



TO

Mrs Fiona Marshall
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

Re: Decision V/9d on Convention compliance by Bulgaria referring to communication ACCC/C/2010/58

Dear Mrs Marshall,

We would like to provide you with our analysis and comments on the progress report submitted by Bulgaria in implementing the recommendations of the Committee on communication ACCC/C/2011/58.

On the first place, we regret that the Party concerned has not undertaken any legislative amendments or other measures to meet the requirements of the Convention concerning the access to justice with respect to spatial plans, as well as construction and exploitation permits, which contravene the environmental legislation. The lack of legislative measures, however, lead to an absolutely contradictory court practice concerning the interpretation of article 9, paragraphs 2 and 3, of the Convention. As a result most of the recent court decisions reflect the position of the government that implementing the recommendations of the Committee is not required for its full compliance with article 9, paragraphs 2 and 3.

Hereby, we provide brief analysis of the recent case law of the Bulgarian courts which reveals the need for due legislative measures and clear interpretation of the Committee recommendations on the implementation of the requirements of the Convention with respect to the spatial planning procedures under the Spatial Development Act. The case-law provided clearly demonstrates that the Spatial Development Act cannot guarantee (as argued by the Member state) that the access to justice provisions in the Environmental Protection Act cannot guarantee that the administrative acts issued under the Spatial Development Act are adopted in full compliance with the environmental legislation.

Balkani Wildlife Society

Reg 5150/1992 in SCC, BULSTAT 831467860
Address: 8, Dragan Tsankov Blvd., 1164 Sofia
Tel/Fax: +359 2 9631470, e-mail: office@balkani.org
<http://www.balkani.org>

1. Case-law in compliance with the Convention

Three final court decisions in the period 2012-2014 reflect the findings and recommendations of the Committee on communication ACCC/C/2011/58.

a/ Final ruling No. 11933/28.09.2012 on case 10976/2012 of SAC (att. 1)

In case 10976/2012 the court argued that the prohibition on access to justice under article 215 (6) of SDA contradicts to article 9, paragraph 2 (1) of the Convention and thus this prohibition should not be applied to all decisions, acts or omissions on activities under p. 20 of annex I of the Convention, particularly to plans (e.g. the General spatial plan of Tsarevo Municipality) authorized before the obligatory SEA statements were issued.

b/ Final ruling No. 5108/11.04.2013 on case 2690/2013 of SAC (att. 2)

In case 2690/2013 the court found that due to the lack of legally established review procedure for the SEA statement of a spatial plan, the general spatial plan of Tsarevo Municipality should be subject to a review procedure in compliance with article 9, paragraph 2 of the Convention, particularly as long as the plan is adopted without the obligatory SEA statement.

c/ Final decision No. 14549/20.11.2012 on case 13311/2012 of SAC (att. 3)

In case 13311/2012 the court concluded that in line with article 6, paragraph 1, any decision, act or omission concerning activities listed in annex I to the Convention should be subject to a review procedure. In the particular case the court allowed the general public to challenge the final decision of the Council of Ministers permitting concession for a quarry (surface >25 ha) without a valid EIA¹.

2. Case-law in contradiction with the Convention

In most cases the national courts made interpretations of the Convention which clearly contradict the findings and recommendations of the Committee on communication ACCC/C/2011/58.

a/ Final decision No. 543/15.01.2014 on case 13729/2013 of SAC (att. 4)

In case 13729/2013 the court argued that article 9, paragraph 2 (1) of the Convention cannot be interpreted as derogating the prohibition on access to justice for spatial plans under article 215 (6) of the Spatial Development Act. In particular, the court denied access to a review procedure with respect to the General spatial plan of Tsarevo Municipality, although two previous final rulings of the same court allowed access to a review procedure on this plan (see p. 1 a/ and b/).

¹ The development project for the quarry which was authorized by the Council of Ministers was not identical with the project which was subject to EIA.

b/ Final ruling No. 11175/24.09.2014 on case 10851/2014 of SAC (att. 5)

In case 10851/2014 the court considered that the access to justice provisions of article 9, paragraph 2, of the Convention are applicable only with respect to EIA or SEA decisions even though in the referred case the challenged detailed spatial plan was authorized without being subject to the obligatory SEA procedure under EPA.

c/ Final ruling No. 6851/20.05.2013 on case 3226/2013 of SAC (att. 6)

In case 3226/2013 the court assumed that the General Spatial Plan of Varna Municipality cannot be considered as any of the activities listed in annex I (incl. p.20) of the Convention, even though both the plan and its SEA are subject to public participation under the national Spatial Development Act and the Environmental Protection Act. The court interpreted that the Convention is allowing access to justice only with respect to EIA and SEA decisions rather than to the orders for the adoption of spatial plans.

d/ Final ruling No. 14586/04.12.2014 on case 13968/2014 of SAC (att. 7)

In case 13968/2014, as well as in cases 13777/2014 (att. 8), 14650/2014, 11464/2014, all of them concerning complaints against the construction permit for the South stream project (i.e. an Annex I activity), the court argued that "the public concerned" under Article 2, paragraph 5, of the Convention has access to justice only with respect to the EIA decision of the project under the national Environmental Protection Act, rather than on the construction permit issued under the Spatial Development Act. In the particular case, the complainants in all referred cases claimed that the construction permit for the South stream project has been issued in violation of the Environmental Protection Act.

e/ Final ruling No. 11209/24.09.2014 on case 11063/2014 of SAC (att. 9)

In case 11063/2014 the court concluded that in line with C-240/09 of ECJ the national courts are entitled to interpret whether an administrative decision, which may contradict the EU environmental legislation, can be challenged before court by ecological organizations. In this respect, the court considered that article 9, paragraph 3 of the Convention is applicable only with regard to EIA/SEA decisions, rather than the administrative orders for the adoption of the spatial plans (in the case a detailed spatial plan).

f/ Final ruling No. 9710/10.07.2014 on case 7282/2014 (att. 10)

In case 7282/2014 the court concluded that even direct neighbors are not allowed to appeal the order for adoption of a detailed spatial plan which was amended after its adoption in a way that the green areas in the plan are removed. In that particular case the direct neighbors were neither notified and consulted by the municipality for the amendment, nor the court accepted their complaint against the Spatial Plan submitted at the moment that the neighbors found the illegal amendment of the plan.

The above listed case-law clearly demonstrates that the national courts disrespect the findings and the recommendations of the Committee on communication ACCC/C/2011/58 by:

- not examining whether the challenged acts may contravene provisions of the environmental law within the meaning of article 9, paragraph 3, of the Convention (in cases of spatial plans) or whether these acts constitute permits, authorizing activities listed in annex I of the Convention within the meaning of article 6, paragraph 1 in conjunction with article 9, paragraph 2.

- denying to accept that the EIA/SEA decisions under the Environmental Protection Act and the subsequent final decisions issued according to the Spatial Development Act, form different stages of a tiered decision-making, what implies that by restricting the access to review procedures before court to challenge only the preliminary acts rather than the final acts, particularly when EIA/SEA decisions are missing or disrespected, the Party concerned fails to comply with article 9, paragraph 2 and 3, of the Convention.

With regard to the above, we consider that the State party should adopt legal measures in the Spatial Development Act which guarantee that the public concerned is provided adequate and effective procedures for challenging acts and omissions that may contravene environmental law, in particular when plans or projects are authorized by omitting the obligatory SEA or EIA procedures or when the SEA or EIA are not respected in the final decisions (e.g. the orders for adoption of spatial plans or the construction permits).

Yours faithfully,



Alexander Dountchev,

On behalf of the Balkani Wildlife Society

Date:

Attachments:

- Att. 1. Final ruling No. 11933/28.09.2012 on case 10976/2012 of SAC
- Att. 2. Final ruling No. 5108/11.04.2013 on case 2690/2013 of SAC
- Att. 3. Final decision No. 14549/20.11.2012 on case 13311/2012 of SAC
- Att. 4. Final decision No. 543/15.01.2014 on case 13729/2013 of SAC
- Att. 5. Final ruling No. 11175/24.09.2014 on case 10851/2014 of SAC
- Att. 6. Final ruling No. 6851/20.05.2013 on case 3226/2013 of SAC
- Att. 7. Final ruling No. 14586/04.12.2014 on case 13968/2014 of SAC

Att. 8. Ruling No. 13216/05.11.2014 on case 13777/2014 of SAC

Att. 9. Final ruling No. 11209/24.09.2014 on case 11063/2014 of SAC

Att. 10. Final ruling No. 9710/10.07.2014 on case 7282/2014 of SAC