



REPUBLIC OF BULGARIA
MINISTRY OF ENVIRONMENT AND WATER

Ref.: Decision V/9d on compliance by Bulgaria with its obligations under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

99-60-193
Sofia, 28 October 2015

Dear Mrs. Marshall,

In response to your letter from 20 October 2015 and pursuant to paragraph 6 of Decision V/9d of the Meeting of the Parties, concerning compliance by Bulgaria with its obligations under the Aarhus Convention, adopted by the Meeting of the Parties at its fifth session (29 June – 2 July 2014, Maastricht, The Netherlands), with regard to Communication to the Aarhus Convention Compliance Committee related to restricted access to review procedures in spatial planning in Bulgaria (Ref. ACCC/C/2011/58), I present to your attention **second report for the progress to date in implementation of the recommendations of the Compliance Committee to the Party set out in Decision V/9d:**

In pursuance of **paragraph 2, point (b) of Decision V/9d** of the Meeting of the Parties and taking into account the conclusions of the Committee in paragraph 59 of its finding and recommendations, concerning Communication ACCC/C/2011/58, **some legislative amendments were taken that secure the right of the public concerned to appeal/challenge the statements/decisions on Strategic Environmental Assessment (SEA), as an independent and separate administrative act falling within the scope of the provision of article 9, paragraph 3 of the Aarhus Convention.** By this way was overcome the legal uncertainty about whether the statement/decision on SEA, in cases where it is an element of the factual composition of the general spatial plan (GSP) or detailed spatial plan (DSP), is subject to a separate appeal or such is not allowed on the grounds that the statement/decision on SEA is an interim, mediating act which is "absorbed" into the final one, namely – the act of approval of GSP/DSP.

In particular, with the adopted **Act for Amendment of the Environmental Protection Act** (promulgated State Gazette No. 62 of 14.08.2015, effective from 14.08.2015) **a new paragraph 3 to article 88 was introduced**, which states: "The persons concerned may appeal against the statement or decision on paragraph 1 [statement/decision on SEA] according to the procedure established by the Administrative Procedure Code within fourteen days after its announcement."

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We remind that before the legislative amendment **the national legislation in the field of environment also provided completely the possibility members of the public to appeal/challenge judicially statement/decision on SEA** whose presence is absolutely essential condition for approval of the spatial plans. The statement/decision on SEA then also was subject to appeal under the Administrative Procedure Code, given that **the Environmental Protection Act and the Ordinance on conditions and procedures for SEA did not include text that prohibits the appeal and/or restricts the access of the public concerned to such.** With the new provision, however, **additional protection of the right of access to judicial and administrative review procedures is expressly provided**, where adoption of statement/decision on SEA represents a stage of the procedure of issuance of final administrative acts, including also such for approval of GSP/DSP.

We consider that it is of great importance, regarding the recommendations of the Committee concerning Communication ACCC/C/2011/58, to note the circumstance that **the spatial plans and the construction permits identify the purpose and the manner of development of the separate structural parts of the territory not only from the perspective of the considerations of environmental protection**, i.e. the authority adopting the plan/construction permit acts in terms of circumscribed powers and competence. At the same time, these considerations are a separate subject of the statements/decisions on SEA/environmental impact assessment of investment proposals (EIA) and, therefore, precisely these acts fall directly within the scope of the Convention - they directly address issues related to the environmental impact.

By this principle position are ruled the courts in Bulgaria, as evidenced by the most recent case law.

For example, in Ruling № 2345/04.05.2015 of the Administrative Court - Sofia on administrative case № 11003/2014 by which is left without consideration an appeal against Decision № 491 in Protocol № 66/24.07.2014 of Sofia Municipal Council for approving a draft amendment of street regulations, as procedurally inadmissible because of lack of legal interest of the appellant, the Court stipulates: “It is unreasonable, also, the held view that the appellants have the status of persons concerned, because the approved DSP is without compulsory environmental assessment and that they represent “public concerned” within the meaning of article 2, § 4 and § 5 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. [...] **With respect to the admissibility of complaints against DSP and their amendments, Bulgarian legislature has adopted special procedural legal rule which is applicable in this case with priority over the norms of the said Convention. The latter would have a direct effect, provided that the subject of contestation in the present case is an act of the Ministry of Environment and Water, respectively the Regional Inspectorate of Environment and Water, which is subject to an independent challenging within the procedure for approval of DSP, but not against the DSP itself. Within the proceedings for approval or amendment of DSP, the administrative act which is with crucial importance for the environment is this one issued under article 82 of the Environmental Protection Act - decision on SEA within the procedure for adoption of DSP, if such exist, which is subject to independent (separate) judicial review before the court with applicability of article 9, paragraph 2 and 3 of the Aarhus Convention with respect the range of the appellants”.**

In Ruling № 1079/30.04.2015 of the Administrative Court - Plovdiv on administrative case № 930/2015 by which is left without consideration an appeal against the amendment of the GSP - Plovdiv, approved by Decision № 375 in Protocol № 16/05.09.2007 of the Plovdiv Municipal Council, is stated: “**The ratification of the Convention [Aarhus] does not mean that its provisions should be applied so that to be acknowledged, always and under all facts and circumstances, the right to legal challenge, how it is actually claimed by the complainant. And this is because in each case the assessment is granted to the national court, which should**

analyze the facts and the relevant procedural rules and to bring administrative or judicial proceedings in accordance with the objective of article 9, paragraph 3 of the Convention and with the objective of an effective judicial remedy of the rights created by the EU legislation, in order to provide the environmental organization with the opportunity to challenge the court decision, which may contradicts the legislation of the Union [European Union] in the field of the environment (decision of the Court of Justice of the European Union from 11.03.2011 on Case C-240/09). The main determinant element in this evaluation is the type of the contested administrative act and is the same crucial in the field of environment. Within the proceedings for approval of the amendment of GSP, the administrative act which is essential for the environment is this one stipulated under article 82 of the Environmental Protection Act - statements/decisions on SEA which is subject to judicial review in separate proceedings and with applicability of the provision of article 9, paragraph 3 of the Aarhus Convention concerning the range of the appellants. The appeal is inadmissible because the processed amendment to GSP does not contain an environmental component and determines the manner of development and the purpose of the territory of a particular spatial area. The administrative act dealing with environmental considerations is subject to its own, separate challenge and judicial review.”

Another important aspect that should also be noted is **whether and to what extent the references to national law, present in the provisions of article 9, paragraphs 2 and 3 of the Convention, allow the possibility to restrict the range of persons concerned with access to administrative and judicial appeal procedures in complex proceedings covered by simultaneously regulation with different legal acts, incl. and such beyond environmental legislation, which is the case notably with spatial planning and authorization of construction activities.**

Indicative for this are the findings of the Supreme Administrative Court (five members chamber) in its Decision № 543/15.01.2014 on administrative case № 13729/2013 for the annulment of Decision № 9482/25.06.2013 on administrative case № 14767/2008 of the Supreme Administrative Court (three members chamber) by which was canceled Order № RD-02-14-776/13.08.2008 of the Minister of Regional Development and Public Works for approval of the GSP of Tsarevo Municipality, Burgas Region. In the Decision, the Court exposes the following arguments: **“This court chamber does not share the reasoning relied on in this case, namely that, by virtue of article 9, paragraph 2 (b) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, ratified by the Republic of Bulgaria, complaints against the challenged order for approval of a GSP should be reviewed by the court regardless of the compatible with the Constitution of the Republic of Bulgaria (according Decision № 5 of 09.05.2006 of the Constitutional Court of the Republic of Bulgaria on constitutional case № 1/2006) legal provision for non-contestability of this kind of acts. In article 9, paragraph 2 of the Convention is regulated (arranged) the right of challenge of the members of the public of decisions, acts or omissions in accordance with article 6 of the Convention and in cases where so provided for under national law. In the next paragraph the Convention refers again to the national legislation about what constitutes a sufficient interest and impairment of a right. I.e. when the court appeal of an act is precluded for all persons regarding an explicit national legal rule, in accordance with the Constitution of the Republic of Bulgaria, as in this case, the text of the Convention may not be interpreted as a reason for derogating from national provisions in view of the cited cumulatively required prerequisite in article 9, paragraph 2 (b) of the Convention that provides for compliance with the national law.”**

In the presented first report for the progress in implementation of the recommendations of the Compliance Committee to the Party set out in Decision V/9d we pointed out another important circumstance, namely, that **the issue of providing access to the members of the public, including environmental organizations, to review procedures concerning spatial plans and construction permits cannot be considered one-sided, only in terms of protecting the environment, since it**

relates to a number of significant socio-economic factors requiring comprehensive consideration and achievement of a balance of the public and private interests. For us it is essential to do not allow delay and hinder the investment process in the country, due to the additional inclusion of other persons concerned to those having a direct and immediate legal interest in administrative and judicial proceedings under article 131 of the Spatial Planning Act, which are developing in a peculiar order and with explicit legislatively defined parties.

In this connection, it should be noted that with Decision № 617 from August 12, 2015 of the Council of Ministers was adopted an **analysis of the problems hindering the growth of investment in the country and was approved a list of main problem areas and proposals for measures thereto.** The **large number of procedures on issuing construction permits and the significant time for their execution** have been identified as one of the problem areas and, accordingly, were proposed as measures: streamlining the timing and the number of the procedures for issuing construction permits; facilitating the principle of integrated administrative service; strengthening the control over the implementation of statutory time limits for issuing construction permits; review of all regulatory regimes in the area of construction permits established by a special law, etc. Furthermore, **interdepartmental working groups were created with the task within January 31, 2016 to specify the measures envisaged in concrete proposals for legislative, administrative and coordination actions aimed at improving the investment climate.** In order to be supported the activities of the working groups, in November 2015 the latter will be provided with **draft laws aimed at alleviating the regulatory burden on businesses and citizens in the investment process,** elaborated within a project of the Council of Ministers Administration named "Improvement of the investment policy in Bulgaria through better regulation of the investment process and the development of e-government", implemented with the financial support of Operational Programme "Administrative Capacity", co-financed by the Funds of the European Union. The bills, among other, also **will affect the determination of the range of persons concerned in proceedings on issuing administrative decisions and enforcement of regulatory regimes in the area of spatial planning and construction.**

In relation with the above, in its **third progress report on the implementation of recommendations set out with Decision V/9d, Bulgaria will inform the Compliance Committee for the results of the government's initiative for providing a favorable investment environment** – a process that, as it is clear from the foregoing, is directly related to the optimization of the proceedings for the adoption of spatial plans and issuing building permits, incl. **the access to administrative and judicial appeal procedures.**

Yours sincerely,

Ivelina Vassileva

*Minister of Environment
and Water*

