REPUBLIC OF BULGARIA
MINISTRY OF ENVIRONMENT AND WATER

Ref.: Communication to the Aarhus Convention Compliance Committee concerning compliance by Bulgaria with provisions of the Convention in connection with restricted access to review procedures in spatial planning (Ref. ACCC/C/2011/58)

Sofia, 29 February 2012
Изх. №: 99-00-51

Dear Mrs. Marshall,

Following your letter from 2 February 2012 concerning the compliance by Bulgaria with provisions of the Aarhus Convention (Art. 9, Par. 3) in the area of contestations of spatial planning acts we send you answers to the questions, raised from the discussion at the thirty-fifth meeting of the Compliance Committee (Geneva, 13-16 December 2011) in Annex I.

We would like to apologize once again that due to financial reasons representative of the Ministry of Environment and Water was not able to participate at the thirty-fifth meeting of the Compliance Committee.

We hope for a fruitful collaboration with the Compliance Committee concerning the Communication Ref. ACCC/C/2011/58 and we express our willingness to do all efforts for that.

Yours sincerely,

Evdokia Maneva

Deputy Minister of
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ANNEX I

Answers to the questions concerning Communication to the Aarhus Convention Compliance Committee concerning compliance by Bulgaria with provisions of the Convention in connection with restricted access to review procedures in spatial planning (Ref. ACCC/C/2011/58)

1. Please clarify if the SEA procedure for spatial plans is an independent legal procedure, or if it is integrated into the procedure for the adoption of spatial plans. Also, please explain if the conditions/recommendations of the final act of the SEA procedure (SEA statement/decision) are binding for the authority adopting the spatial plan, or if it only has to "take them into account" (i.e. has to consider them, but is not bound by them).

The procedure for strategic environmental assessment (SEA) **is integrated in the procedure of elaboration and adoption of spatial plans,** which results from the following provisions:

- In accordance with article 125, paragraph 6 of the Spatial Development Act, **environmental assessment is part of the spatial plan.**
- In accordance with article 81, paragraph 1 of the Environmental Protection Act (EPA), the SEA procedure is performed for plans and programmes that are **in process of preparation and/or approval** by the central and territorial authorities, local government and National Assembly;
- In accordance with article 81, paragraph 3 of the EPA, SEA procedure is performed **simultaneously with the preparation of plans** and the final act (decision/statement) should be issued before the approval of the plan.

Measures and conditions/clauses of the final act issued following the procedure of SEA should be taken into consideration by the authorities for approval and implementation of the plan, which results from the following provisions:

- In accordance with article 82, paragraph 4 of the EPA, **the authorities responsible for approving and implementing of the plan comply with the SEA decision/statement;**
- In accordance with article 29, paragraph 1 of the Ordinance on conditions and procedures for environmental assessment of plans and programmes (SEA Ordinance) from contractor/commissioner of the plan is required within **14 days before final acceptance or approval of the plan** to send to the competent environmental authority and to the authorities responsible for implementing of the plan a **summary**, including analysis of:
  - compliance of the plan/programme with the main findings and recommendations in the SEA report and the results of public consultations included in the SEA statement or with the conditions/clauses and measures of the decision for the evaluation of the need of SEA;
  - compliance of the plan with the reasoned in SEA statement alternative for achieving the objectives of the plan;
  - extent that measures under article 26, paragraph 2, items 2 and 3 of SEA Ordinance are provided in the plan or programme (measures for prevention, reduction or possible elimination of eventual adverse consequences on the

environment as a result of implementing the plan or programme; measures for monitoring the implementation of the plan or programme, including frequency of reporting on monitoring).

The environmental authority or a person authorized by it **shall give a written opinion for the summary** within seven days of its submission and shall notify the authority for approving the plan. Pronounciation should be available before approving the plan. If the summary is not accepted (when the competent authority do not approve the way by which the contractor/commissioner has declared to implement the measures and conditions of the SEA satetment/decision for evaluation of the need of SEA), it shall be returned for completion/revision with specific guidelines.

The SEA procedure for plans and programmes concludes with the statement of the Minister of Environment and Water or the Director of the Regional Inspectorate on Environment and Water, which must include a justification/rationale for the conclusion for preferred alternative in terms of the environment and measures for monitoring the implementation of the plan or program to be undertaken. Therefore relevant (for the legality of the adopted spatial plan) is the time of issuance of the SEA decision (before the said development plan), but not vice versa - the time of the adopted plan to affect the legality of the SEA decision.

2. Please explain if and why General Spatial Plans (GSP) shall be considered to be binding administrative acts, or if not, why not. In that regard, please also explain what you meant in your response to the communication that GSP have "no direct investment application".

The procedure for preparation of General Spatial Plan (GSP) is regulated by article 127 of Spatial Development Act (SDA). It includes public consultations on the project of GSP prior to its submission to the expert council for spatial planning. The final spatial plan is approved by decision of the Municipal Council, and it is published in "Official Gazette" (article 127, paragraph 6 of the SDA). In cases where GSP applies to settlement formations of national importance, it is approved by the Minister of Regional Development and Public Works after consultation with the Municipal Council and after that GSP is published in "Official Gazette" (article 127, paragraph 10 from SDA). Decisions of the Municipal Council respectively the Minister of Regional Development, by which are approved GSP are common administrative acts which are binding for the State and other entities. Under the provisions of the Administrative Procedure Code (APC) entered into force administrative acts are subject to implementation.

For its part, the detailed spatial plans (DSP) can not contradict the GSP, but when there are grounds for amending the DSP and they require an amendment to the GSP, the last shall be amended (article 134, paragraph 3 of the SDA).

In accordance with article 104, paragraph 1 and 3 of SDA general spatial plans/master plans shall provide a basis for the overall planning of the spatial development of the areas of municipalities, of parts thereof or of individual populated settlements with the land-use areas thereof. The projections of the general spatial plans, determining the general structure and prevailing assigned use of the spatial development area, the type and assigned use of the physical infrastructure and the protection of the environment and the cultural and historical heritage sites, shall be mandatory in preparation of the detailed plans.

A general spatial plans/master plan shall have no direct applicability to construction authorization, that is why it has "no direct investment application".

In accordance with article 108, paragraph 1 detailed plans shall express in concrete form the planning and building development of populated settlement areas and of the land-use areas thereof,

as well as of the dispersed settlements. **The projections of detailed plans shall be mandatory in development/investment project designing.**

Under the provisions of article 103, paragraph 2 of SDA with DSP is determined the prevailing purpose and the development of various structural parts of the territories covered by the plan and it is a base for the overall development of the territories, subject to the plan. With the GSP shall be given only general frameworks and guidelines for construction and development of the territories, and these plans have no direct application to individual land properties, as well as for allowing the construction in them.

Preparation of general spatial plans/master plans shall be commissioned by the municipality mayor in pursuance of a Municipal Council resolution, where the said plans are financed with municipal budget resources, or by the Minister of Regional Development and Public Works, in the cases of financing from the national budget.

Preparation of detailed spatial plans shall be commissioned by the municipality mayor, by the Regional Governor, by the Minister of Regional Development and Public Works, or by other persons specified in a law.

Preparation of detailed plans may furthermore be commissioned by interested parties.

3. Is it possible, according to the Bulgarian legislation and/or practice, for an authority to decide that an activity regulated by a Detailed Spatial Plan, for which an SEA statement was issued, does not subsequently require an EIA procedure before a construction permit will be issued? If yes, does this possibility apply to activities listed in annex I of the Aarhus Convention, and if so, please give examples?

Under the provisions of article 91, paragraph 2 of the EPA, when for an investment proposal, included in Annex № 1 and № 2 of the EPA is required the preparation of a **separate** plan or programme in accordance with article 85, paragraph 1 and 2, the **competent environmental authority could allow the performance of only one of the assessments in Chapter Six (SEA or EIA) in its opinion or at the request of the contractor/commissioner.**

These rules shall apply when both the following conditions are met:

- for the investment proposal which is included in Annex 1 or Annex 2 of the EPA is carried out procedure for environmental impact assessment (EIA), finished with a positive final decision;
- investment proposal fully coincides/falls in on the scope and subject with the detailed spatial plan, which is prepared for the implementation of the investment proposal;
- the draft of detailed spatial plan complies and implements the relevant measures and conditions/clauses stipulated by the final act of the EIA.

Regarding the above, in most cases (90%) when is applied the provisions of article 91, paragraph 2 of EPA, **shall be performed only the EIA procedure.**

Said provision shall not apply to cases when the investment proposal and the relevant plan or programme fall under mandatory EIA and SEA.

The exception of article 91, paragraph 2 of the EPA shall not apply and in practice **there are no cases when is allowed to a competent environmental authority to make only SEA procedure for detailed spatial plan setting out the framework for development activities listed in Annex I of Aarhus Convention.**

4. With respect to the activities listed in Annex I of the Aarhus Convention, which decision shall be considered as the one literally "permitting" the activity - the EIA decision, the construction permit or both?

In respect of the activities listed in Annex I to the Aarhus Convention, **the act that literally "permitting" the activity is the construction permit** for activities which fall under the construction/building category and which require the issuance of such permit. **Mandatory requirement for issuing of such permit is the presence of EIA Decision**. Some actions are being taken to be changed the legislation, as the EIA decision, when it is required for the activity, will be an integral part of the construction permit or part of an administrative act, which literally "permits" activity. In this regard, for the activities under items 10 and 11 of Annex I to the Aarhus Convention, which are related to water abstraction, the role of such administrative act is played by permit for use of water body, which is enacted by the Water Act. For activities under section 16 related with open mining of minerals, the role of such acts play certificates and decisions, enacted by the Mineral Resources Act.

5. What are the precise legal effects of the EIA decision? Is, according to the Bulgarian legislation, the EIA decision (or its conditions) independently enforceable with respect to the developer? If yes, by which authorities and by what means is the project's compliance with the EIA decision to be ensured?

By its nature, the EIA decision is affirmative administrative act through which in favor of the addressee is constituted subjective right to conduct the activity in presence of conditions, defined by the substantive legal norm. With EIA decision is approving the eligibility of the designing of the investment proposal by assessing the location (site, path) of objects and the expected impact on the environment based on the EIA report, taking into account public opinion and the opinions of the affected community (item 30 additional provisions of the EPA).

According to article 82, paragraph 5 of the EPA, **EIA decision is mandatory for the contractor/commissioner (developer), and its presence is indispensable** condition for the further approval of the investment proposal made under the special law. According to article 21 of the Ordinance on procedures for the environmental impact assessment (EIA Ordinance) EIA decision is an constituent element of the procedure for issuing the act for approval/authorization under the special law. Thus the presence of EIA decision is obligatory prior to and for delivery of the final permit, and must be taken into consideration by the authority issuing the permit. Obligation to do so arises from the provision of article 20a of the EIA Ordinance.

Obligations to the implementation the conditions/clauses and measures in the EIA decision has the contractor (developer) which must comply with and follow them at all stages of the fulfillment of the investment intention - the design phase, construction phase, the phase of operation and closure. Control over the fulfillment of these obligations are carried out by regional structures of the Ministry of Environment and Water – Regional Inspectorates on Environment and Water, River Basin Directorates and National Parks.

According to art. 21 of the EIA Decree/Ordinance, **EIA decision is integral and constituent element of the substantial composition of the procedure for issuing the act for earliest approval of the investment proposal under the special law** (article 82, paragraph 2 of the EPA).

For its part, article 82, paragraph 2 of the EPA provides: "Environmental impact assessment can be fully compliant in the preparation of preliminary (feasibility) investment studies or design assignment, taking place before the act of the earliest approval under a special law, which sets the nature, location and capacity of the investment proposal".

Next, article 144, paragraph 1, item 4 of the SDA expressly provides that the investment projects, for which is issued a building/construction permit shall be coordinated and approved after a written request from the contractor (developer) and **after the submission of administrative acts, which, depending on the type and size of building, are required as a condition for permitting the construction in accordance with EPA or a special law**.

Without decreed EIA decision the substantial composition of the procedure of the issuance of a construction permit is incomplete and the procedure could not legitimately be carried out, which in turn means that the actual realization of the investment proposal can not start up – the last has been legally inadmissible. In this sense, the issuance of an administrative act - construction permit by the chief architect of the municipality before the completion of the EIA procedure is unlawful. **The condition - EIA decision to be decreed before the act of the earliest approval, the legislator regulates as a binding and guaranteeing the issuance of a lawful administrative act – construction permit.**

Given the above, although construction permit is called "approval under the special law" all activities performed on the basis of construction permits, which are not subject to EIA are carried out unlawfully and the entities (the Authority issued building permit and those which perform construction activities) bear administrative and civil liability under Chapter Ten and Chapter Eleven of the EPA, and in some cases criminal liability under the Criminal Code. On the other hand the head of the Directorate for national construction control shall have the power to remove illegal structures (article 225 of the SDA).

Legislation amendment has been initiated, in particular EPA and the Spatial Development Act, with the aim for further strengthening of the control over compliance with the conditions/clauses and measures in the EIA decisions in the projects, which are a basis for issuing construction permit or final administrative act.

It is expected the legislative changes to enter into force in the first half of 2012.

6. Does article 149 of the Spatial Development Act, which limits the scope of persons entitled to appeal building permits in the court, apply also to building permits concerning activities listed in Annex I of the Aarhus Convention?

According to Article 149 of the Spatial Development Act any construction/building permit, issued by the Chief Architect of the municipality (or district), or any refusal to issue such a permit shall be communicated to the interested parties under the terms and according to the procedure established by the Administrative Procedure Code. Issuance may be denied solely on grounds of legal non-conformity, citing a specific reasoning.

Interested parties shall be in the cases of a new construction work, extending or heightening of a pre-existing construction work: the contracting authority, the owners and the holders of limited property rights in landed estate, the person enjoying a right to build in another's property by virtue

of a special law, the owner of the land, the holders of limited rights in buildings (condominium owners). Shall not be interested parties the owners and the holders of limited rights for an estate for which there is an effective detailed spatial plan and a sequestering act has been issued for the development of national works or municipal works of primary importance.

For any construction permit issued together with the development/investment projects approved by the Minister of Regional Development and Public Works or by a Regional Governor, or any refusal to issue such a permit, shall be communicated to interested parties by notice published in the State Gazette. Any such building permit or any refusal to issue such a permit, shall be appealable before the Supreme Administrative Court within fourteen days after the publishing thereof.

The above provisions are applicable to all kind of construction activities, including those listed in Annex I of the Aarhus Convention, because any building works are not allowed without construction permit. Exception is allowed for: exterior and interior painting of buildings and structures; replacement of roof covering materials; interior remodellings; routine repair of buildings, structures, facilities and utility-service systems; routine repair of the physical-infrastructure elements; routine repair of roads, whereby the structure of the roadway is not altered; terrain conservation of immovable cultural values; conservation and restoration of facades and of artistic elements and frescoes forming part of the interior of cultural values of an architectural or artistic nature and conservation of archaeological immovable cultural values.