that damages to nature are not probable, even in case when such damages had been already sustained.

With regard to the above, we would expect the ACCC to find the established administrative and judicial practices in Bulgarian with regard to the application of the exception under Art. 60 ACP in violation of the requirement for efficient injunctive relief under Art. 9 (4) of the Aarhus Convention. We would like to ask the ACCC to make an interpretation of the relevant provisions of the Convention. We have already seen the practice of the national courts changing after the previous such decision of the Committee, even though the law itself has not been amended of yet.

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