REPUBLIC OF BULGARIA
MINISTRY OF ENVIRONMENT AND WATER

Ref.: Decision VI/8d of the Meeting of the Parties 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)

Dear Ms Marshall,

In accordance with paragraph 9 (a) of Decision VI/8d of the Meeting of the Parties to the Aarhus Convention, I bring to your attention second progress report of Bulgaria on the measures taken, and the results achieved, to implement the recommendations in paragraphs 3 and 8 of the same decision:

1. <u>On paragraph 3 (a) и (b), with regard Communication ACCC/C/2011/58 related to restricted access to review procedures in spatial planning and construction permitting</u>

To take actions to ensure access of the public to appeal spatial plans and construction/exploitation permits will lead to duplication of review procedures on environmental issues, which have already been the subject of separate independent administrative and judicial procedures for issuing statements/decisions on environmental assessment of plans and programmes – Strategic Environmental Assessment (SEA) and environmental impact assessment of investment proposals (EIA) and will create prerequisites for delay and deterring the investment activities in the country. It will be also in discrepancy with leading priority of the government – improving the investment policy in Bulgaria through better regulation of the investment process.

Public interests and relationships should be decisive in the enforcement of the relevant procedural rules in order to bring administrative or judicial proceedings in accordance with article 9, paragraph 2 and 3 of the Convention (in order to provide the members of the public with the opportunity to challenge before a court administrative decision). The main determinant element in this direction should be the type of the contested administrative act and is it with crucial importance in the field of environmental protection. In spatial planning and construction permits proceedings, the acts which are crucial for the environment are the SEA/EIA statements/decisions – subject to judicial review within separate judicial-administrative proceedings as administrative decisions relevant to the environmental issues, with applicability of article 9, paragraph 2 and 3 of the Aarhus Convention, concerning the range of appellants.

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The access to justice in respect of spatial planning and construction permitting on environmental issues is exercised by challenging the SEA/EIA statement/decision. Therefore, to allow the challenging of spatial plans and construction and exploitation permits on issues related to the environment by members of the public concerned, incl. environmental non-governmental organizations, would mean that the court would reconsider, again, issues on which it had already ruled on, with the entered into force ruling on a contested SEA/EIA statement/decision.

In support of the above, we again note that:

- In Article 125, paragraph 7 of the Spatial Planning Act (SPA) is stated that the SEA is part of the spatial plan. The SEA statement/decision contains mandatory conditions, measures and restrictions in respect of spatial planning, and they constitute the environmental component of the spatial plan. Entered into force statement or decision is a prerequisite for the subsequent approval of the plan and the authorities responsible for approving and implementing the plan shall comply with the statement or decision and the conditions, measures and restriction laid down therein (Article 82, paragraph 4 of the Environmental Protection Act (EPA).
- In Article 148, paragraph 8 of the SPA is stated that the entered into force EIA decision is an annex, an integral part of the construction permit. Identical is the norm of Article 82, paragraph 5 of the EPA, which determines also that the authority for approval shall approve the investment proposal in accordance with the nature of the decision and shall take into account the conditions, measures and restrictions laid down therein.

2. <u>On paragraph 8, with regard Communication ACCC/C/2012/76 concerning injunctive relief in procedures of reviewing environmental permits</u>

2.1. <u>8 (a) и (b)</u>

It is necessary to distinguish between the functions of the courts and those of the public authorities, given the principle of the separation of powers, enshrined in Article 8 of the Constitution of the Republic of Bulgaria, and the independence of the judiciary, proclaimed in Article 117, paragraph 2 of the Constitution. Courts carry out litigation, which is expressed in an independent and self-resolving disputes in conditions of competition, after due referral. The bodies of the executive power issue individual administrative acts, by which they implement and enforce the law, within the limits of their powers and on the grounds established by the law.

In accordance with the principle of separation of powers, the court should review the legality of administrative acts of the authorities of the executive power, in the context of an independent procedure, and is not correct the court to be entrusted with duplicate functions inherent in such bodies, such as carrying out an assessment of the significance of the environmental impacts and the risk of environmental damage, which is the responsibility of the authorities with competence in the implementation of the environmental legislation.

According to Article 170, paragraph 1 of the Administrative Procedure Code (APC), the administrative body must prove the existence of the factual grounds, specified in the administrative act and the fulfilment of the legal requirements, when issuing this act. The administrative body competes equally with the appellant, who has equal procedural capacity (Article 8, paragraph 1 of the APC) and may challenge the assessment of the administrative body and, also, may request the appointment of expertise (Article 171, paragraph 2 of the APC).

In accordance with Article 168, paragraph 1 of the APC, the court is not limited to discussing the grounds stated by the appellant, but is obliged, on the basis of the evidence presented by the parties, to verify the legality of the administrative act on all grounds, under Article 146 of the APC (lack of competence; non-compliance with the established form; significant violation of

administrative procedure rules; contradiction with substantive provisions; inconsistency with the purpose of the law). The Court assesses all the evidence in the case and the arguments of the parties by own conviction (Article 12 of the Civil Procedure Code).

It should be noted that the legislator has envisaged the increased importance of the principle of *Ex Officio* in the administrative procedure. According to Article 171, paragraph 2, sentence 2 of the APC, the court may also order an expertise on its own initiative – it may appoint experts *Ex Officio*, and this is part of the process of the elaboration of the own conviction and discretion of the court. This principle is reflected in the provisions of Article 9, paragraph 3 and Article 171, paragraph 4 of the APC, which oblige the court to indicate to the parties that, in some circumstances relevant to the resolving of the case, they do not adduce evidence, and to assist them in removing formal omissions. The court is obliged to indicate to the parties the distribution of the burden of proof (Article 170, paragraph 3 of the APC).

The above legal analysis clearly and firmly shows that the Bulgarian legislation creates all prerequisites for the independence of the court in establishing the relevant facts.

In the administrative judiciary, the court does not seek a balance of interests, but is strictly governed by the legal norm, bringing under the hypothesis of the norm the facts established in due process in the course of the court proceedings.

According to Article 172a, paragraph 2 of the APC, to its decision, the court sets out reasons in which are stated the opinions of the parties, the facts of the case, respectively the evidence to support them, and the court's legal conclusions.

Balancing is a matter of expediency, which is apprised by the body of the executive power, acting under conditions of operational autonomy.

As already presented to the Committee – there are two different court proceedings – on contesting the individual administrative act (SEA/EIA statement/decision) – in accordance with Article 145 and the following of the APC, and on challenging the order for admission of the preliminary execution of the act – in accordance with the procedure of Article 60, paragraph 5 of the APC. The distinction between the two proceedings is important, because different sets of facts must be established and proved in each of them.

The facts to be established and proved in the proceedings for challenging the order for admission of preliminary execution are listed exhaustively in the provision of Article 60, paragraph 1 of the APC (the need to ensure the life or health of citizens, the need to protect particularly important state or public interests, the danger of obstruction or serious difficulty in the implementation of the act, etc.). Only in the presence of these facts is admissible the exception to the prohibition under Article 90, paragraph 1 and Article 166, paragraph 1 of the APC for the execution of the act, in case the same has been contested.

The significance of the impacts on the environment, respectively the risk of damaging it, is subject to establishing and proving in the course of the court proceedings of the contestation of the SEA/EIA statement/decision by itself.

2.2. 8 (c)

The National Institute of Justice (NIJ) has conducted an e-training: "Challenges of the Aarhus Convention in Law Enforcement" (03-13.12.2018). The training's background information addresses the issue of the application of remedies, including for injunctive relief for certain activities, pursuant to Article 9, paragraph 4 of the Convention. The training has been attended

by 27 participants: 12 judges, 3 registry judges, 4 prosecutors, 3 court assistants, 1 juror and 4 court officials. It is planned to be conducted training with the same subject in the period 05-19.11.2019.
Bulgarian magistrates have been provided with access to the recommendations in paragraph 8 of Decision VI/8d in the internal electronic network of the NIJ (virtual reading room).

In view of the constructive dialogue and fruitful cooperation, established between the Government of Bulgaria and the Committee over the years, I would like to express my confidence that the Committee will take into account, along with the progress achieved, the presented in this report facts, conditions and circumstances, which outline the framework at national level (political, institutional and regulatory) for the implementation of the recommendations in paragraphs 3 and 8 of Decision VI/8d, as well as the exposed in the report fundamental principles of the legal order and separation of powers in Bulgaria.

Yours sincerely,

Neno Dimov

Minister of Environment and Water