TO

Ms Aphrodite Smagadi

Secretary to the Århus Convention Compliance Committee

United Nations Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais des Nations

CH-1211 Geneva 10

Switzerland

Answers to the questions of the Compliance Committee

The communicant answers herewith the questions of the Compliance Committee, which were annexed to the letter to parties after CC-41 sent by the Secretary to the Århus Convention Compliance Committee, dated of 9 July 2013.

In addition, and in response to questions to the communicant in the abovementioned letter we enclose the following documents:

> **Enclosure A.)** Translations of court decisions provided in Appendixes 6 and 8 to the communication as well as translations of additional court decisions and rulings provided in appendixes 31, 32, 33, 34 and 35 (in .zip archive);
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> **Enclosure B.)** Statistical table of all relevant cases for the last two years;
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> **Enclosure C.)** Copy of the plan of our oral statement for the 41st CC of ACCC held on 25th of June, 2013, in Geneve, used by the communicant attorneys Mr. Svilen Ovcharov, Mr. Vesselin Paskalev, kindly aided by Mr. Thomas Alge, observer and as *amicus curie*. The plan has been developed in a written statement, as well as updated with new references concerning the new development and new cases provided with the present response.

I. Analysis of the translated court decisions provided in Enclosure A.)

First, we would like to provide translated copies of 6 court decisions and 1 decision of the MoEW which substantiate the position of the communicant:

On the basis of the documents provided in Enclosure A.) the communicant would like to give additional comments to the facts provided in chapter 3.1 of the communication "Case-law regarding the DAE of development consents", as follows:

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Case A1/ Two ski lift projects in "Pirin" National park (ref. paragraphs 21-24 of the main communication)

Appendix 6. Ruling No. 15789/2010 on case No. 14241/2010 of SAC

Hereby, we provide translation (Appendix 6 in Encl. A) of Ruling No. 15789/2010 on case No. 14241/2010 of SAC (Appendix 6 to the communication). This ruling of the second and final instance court upheld the DAE of decision No. 31-ПР/2010 of MoEW (Appendix 3 to the communication). In this case, 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. We find it as a legal and logical absurd to justify the decision to uphold the DAE on the basis of the very claim which is appealed in the main proceedings, which makes the procedure for DAE appeal redundant. Furthermore, from the reasoning of that particular decision is again clear that when balancing the interests opposed, 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.

Appendix 8. Decision No. 15028/2010 on case 14251/2010 of SAC

Hereby, we provide translation (Appendix 8 in Encl. A) of Decision No. 15028/2010 on case 14251/2010 of SAC (Appendix 8 of the communication). This decision of the second instance court, which is 100% equivalent to case No. 14251/2010, repealed the DAE of decision No. 33-ПР/2010 of MoEW (Appendix 2 of the communication), taking into account the precautionary principle and performing detailed review of all the facts concerning the appealed DAE.

Appendix 31. Decision No. 6587/2013 on case 3290/2013 of SAC

Hereby, we provide translation of **Decision No. 6587/2013 on case 3290/2013**, being the second instance court decision (Appendix 31 in Encl. A) adopted recently during the main proceeding on substantial review concerning the appeal of Decision No.31-ПР/2010 of MoEW (Appendix 3 to the communication). The second instance court repealed the decision of MoEW. The court founds that the development project authorised by Decision No. 31-ПР/2010 of MoEW was inadmissible with respect to the Management plan of Pirin National Park and the EIA decision on the Spatial plan of the ski-zone. However, through the application of the DAE of Decision No. 31-ПР/2010 which was upheld by court Ruling No. 15789/2010 of SAC (Appendix 6 to the communication) the development project had been already realised and the environment irreversibly damaged. At present and in view of that legal situation, the MoEW is looking for administrative ways to legalise the already realised

project instead of applying the legally required administrative procedures for restoration of the environment damaged as result of the implementation of the development project.

This case proves as good as possible the position of the communicant that the current jurisprudence cannot guarantee the protection of the environment in case that a development project is authorised by a decision for preliminary execution of the appealed environmental decision allowing the developer to start with the construction activities and cause irreversible damages to the environment before the resolution of the dispute in the court. This would not be the case if the competent authorities, while granting DAE for the EIA approving decisions, and the court in controlling the lawfulness of appealed DPE perform a proper balance of interests check as well as an examination on the possibility of irreversible impacts on the environment in case of preliminary execution of a development project.

Case A5/ Wind turbine parks (ref. paragraphs 42-45 of the main communication)

Appendix 32. Ruling 8885/2012 on case 7659/2012 of SAC

Hereby, we provide translation of Ruling 8885/2012 on case 7659/2012 of SAC (Appendix 32) taken recently by the second instance court concerning the appeal of the DPE of EIA Decision No. VA-7/2012 of RIEW Varna (annex 18 of the communication). In this case 7659/2012, the second instance court upheld the DPE of EIA Decision No. VA-7/2012 of RIEW Varna. The court found that the DPE of the referred EIA decision is issued on basis of the last criterion under Art. 60 of APC concerning *"the protection of a particular interest of the developer"*. With regard to this, the court, without any further consideration of facts concerning the potential environmental impacts, concluded that any potential detriments to third interested parties would be backed up by the financial guarantees[1] 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 applies to the public health or to the environment the ruled irreversible monetary compensation is usually inadequate.

Appendix 33. Decision No. 181/2012 of MoEW

Hereby, we provide translation of Decision No. 181/2012 of MoEW (Appendix 33) taken recently by the Ministry of environment and waters concerning the appeal of EIA Decision No. VA-7/2012 of the RIEW Varna (annex 18 of the communication). The EIA Decision No. VA-7/2012 of RIEW Varna was repealed by decision No. 181/2012 of MoEW because of severe violations of the environmental law such as the lack of proper public consultation procedures, incomplete information in the EIA report, inadequate assessment of the environmental impacts, etc. This means that if the project had been realised on basis of the

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

DAE of that particular EIA decision, it would have caused not only assessed but also non-assessable irreversible environmental damages.

The case demonstrates that by Ruling No. 8885/2012 of SAC (Appendix 32), the court allowed the preliminary execution of the development project by failing to exercise even *prima facie* review of the facts provided by the complainants concerning the potential irreversible environmental impacts of the project while all those facts were accepted and confirmed by the MoEW in its decision No. 181/2012.

Case A4/ A public highway through "Bulgarka" Nature Park (also SCI/SPA) (ref. paragraphs 38-41 of the main communication)

Appendix 34. Ruling 10998/2012 on case 9447/2012 of SAC

Hereby, we provide translation of **Ruling 10998/2012 on case 9447/2012 of SAC** (Appendix 34 in Encl. A) taken recently by the second instance court concerning the appeal of the DPE of EIA decision No. 4-2/2012 of MoEW (Appendix 15 to the communication). In this case 9447/2012 the second instance court upheld the DPE of EIA decision No. 4-2/2012 of MoEW on basis of the argument that the development 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 and that environmental concerns are to be discussed in the main proceedings. Furthermore, the court argues that the DAE of the EIA decision will not allow the investor to start with the construction activities before the resolution of the dispute in the court because the administrative procedure concerning the issuance of the building permit would take a lot of time. Instead of reviewing the facts for potential irreversible environmental impacts of the project development, the court proposed that the complainants should require injunctive relief under art. 166 of APC (injunctive relief request based on new facts) after and if such impacts are being caused by the developer.

Appendix 35. Ruling of 10.06.2013 on case 6941/2012 of SAC

Hereby, we provide translation of Ruling of 10.06.2013 on case 6941/2012 of SAC (Appendix 35 in Encl. A) taken recently by the first instance court during the main proceedings concerning the appeal of the EIA decision No. 4-2/2012 of MoEW (Appendix 15 of the communication). With that ruling the court rejects a request of the plaintiffs for injunctive relief under art. 166 of APC, submitted on basis of newly occurred facts that the developer started with the construction activities before the resolution of the dispute by the court.

On the one hand, this ruling is one of the few examples when the court do takes into account the arguments for potential environmental impacts resulting from the on-going construction activities. It is the development of the jurisprudence we expect with regard to the court review

of DAE of EIA decisions in compliance with art. 9 (4) of the Aarhus Convention - review on the merits, gathering facts, collecting evidence for potential and future damages, etc.

On the other hand, the review on the merits in this ruling has been made *pro forma*, i. e. for the sake of appearance only. The request of the plaintiffs was grounded on the conclusions of independent expert report, which confirmed the allegations of the plaintiff that the EIA report had not assessed the impact of the development project on natural habitats situated in the vicinity of the road, incl. within the construction perimeter. Those natural habitats were not even mentioned in the EIA report. Nevertheless, by the abovementioned Ruling of 10.06.2013 (Appendix 35) the court took for granted the opinion of another expert appointed by the court that the construction activates would not cause negative impacts on those habitats without having any scientific facts or analysis to ground its position and rejected the request for injunctive relief. Thus, the expert as well as the court misused their competence since the environmental impact of the development project on any habitat or species shall be subject to porper EIA report. Such a scientific analysis could be made in addition to the existing EIA or as a new EIA.

With regard to the above, we can conclude that Case A4/ A public highway through "Bulgarka" Nature Park is in the same time a positive and negative example of compliance with the Aarhus Convention:

- From procedural point of view, this is one of few cases, when the court reviews the merits and examines the potential irreversible impact on the environment.

- In substance, the current examination of the court is not scientifically based and cannot solve for the deficiencies in the appealed EIA.

II. Statistical analysis of the latest case-law provided in Enclosure B.)

In addition, the communicant provides a statistical analysis and commentary of the latest jurisprudence from the last two years concerning complaints against DAEs of SEA/EIA/AA decisions by environmental authorities. All relevant acts are provided as links in the statistical table in Enclosure B.). The DAEs referred in the table could be found on the internet sites of the MoEW, the RIEW Varna and the RIEW Haskovo, concerning mainly the authorisation of wind turbine projects (see case A5/, par. 42-45 in the main communication), urban development plans and industrial projects (see cases A2-A4/, par. 25-41 in the main communication). In general, the DAEs are issued in connection with either the protection of a particularly important interest of the developer or the protection of the public interest to develop the regional economy and improve the employment. The provisions of DAE were 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. In most cases the DAE were challenged before the court.

In the cases **M2, M3, M7, V1, V4, V8, V10, V11, V12, V13, H1** in the table the court made no real balance of interests and did not consider whether the preliminary execution of the

EIA/SEA decision for the relevant project/plan could have an irreversible impact on the environment. As a result thereof, the court upheld the DPEs. Later, in cases **V10, V11 and V13** the relevant EIA decisions were cancelled by the MoEW arguing that the environmental impact had not been properly assessed and that the EIA decision of RIEW Varna cannot guarantee that the relevant projects would not cause any adverse environmental impacts if realised. We have no information if in those case the developers of the referred wind turbine projects had started with the construction activities before the resolution of the dispute in the court (in the case in the MoEW), however, if the developer had started with the construction activities he could have caused not properly assessed irreversible damages to the environment.

In the cases **V2, V6** and **V15** the court also made no real balance of interests and did not consider whether the preliminary execution of the EIA/SEA decision for the relevant project/plan could have an irreversible impact on the environment. However, the court cancelled the DPE because the court found that the developer had not paid a financial guarantee required in the cases that the DPE is issued for the protection of private developers interests as required by Art. 60 of APC.

Only in case **V14** the court made real balance of interests and did consider whether the preliminary execution of the EIA decision for the relevant wind turbine project could have an irreversible impact on the environment (similarly to case 14251/2010 of SAC - Annex 8 of the communication). The court found that the preliminary execution of the project would lead to the irreversible destruction of natural habitats and the killing of migrating birds. On the basis of this analysis the court decided to repeal the DPE.

Yours faithfully,

Alexander Dountchev,

On behalf of the Balkani Wildlife Society

Date: 20.08.2013