REPUBLIC OF BULGARIA
MINISTRY OF ENVIRONMENT AND WATER

Ref.: Communication to the Aarhus Convention Compliance Committee 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)

Sofia, October 2015

Dear Mrs. Marshall,

Following your letter from 4 September 2015 relevant to the Communication to the Aarhus Convention Compliance Committee 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) and according to paragraph 34 of the annex to decision I/7 of the Meeting of the Parties, we present to your attention the following statement, concerning the draft findings of the Committee regarding Communication ACCC/C/2012/76:

Some cases from the latest courts' practice (Ruling № 8380/07.07.2015 of Supreme Administrative Court (SAC) on administrative case № 7704/2015 and Ruling № 8539/23.06.2014 of SAC on administrative case № 6267/2014) **confirm our conclusion** in the provided to the Committee on 22.08.2013 information and subsequently noted in par. 75 of the draft findings of the Committee, namely **that there is a trend** the courts in Bulgaria **to reject the appeals against the preliminary enforcement** of decisions on environmental impact assessment of investment proposals (EIA)/strategic environmental assessment of plans and programmes (SEA) on the grounds of the **prevailing public and state interest** in the implementation of the investment proposals or plans and programmes, in the presence of the prerequisites under art. 60, para. 1 of the Administrative Procedure Code (APC).

It means that the courts take decisions in the **presence of provided by the competent authority motives in defense of important public and state interests**, as well as, the **results of an independent and objective EIA/SEA procedure**, in the course of which, have been taken into consideration the received within this procedure **views, comments and suggestions of the members of the public.** The impact on the environment is assessed within the administrative proceedings for issuance of EIA/SEA decisions or within the judicial proceedings for their appeal.

In this regard, it is important to note that, in order to **clarify the risk assessment of environmental damage, often within judicial review of EIA/SEA decisions is appointed by the court an expert witness at the request of a party or ex officio, when special knowledge is required, which gives its own assessment of the risk of threatening/harm to the environment**, despite the conclusions in the contested by an appeal EIA/SEA decision. Pursuant to the Judiciary System Act, all state authorities, legal entities and citizens having materials required for an expert assessment shall be held to provide access thereof to the expert

witness concerned in accordance with the level of access to classified information of the expert witness, as well as to provide the assistance required for the attainment of the expert assessment objectives. An expert witness shall be appointed by the body which has assigned an expert assessment from the respective list of specialists approved to serve as expert witnesses. Lists of specialists approved to become expert witnesses shall be drawn up in the judicial area of each regional and administrative court as well as for the specialised criminal court.

Given the above, **we consider unfounded the allegation that courts fail to comply with the provisions of art. 7 and art. 60, para. 1 of the APC.** When taking their decisions, they **exercise evaluation of the prerequisites under art. 60, para. 1 of the APC, all available facts and arguments relevant to the case,** as well as the **identified public and private interests**, based on a **comparison of the benefits and harms of the preliminary enforcement.** Decisions are taken on the basis, **first – the arguments of the competent authority** in support of the balance of the public interests, second – **the conditions, measures and restrictions set out in the EIA/SEA decisions**, complying with the **proposals of members of the public**, expressed during the public consultations, and in the proceedings for judicial review of EIA/SEA decisions is taken into account also **the independent expertise of the appointed by the courts expert witnesses**. The Court is not obliged to accept the expert witness's conclusions and consider it together with the other evidence on the case.

Further, we present **examples of case law:**

With the said **Ruling № 8380/07.07.2015 of the SAC on adm. case № 7704/2015** is rejected an appeal against the decision of the Minister of Environment and Water № 56/25.03.2015. With the decision has been allowed **preliminary enforcement of SEA decision № 4/2015** by which is accepted to **not carry out an environmental assessment of the detailed development plan for a fishing port** in the territory of the district "Kraimorie", city of Burgas, Burgas municipality, since it is found that **its implementation is not likely to have a significant negative impact on the environment and human health.** In taking its decision, **the Court has considered the public interests** related to the timely utilization of agreed grants from European Union funds for development of fishing activities in the municipality and the preservation of the traditional fishery craft, as well as the removal of illegal constructions on the outfall of the river Otmanliyska and building facilities in their place in order to protect the population from floods. **In its reasoning the Court states:**
"**The administrative authority has indicated in its decision specific facts and circumstances, which justify its conclusion** that it should be permitted preliminary enforcement of the act, pursuant to art. 60, para. 1 of APC. Therefore, **to stop the preliminary enforcement, in this case, must be proved the lack of the prerequisites**, which refers the provision. It is true that, as opposed to the hypotheses of art. 166, para. 2 of APC, under dispositions of art. 60, para. 1 of APC the burden of proof for establishing any of the conditions laid down in the provision is to the authority, not to the appellant. **The last, however, do not disprove with nothing the reasoning of the issuer of the act and its conclusion** that the preliminary enforcement of SEA decision № 4/2015 is necessary to ensure the life and health of citizens and the protection of important public interests. **No evidence is engaged to the opposite assertion**, namely that there is no threat to frustrate or seriously hamper the implementation of this administrative act after its entry into force, and there is no probability of significant damages from failure to execute it before that, and on the contrary, such are possible as a result of the preliminary enforcement."

Following a similar approach, with **Ruling № 8539/23.06.2014 of SAC on adm. case № 6267/2014** was left without consideration an appeal against an order, by which is granted preliminary enforcement of decision № 1-1/2014 of the Minister of Environment and Water for approving the implementation of **the investment project "Sea natural gas pipeline South**

Stream - Bulgarian section." The Court has taken into account that the purpose of the preliminary enforcement of the contested decision of the Minister of Environment and Water is **the protection of state and public interests of particular importance**, related to: the energy policy of Bulgaria, as well as of some of the Member States of the European Union; the national security; promoting economic stability of the country; the implementation of the agreement between Bulgaria and Russia on cooperation in construction of a pipeline for transit of natural gas through the territory of Bulgaria and others. It is noted by the Court that:
"**The challenged order has been issued in the presence of the substantive prerequisites** of the provision of art. 60, para. 1 of APC – to ensure protection of the interests of the state, as well as, with regard to the public importance of the project. **In comparison between the damages exposed by the private complainant** - "First Investment Bank", which **hypothetically may arise, without specifying in detail the danger of their occurrence**, in implementing the decision № 1-1/2014 and in not performance of this administrative act, the court found that **the delay of execution may occurs significant damage. Evidence by the appellant in the opposite direction was not engaged. In his burden is to justify the need to stop the admitted preliminary enforcement, by motivating the lack of grounds and prove that the same is not necessary to protect state and public interests of particular importance, or that will occur significant or difficult to recover damages."**

Based on the foregoing, **we consider that the main and the most important precondition in order to be efficiently and fully 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 within the legal proceedings for challenging of interim measures, is, in each case, the appellants/complainants to present well-reasoned arguments in support of their claims, accompanied by appropriate justification and evidence *prima facie*. This will make possible the courts in Bulgaria**, instead of "rely on the conclusions of the contested EIA/SEA decision", to perform "their **own assessment of the risk of environmental damage in the light of all the facts and arguments** significant to the case taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm" (para. 82 of the draft findings of the Committee), **beyond the regular practice of using the expertise of court-appointed expert witnesses.**

With respect to **the opinion, expressed by the Committee in para. 66 of its draft findings**, we consider that **the Committee did not take into account in its entirety our statement in page 7 of the information, sent by Bulgaria in March 2013.** There we point out that **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, **but only given that "EIA decisions expose justified, that shall not be expected significant negative impacts on the environment under certain conditions and measures".**

With a view to more clarity and unified expression, **we propose the following technical amendments to the text of the draft findings:**

1. Because in para. 82, which contains the main conclusions of the Committee, are referred the courts, in particular, and in para. 83, which sets out the recommendations, deduced from the conclusions, instead courts is used term with a broader meaning - "review bodies", with the aim to align the text, in para. 83 "review bodies" to be replaced with "courts".
2. In para. 82, (b) the phrase "the courts' decisions" to be replaced with "the courts in their decisions".

In conclusion, we express our willingness to ensure fruitful cooperation with the Committee concerning Communication ACCC/C/2012/76. In this regard, we would be very grateful and would highly appreciate provision by the Committee of practical guidance on the criteria, principles and approaches that courts in Bulgaria should apply in making its own assessment of the risk of damage to the environment and balancing of interests.

Yours sincerely,

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