ANNEX I

STATEMENTS

Subject:

Communication concerning compliance by Bulgaria with the Convention in connection with the award of injunctive relief during the review of environmental permits (ref. ACCC/C/2012/76)

According to Art. 9, para. 4 of the Aarhus Convention, **the review procedures** before a court of law and/or another independent and impartial body established by law to challenge acts and omissions by private persons and public authorities which contravene provisions of the national legislation related to the environment, **should „provide adequate and effective remedies, including injunctive relief as appropriate".**

Injunctive relief for halting the enforcement of decisions for Environmental Impact Assessment (EIA), Strategic Environmental Assessment of Plans and Programmes (SEA) and Assessment of Compatibility with the Special Protected Zones of Natura 2000 (AC), since they are administrative acts, **may be imposed by the rules of Administrative Procedure Code (APC)**. According to Art. 90 and Art. 166 of APC, **administrative acts shall not be performed, before the expiration of the terms of their challenge, and if complaint or protest is submitted – before the settling the dispute by the appropriate authority. So, the challenge stops the execution of administrative acts. These provisions of APC, in fact, serve as an automatic injunctive relief.**

Despite this, however, Art. 60, para. 1 of **APC allows "the administrative act to include an order/direction/disposition for preliminary enforcement**, when necessary, with the purpose of ensuring the life and health of citizens, protecting state or public interests of vital importance, in danger that it can be prevented or seriously hampered the performance of the act, or if by the delay of execution may follow significant or difficult to repair damage, or at the request of either of the parties – for protecting its particularly important interest. In the latter case the administrative authority requires a guarantee".

The included in these provisions prerequisites are indicated alternative, and the presence of any of the exhaustively listed in Art. 60, para. 1 of the APC **assumptions should be justified on factual and legal grounds with evidence**, within the issuance of the order, in order **to be provided an opportunity for stakeholders to realize their rights of legal defense in case of an appeal against the order**, under Art. 60, para. 4 of APC.

Lack of reasoning and evidence for the presence of some of particular enumerated in Art. 60, para. 1 of APC **prerequisites makes the order of the administrative authority for allowing preliminary enforcement of the act unlawful.** The administrative authority **is obliged to explain which of the aforementioned hypotheses is available** in this case and to indicate what circumstances necessitates the admission of preliminary enforcement of the act.

Court shall verify the legality of the order of the administrative authority **in accordance with the merits** mentioned in Art. 60, para. 1 of the APC, **and may repeal it, which leads to the suspension of the administrative act**, or reject the challenge, confirming the consequences of preliminary enforcement. Then, when the authority has issued an order for

preliminary enforcement of the administrative act and it has not been appealed or has been appealed, but the court has rejected the challenge, there is entered into force order of the administrative authority.

According to the communicant, the admission of preliminary enforcement, by the administrative authority, **is often motivated only with "protection of relatively considerable investors interest" and the courts take decisions in support of that arguments of the authority, without taking into account whether and to what extent the projects and plans, approved by the contested decisions on EIA/SEA/AC, will have irreversible impacts on the environment.**

This statement is contradicted by the following example from the national case-law: with Decision № 4891 from 04.04.2012 of the Supreme Administrative Court (SAC) under administrative case № 3904/2012 (fifth section) the court left into force Decision № 813 from 16.12.2012 of the Administrative Court Varna under administrative case № 592/2012 by which was canceled the order of Regional Inspectorate on Environment and Water (RIEW) Varna for admission of preliminary enforcement of its EIA decision № BA-4 from 07.02.2012. In this case, the court, having found that the administrative authority has justified the admission of preliminary enforcement in protecting considerable interests of "Enertrag Metodievo" Ltd., has accepted that, in compliance with Art. 60, para. 1 of APC, the authority is obliged to require appropriate guarantee. **The court considered that because no guarantee was required by the administrative authority, the same has issued the act in violation of the legal provisions.** In spite of the fact that in merits of the act is included protection of public interests, due to the lack of evidence to justify the presence of such interests, the court reasonably found that the leading motive in this case is the protection of the interests of the investor. It could be concluded that the court not only verifies/examines whether the prerequisites in accordance with Art. 60, para. 1 of APC are available and the relevant evidence for that is provided, but also, in this case when the request for allowing of preliminary enforcement is in interest of the investor, the court verifies whether appropriate guarantee is applied.

The analysis of the legislation shows that **the court can pronounce on the preliminary enforcement of the administrative act, only if it is a result of the disposition of the administrative authority or in stage of legal proceedings**, under Art. 167, para. 1 of APC, **and preliminary enforcement could be allowed by the court at the request of the parties under the circumstances under it could be allowed by the administrative authority,** namely under Art. 60, para. 1 of APC.

In Art. 60, para. 1 of APC are regulated exhaustively the cases in which it is permissible to allow preliminary enforcement of the administrative act. When the request comes from a party, it has the burden to prove the existence of the relevant merit (that has an interest in preliminary enforcement and that this interest is particularly considerable). With the presence of other possible merits the authority shall keep up *ex officio*, and if necessary, may take evidence in this regard.

In APC is not explicitly stated what should be the size and the type of guarantee and how to establish it. Answer to this question is given in Art. 180 and Art. 181 of Law on Obligations and Contracts: “Where the law decrees providing a guarantee before the court, the means may be deposit or government bonds or mortgage. The value of bonds and real estate is estimated at 20 % below its market value. The pledge is established by depositing cash or bonds in a

bank. Mortgage is established by entry of a notarized consent of the owner of the property of real estate. Pledged cash and bonds are returned to the pledgor and the mortgage is deleted by an order of the court before which the guarantee is provided."

We do not believe there are grounds for the communicant's allegations **that the legislation and case law do not require the competent authority to assess/examine whether the project/plan/programme**, for which has been issued a decision on EIA/SEA/AC, **will have irreversible effects on the environment.**

The issuance of decisions on EIA/SEA/AC is at the final stage of a procedure, requiring, both detailed information for the project/plan/programme, and also **comprehensive studies on the environmental impacts**. Such information is a part of the report for EIA/SEA/AC, and the competent authority shall take into account all environmental considerations indicated there in its decision.

Authorities responsible for approval and enforcement of the project/plan/programme, shall comply with the EIA/SEA/AC decision and with the stipulated there terms/conditions, measures and restrictions, which ensures that it will be taken into account circumstances that may lead to irreversible environmental impacts, incl. in case where preliminary enforcement is allowed.

In this sense, we do not find that, somehow, the issues regarding the possible environmental impacts have been left without consideration and analysis by the competent authority. Also, the procedure itself includes public participation, which is an important precaution measure against the arising of even minimal risk of environmental damages, including such related with quality of life and public health in a region.

Moreover, **the ongoing EIA/SEA/AC procedures could be terminated at any stage**, if the relevant investment proposal, plan or programme is found inadmissible. It is possible to be used expertise in accordance with Art. 83 of Environmental Protection Act (EPA).

The communicant claims, also, that Art. 60 of APC is interpreted by the courts in a way that allows the examine the order for preliminary enforcement only in terms of its formal compliance with the merits mentioned in Art. 60, without an assessment of current and actual information.

We found this statement unacceptable.

Art. 60 of APC regulates possibility in the administrative act itself, even with the issuance, to be included order for its preliminary enforcement (pre-enforcement), as specified in para. 1 hypothesis/speculations. Pre-enforcement may be allowed also after issuance of the act. **Lack of strictly requirement for particular, separate motivation of pre-enforcement, only at first sight relieves the authority to do it. In fact, however, the admission of pre-enforcement always should be motivated in order to be possible the verification of its necessity and legality, in case of challenge before the higher administrative authority and the court.**

The order for pre-enforcement is subject to separate appeal, different from the appeal of the administrative act itself. Within three days of its announcement, the order may be appealed before the court, regardless of whether the act itself was challenged – Art. 60, para.

4 of APC. And even it was not explicitly provided, it would be clear that this is so - the period for challenging the act is much longer than the three days term for appealing the admitted pre-enforcement. **There is no obstacle in this period to be appealed the order, and later to be submitted a complaint against the act.** Specificity of the proceedings before the court is that the appeal against the pre-enforcement is considered in a closed session, and copies thereof shall not be delivered to the parties. The appeal does not stop the execution, unless the court decides otherwise - Art. 60, para. 5 of APC.

Omitting the three-day period for appeal under Art. 60, para. 4 of APC extinguishes/lapses the right of appeal. Within the period for challenging the administrative act, the pre-enforcement order may no longer be appealed separately. May be requested a suspension of execution of the act by the court, as part of an already submitted complaint or protest against it and then, in all cases we have entered into force order for pre-enforcement.

Different options are provided for in Art. 166 of APC. First, it is proclaimed the suspensive effect in legal proceedings - challenging suspends the execution of the administrative act (Art. 166, para. 1 APC). At each stage of the case, until the entry into force of the decision, the court, on the request of the appellant, may suspend the pre-enforcement, allowed by an entered into force order, if it could do significant or difficult to repair harm/damage to the appellant (Art. 166, para. 2 APC). This option may be used only if the pre-enforcement order has not been appealed under Art. 60, para. 4 of APC.

According to national case-law (Decision № 5/2009 of SAC), the law provided for a pre-enforcement of an act, aims to protect important state or public interests or to avoid other consequences, in the sense of scope and field of applying of the criteria listed in the regulation of Art. 60 of APC, but **if this pre-enforcement, for each case, may cause serious damages, in general sense of Art. 120 of the Constitution of the Republic of Bulgaria, the court may review and hear the appeal against the pre-enforcement.**

The opposite view would be contrary to the purpose of the adopted **general principle of EU legislation**, transposed and proclaimed in Art. 6 of APC - **the proportionality principle** expressed in that the administrative act and its enforcement shall not affect the rights or legitimate interests in a greater extent, than most necessary for the purpose for which the act is issued.

At the same time, **there is another provision of APC**, under Art. 90, para. 1, for the establishment of injunctive relief on administrative acts, for the period before the expiration of terms of its litigation, and in the case of a submitted complaint or protest – before the resolving the litigation/dispute by the appropriate authority. An exception to this rule, is contained in Art. 90, para. 2 of APC under which the rule does not apply when all interested parties request in writing pre-enforcement of the act, or when in accordance with a law or by an order under Art. 60 of APC has been allowed pre-enforcement of the act.

The range of interested parties/stakeholders may include the public concerned, incl. NGOs, which ensures a balance of interests in the decisions of the courts. Furthermore, **the higher administrative authority may suspend admitted by order pre-enforcement**, at the request of the appellant, if it is in the public interest or would cause irreparable harm to the person concerned (Art. 90, para. 3 of APC). This is another opportunity to prevent the occurring of irreversible environmental impacts.

Remedies for challenging the admission of pre-enforcement of an EIA decision is comprehensively described in Decision of SAC № 10998 from 08.09.2012 (the full text of Decision № 10998 is attached to these statements), how it is clear from the following quote:

"The Court finds it necessary to point out, first, that the examination of legality of any administrative act is made on the basis of specified in it factual and legal merits. In the order appealed, the administrative authority has not presented factual merits for the admitted pre-enforcement. Such merits – certainly with detailed argumentation, are exposed by the authority in presented within the case statements, with regard to the appeal of the private complainant. It is true that the court, generally, provides in its practice the possibility motives/pleas to be presented additionally, i.e. subsequent exposing of pleas not always and not automatically is a violation of the requirement for the form, leading to the repeal of the act. But timely exposing of motives is a guarantee of the rights of parties in administrative proceedings. In this case, evidenced by the complaint, the right for remedies of the private appellant is not violated to such an extent that the infringement/breach should be considered as crucial, and in result, on the basis only of this plea, the act to be repealed, but the breach should be pointed out, with regard to the overall obligation of the administrative authority to exercise its prerogatives in a reasonable manner and in good faith, as required by Art. 6, para. 1 of APC.

Assessing whether an interest is particularly important, administrative authority shall make in the framework of public relations that it has the competence to regulate, and also by weighting the degree of importance of state and public interest. It is clear from the reasoning of the administrative authority that the fact, which determines the appraisal of the authority for the particular importance of state and public interest, is the linkage between the possibility for enforcement of the project and the terms for providing the necessary grant, which are limited.

What does it mean, actually, delaying the enforcement of the mandatory instructions, given by the EIA decision № 4-2/2012 until its entry into force, for the construction of the object? It means that as long as the decision № 4-2/2012 had not become final fixed administrative act, may not be performed any actions under the project including and the design phase also. In view of the existing under Art. 99, para. 6 of EPA possibility the decision for environmental assessment to be challenged before a court and taking into account the average duration of a two-instance legal proceedings, there are extremely high probability until the deadline for possible funding to do not have final administrative act. This means irreversibly to be lost the ability to be implemented the object and, therefore, to be realized state and public interest.

In contrast, it is not established, and the private complainant does not refer to specific arguments and facts, just hypothetically affirms that the pre-enforcement, if it cause destruction of priority for EU protected species and habitats, which the state has been able to avoid by waiting for the entry into force of the impact assessment decision, would led to EU infringement procedure against the country.

The assessment of the possible real impact of the admitted pre-enforcement on realizing state and public interest and on the protected zone, requires to be taken into consideration the statutory procedure for the construction of objects, like this one under current procedure, and in this view, the opportunities that the investor has at different stages of implementation. Environmental impact assessment ensures non-significant negative impact on the environment and biodiversity as a result of implementation of the investment project. To be implemented

the investment project, must be completed the phases of design, co-ordination/consultation, approval, change the land use, expropriation of the affected properties. After that, only, it is possible the issuance of a building permit and to start the real construction. Each stage is a prerequisite condition for the next.

Admitted pre-enforcement of the EIA decision does not automatically mean immediate real construction activities at the site. It means that at the beginning of the process of the project implementation – at the design phase, there are set requirements for protection of environment. I.e., in this case the design will be done in compliance with the decision, which provides 14 requirements for the design phase, as they will be binding for the project. Therefore, and considering the statutory period of the co-ordination/consultation with authorities, as well as the period for approval of the project, which is *notorus* (also a well) that takes a significant period of time, the court considers that at this stage there is no evidence, that rises a reasonable suspicion/doubt for irreversible impacts on the protected zone which would be caused by the admitted pre-enforcement. Furthermore, in the time frames of judicial proceedings for challenging the EIA decision *per se*, throughout this whole time period until the entering into force of the EIA decision № 4-2/2012 , the private complainant have at its disposal an effective remedy – the opportunity to claim/ask the court to stop the admitted pre-enforcement, pursuant to Art. 166, para. 2 of APC. At any time, prior to the entry into force of the EIA decision, when the private complainant considers that there is a risk for the protected zone, it may ask the court to decree suspension of pre-enforcement.

Concerning the applicant's claim that there are undiscussed alternatives, if during the examination of the legality of the EIA decision it is found unlawful, the only result will be the repeal of the environmental assessment, preparation of new one and as a result, the development of a new project that must be complied with the provisions of the new assessment. No direct effect on protected areas will be caused, because the investment proposal is only at the design stage.

Undoubtedly, the international treaty (the Aarhus Convention) requires national legislation to allow for adequate and effective remedies, including the imposition of appropriate injunctive reliefs. But this possibility, exactly, is provided for by national legislation, with the opportunity to challenge the pre-enforcement, as well as with the opportunity to challenge the EIA decision *per se,* and also with the opportunity to request suspension of the pre-enforcement at any time before the entry into force the impact assessment. In addition, just the assessment of the real impact of the admitted pre-enforcement on the protected areas and also the estimation of the objective possibility to be really prevented irreversible damage, with a view of the stage at which the investment proposal is and if there is insufficient protection of particular species or habitat, justifies, at this stage, the legality of admitted pre-enforcement."

The communicant considers that “national legislation should establish an objective standard for judicial appraisal/examination like this which is used in the jurisprudence of the EU, regarding the application of interim measures, such as pre-enforcement.”

Such a standard, actually, is established and applied by the Court of Justice of the European Union in several cases (Case C-445/00, Case C-404/04, Case C-7/04, Case C-377/98, Case C-110/97, etc.). It could be formulated as follows:

„It is settled 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.
The conditions thus imposed are cumulative, so that an application for interim measures must be dismissed if any one of them is absent.
In the context of that overall examination, the Court hearing the application enjoys a broad discretion and is free to determine, having regard to the particular circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a preestablished scheme of analysis by reference to which the need to order interim measures must be assessed."

As can be seen, the Court of Justice of the European Union takes decision to admit pre-enforcement, on the basis of a balance of interests, that should be justified *prima facie* and also by taking into account the particular circumstances of each case, for which does not apply an appointed/fixed scheme.

In this regard, we find that consideration/examination of the public interest in the prevention of possible irreversible effects on the environment, in case of allowing pre-enforcement of EIA/SEA/AC decision, 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: description, analysis and evaluation of the potential significant effects on the population and environment; measures envisaged to prevent, reduce or where possible suspend any significant adverse environmental impacts; views and opinions of the public concerned, the competent authorities on EIA and other specialized bodies and interested countries in a transboundary context, as a result of the consultations. **These should be the merits/reasons of the competent authority in determining the motives for a decision on EIA/SEA/AC and the conditions for its enforcement, including the admission of pre-enforcement. It is not possible, in any other way and using different criteria, to perform an independent and objective appraisal/examination of whether to admit pre-enforcement, taking into account potential irreversible effects on the environment**, **because this would mean the competent authority to take a subjective and unlawful decision, since the EIA/SEA/AC procedures should have an independent character in favor of the public interest, the interests of all stakeholders and democratic principles.**

Moreover, many of the admitted by the competent authority pre-enforcements of EIA decisions concern projects/investment proposals that are related to objects/facilities of national importance and with significant national interest. **In this sense, if EIA decisions expose justified, that shall not be expected significant negative impacts on the environment under certain conditions and measures, we find unreasonably environmental authority to does not comply with and question an act of superior authority (e.g. the Council of Ministers), which, based on the policy in a particular sector/area has determined that the project/investment proposal is of national importance.**

Procedures of EIA/SEA/AC in Bulgaria comply with all criteria and requirements of EU legislation, including the criteria on which to be assessed the need for EIA/SEA/AC and the

requirements for scope, content and quality of the EIA/SEA/AC report. **Thus, decisions on EIA/SEA/AC, issued by the competent authority are motivated on the basis of all available documentation related to the project/plan/programme and in accordance with regulated statutory criteria, norms and standards.**

The principle introduced in Bulgaria is the responsibility to lies with the assignor of the project/investment proposal – i.e. "Polluter pays" principle. Thus, the proposed in the Communication compromise – admission of pre-enforcement only if the competent authority "can prove and/or ensure that the permitted activity will not have irreversible effects on the environment, regardless of its conclusions about the significance of the impact of this activity on the environment" is unacceptable. **Environmental authority pronounces a motivated act - EIA/EA/AC decision, and this authority has further obligations with regard to inspect the activity allowed, but is not responsible for its implementing actually.**

In this regard, we consider that we should always distinguish between the legality of an administrative act such as EIA/EA/AC decision, the legality of the admission of its pre-enforcement and in the end – the administrative/criminal liability of any body/person which do not comply with conditions, measures and limits in permits, decisions or statements issued by the competent environmental authorities. All these conditions are irrelevant in its nature and have to be proven or challenged in separate proceedings.

It is possible, for example, an administrative act to be issued by the competent authority in the statutory form, in accordance with the procedural rules, with proper application of the substantive provisions and in keeping with the law, but the conditions of its enforcement to be violated by other bodies or natural or legal persons, for which they should bear criminal liability.

Based on the above, could be drawn the following conclusions:

1. **It is not reasonable to be claimed that the competent authority includes condition for pre-enforcement in its issued EIA/SEA/AC decision without adequate argumentation - on the contrary, the authority takes into account the results of an independent EIA/SEA/AC procedure (enabling participation of the public concerned),** which are directly reflected in the motives and conditions in the decision, and put them together with the public and state interest, as well as with the interests of all stakeholders, on condition that appropriate guarantees are available. Other mechanism for argumentation, particularly in terms of examination of the possibility of the occurrence of irreversible effects on the environment, that provides the utmost objectivity and wide public participation, is not possible and appropriate.

2. **National legislation provides the necessary remedies in case of admission of pre-enforcement, since it ensures the opportunity:**

    a. **to be challenged the EIA/SEA/AC decision substantially**, whereat its execution is stopped, i.e. automatic injunctive relief is enforced (Art. 90, para. 1 and Art. 166, para. 1 of APC);
    b. **to be appealed the admission of pre-enforcement** of the decision within three days of its announcement, regardless whether the decision itself has been challenged (Art. 60, para. 4 of APC) in which case the injunctive relief remains into force;

c. **to be requested suspension of the pre-enforcement at any time** prior to the entry into force of the decision, if it could cause to the appellant significant or difficult to repair damage, in the case when the option under item b. is not used (Art. 166, par. 2 APC). Court shall issue a decision immediately, which could also be challenged with a private complaint within 7 days of its announcement.

3. The above-mentioned court decisions clearly indicate that **the court examines whether the prerequisites** under Art. 60, para. 1 of APC are available **and the necessary evidence *prima facie* of their existence is adduced**, and also **weights the importance and balance of interests**, fully in compliance with the **standard of Court of Justice of the European Union** with regard to interim measures, incl. pre-enforcement. Moreover, all of the requirements according to this standard are fully reflected in the provisions of Art. 60, para. 1 of APC.
4. **Supposing the hypothesis that an EIA/SEA/AC decision is issued without taking into account all possible negative environmental effects and/or the planned conditions and measures are insufficient** to ensure full protection and preservation of the environment, in such case **the pre-enforcement can not lead to immediate (at least not within the period of its appeal) irreversible environmental impacts**, because the legal effect of the decision occurs, first, at the stages of spacial planning (SEA and AC) and designing of the investment project (EIA). Admission of pre-enforcement of an EIA decision, means, essentially, that it is not allowed to start the project/investment proposal, but that may continue only the following required procedures for the issuance of the final act – a permit, which gives the right to begin the carrying out of the project. On the basis of already approved spatial plan or amendment thereof and investment project, for which the EIA/SEA/AC decision is an integral part of their factual composition, could be proceed, at next stage, to the procedure of issuing a construction permit (it is issued within 7 days after the receipt of the written application, when there is an approved investment project, pursuant to Art. 148, para. 4 of Spatial Planning Act, but also is possible combined procedure – construction permit may be issued simultaneously with the approval of the investment project) and only after the issuance of the permit, may begin the construction activities at the site, that could potentially cause irreversible harm to the environment. According to Art. 144, para. 3 of Spatial Planing Act investment projects are approved (or rejected) within 14 days or within a month after their submission (depending on the way of performance of the required assessment of consistency of the project with the provisions of the detailed spatial plan, rules and regulations for spatial planning, construction specifications and requirements, etc.). Meanwhile, the time for appealing the pre- enforcement of an EIA/SEA/AC decision is only three days after the announcement. The complaint shall be considered immediately by the court in a closed session. It generally does not stop the admitted pre-enforcement, but the court can stop it till the final solving of the complaint.

These conclusions allow us to affirm that Bulgaria fully complies with Art. 9, para. 4 of the Aarhus Convention, with respect to injunctive relief in procedures for review (appeal) decisions on EIA/SEA/AC, because national legislation provides adequate and effective remedies as regards challenging the admission of pre-enforcement as a prerequisite for the repeal of the relief. The analysis of the case-law in Bulgaria shows that the major challenge facing the judicial authorities in connection with allowing of interim measures is the achieving a balance of interests – public, state and private. In order, however, efficiently and fully to be taken into account the interest of Bulgarian society in the protection, preservation and improvement of the environment in favor of

good public health and quality of life, is necessary in legal proceedings for challenging of interim measures, in each case, the appellants/complainants also to give their contribution by presenting well-reasoned arguments that could be justified and proved *prima facie*. These arguments should be related only and strictly to the lawfulness and legality of issuance of the administrative act by which the interim measure is allowed, incl. pre-enforcement, and not to the potential neglecting or infringement/breach the conditions, laid down in the act, by the competent authorities, inspection bodies, economic operators, etc.

Enclosure: Decision of Supreme Administrative Court of Republic of Bulgaria № 10998 from 08.09.2012 on admistrative case № 9447/2012.