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Compliance Committee

Fortieth meeting
Geneva, 25–28 March 2013
Item 7 of the provisional agenda
Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2011/58 concerning compliance by Bulgaria

Prepared by the Compliance Committee and adopted on 28 September 2012

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I. Introduction

1. On 9 February 2011, the Balkani Wildlife Society (the communicant), submitted a communication to the Compliance Committee alleging that Bulgaria had failed to comply with its obligations under article 9, paragraphs 2 and 3, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

2. The communication alleges that the Party concerned fails to implement article 9, paragraphs 2 and 3, of the Convention with respect to access to administrative or judicial review procedures for environmental non-governmental organizations and members of the public to challenge acts that contravene national environmental legislation. The communicant alleges it is not possible to appeal the outcomes of the strategic environmental assessment (SEA) of plans and programmes — "SEA statements" issued under the Environmental Protection Act (EPA). In addition, it alleges that members of the public do not have access to review procedures to challenge orders for the adoption of spatial plans or construction permits and exploitation permits issued under the Spatial Development Act (SDA) that contravene European Union (EU) or national environmental legislation.

3. At its thirty-first meeting (22–25 February 2011), the Committee determined on a preliminary basis that the communication was admissible. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 28 March 2011.

4. By letter dated 16 August 2011, the Party concerned responded to the communicant's allegations. By letter dated 27 September 2011, the communicant provided comments on the response.

5. At its thirty-fourth meeting (20–23 September 2011), the Committee agreed to discuss the content of the communication at its thirty-fifth meeting (13–16 December 2011). In order to guide the discussion, some questions that aimed at framing the upcoming discussion were enclosed with the invitation sent to the parties on 10 November 2011. By letter dated 9 December 2011, the Party concerned addressed the Committee's questions and indicated that it would not participate in the discussion of the communication before the Committee.

6. The Committee discussed the communication at its thirty-fifth meeting, with the participation of representatives of the communicant. The Committee confirmed the admissibility of the communication and expressed its concern that the Party concerned had chosen not to participate in the discussion. At the same meeting, the Committee agreed on a set of questions to be sent to the parties following the meeting.

7. On 10 January 2012, the communicant submitted additional information to complement its position during the discussion regarding the questions sent by the Committee on 10 November 2011.

8. The Party concerned and the communicant both responded to the Committee's questions sent following the discussion at the thirty-fifth meeting on 29 February 2012 and 6 March 2012, respectively.

9. The Committee prepared draft findings at its thirty-seventh meeting (26–29 June 2012), and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 24 August 2012. Both were invited to provide comments by 21 September 2012.

10. The communicant provided comments on 21 September 2012.

11. At its thirty-eighth meeting (25–28 September 2012), the Committee adopted its findings and agreed that they should be published as a formal pre-session document to the Committee's fortieth meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues[1]

A. Legal framework

12. Article 5, paragraph 4, of the Bulgarian Constitution provides that international treaties, ratified according to the constitutional order and published and in force for Bulgaria, are part of the national law. They have priority over provisions of the national laws which contravene them.

13. Article 83, paragraph 1, of the Administrative Procedure Code sets out the general standing provisions for judicial review of administrative acts, namely "an appeal against an administrative act may be submitted by interested persons" (see original communication, para. 9).[2]

14. The authorization procedure for plans and projects is divided into two main stages:

(a) For plans:

(i) The issuance of an SEA statement under the EPA;

(ii) The issuance of an order for the adoption of a spatial plan under the SPA;

(b) For projects:

(i) The issuance of an environmental impact assessment (EIA) decision under the EPA (otherwise known as "development consent");

(ii) The issuance of a final construction and/or exploitation permit under the SPA.

The SEA procedure is a necessary step before the elaboration and adoption of spatial plans; and the EIA decision constitutes a mandatory requirement for the issuing of the final permit, which is the one literally "permitting" an activity (under annex I to the Convention). More details on these two stages are provided in the following paragraphs.

1. SEA statements and EIA decisions under the EPA

15. The EPA (which transposes EU EIA[3] and SEA[4] Directives into national legislation) regulates the issuance of SEA statements and EIA decisions and relevant procedures.

[1] This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

[2] All documentation concerning the communication, including the various responses from the Party concerned and the communicant, are available from a dedicated page on the Committee's website (http://www.unece.org/env/pp/compliance/Compliancecommittee/58TableBG.html).

[3] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)).

[4] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

Through its provisions, the EPA transposes articles 6, 7 and 9, paragraph 2, of the Aarhus Convention into national law.

16. Articles 87 and 95 of the EPA require public participation in the SEA and EIA procedures, respectively. According to article 99, paragraph 6, stakeholders ("interested parties" according to the translation of the EPA provided by the communicant on 12 January 2012) may appeal a decision on EIA under the Administrative Procedure Code within 14 days from the public disclosure of the EIA decision.

17. According to articles 125, paragraph 6,[5] and 144, paragraph 1 (4),[6] of the SPA, SEA statements and EIA decisions issued by environmental authorities under the EPA are mandatory prerequisites for the final adoption/authorization of spatial plans and development projects; as such they are binding on the authorities issuing the construction permit. In addition, they are binding on the investor/contractor, who has to comply with the conditions and measures set out in the EIA statement during the project's implementation.

2. Spatial plans and construction/exploitation permits under the SPA

18. The SDA regulates urban spatial planning as well as the design and permitting procedures for development projects. In other words, the SDA provides the procedures that lead to the final decisions for the adoption/amendment of:

(a) General Spatial Plans, which define the development framework/guidelines of municipalities, of their various parts and populated settlements and the land use of the area under development;

(b) Detailed Spatial Plans, which define more specifically the planning and building development of a populated settlement area and the land use. These plans cannot contradict the framework set by a General Spatial Plan;

(c) Construction permits, necessary for all kinds of building activities, including those listed in annex I to the Convention;

(d) Exploitation permits for development projects, including those regarding activities set out in annex I to the Convention.

19. A summary of the legal procedures regarding the adoption of spatial plans and the authorization of development projects can be found in the form of a table attached to the original communication.

20. Article 213 of the SDA stipulates that administrative acts under the SDA can be subject to judicial review before a court of law "as to their legal conformity" under the conditions set out in that Act; and when the SDA does not stipulate any conditions, then under the conditions set out in the Administrative Procedure Code. The SDA provisions on

[5] "(6) The [planning proposal] referred to in paragraph (1) shall be submitted to the Ministry of Environment and Water or the respective regional environment and waters inspectorate for clearance and determination of the need of an environmental impact assessment according to the procedure established by the ordinance pursuant to Article 90 of the Environment Protection Act. The environment impact assessment shall be part of the detailed plan." (translation provided by the communicant)

[6] "(1) Any development project designs, which serve as grounds for the issuance of a building permit, shall be approved acting on a written application by the contracting authority and after submission of: ... 4. the administrative acts which, depending on the type and scope of construction, are required as a prerequisite for permission of construction pursuant to the Environment Protection Act or a special law". (translation provided by the communicant)

access to justice with respect to General and Detailed Spatial Plans and construction and exploitations permits are briefly outlined in the following paragraphs.

3. General Spatial Plans

21. Article 215, paragraph 6, of the SDA stipulates that General Spatial Plans are not subject to a review procedure before a court.

4. Detailed Spatial Plans

22. Article 131 of the SDA stipulates that the following persons have the right to express an opinion on and have access to judicial review on Detailed Spatial Plans: the owners of the plot regulated by the Detailed Spatial Plan; the owners of the neighbouring real estate (directly affected by the provisions of the Detailed Spatial Plan); and the owners of real estate in the hygiene-protection zones, if any.

5. Construction Permits/Exploitation Permits

23. Article 149 of the SDA determines that the following parties have the right to express an opinion and have access to judicial review with respect to a construction permit for a development project: the competent public authority (the "contracting authority" according to the translation provided by the communicant); the investor(s); the owner of the land; and the owners of the neighbouring real estate directly affected by the project.

24. The SDA does not mention any possibility to express an opinion or have access to judicial review with respect to an exploitation permit for a development project. However, in accordance with court practice, access to judicial review of exploitation permits is admissible under article 213 of the SDA for those parties considered to be interested parties under its article 131 SDA (see para. 22 above).

B. Substantive issues

25. The communicant's allegations relate primarily to non-compliance of national legislation of the Party concerned with the requirements of article 9, paragraphs 2 and 3, of the Convention. The communicant's allegations can be summarized as follows:

(a) The Party concerned fails to ensure access to justice under article 9, paragraph 2, of the Convention, with respect to SEA statements for plans and programmes under the EPA;

(b) The Party concerned fails to ensure access to justice under article 9, paragraphs 2 and 3, of the Convention, with respect to the adoption and/or amendment of spatial plans and construction and exploitation permits under the SPA.

26. The administrative practice and case-law cited in the communication is, according to the communicant, also in non-compliance with the Convention, as a result of shortcomings in legislation.

27. The communicant accepts that the general provision on standing set out in article 83, paragraph 1, of the Administrative Procedure Code (see para. 13 above) would seem to be "more or less consistent" with the requirements of article 9, paragraphs 2 and 3, of the Convention, and the objective of giving the public concerned wide access to justice within the scope of the Convention. However, it notes that standing with respect to administrative acts under the SDA is regulated by specific provisions of that act, which, in its view, do not provide access to justice in accordance with the Convention (see paras. 35 ff. below).

1. Access to justice with respect to acts under the EPA

(a) Access to justice with respect to EIA decisions

28. The communicant does not allege any breach of article 9, paragraph 2, of the Convention with respect to access to justice to challenge EIA decisions issued according to the EPA. Likewise, the Party concerned asserts that the possibility for stakeholders to appeal EIA decisions as granted in article 99, paragraph 6, of the EPA is in accordance with the requirements of article 9, paragraph 2, of the Convention.

(b) Access to justice with respect to SEA statements

29. The communicant alleges that the Party concerned fails to provide for access to justice with respect to SEA statements for plans and programmes. It contends that the core of the problem is the lack of clear and express wording in the EPA as to whether an SEA statement is an individual administrative act subject to appeal before a court of law under the Administrative Procedure Code. This situation, according to the communicant, has resulted in contradictory and unpredictable practice by administrative authorities and in court jurisprudence. The communicant considers that the EPA and the related court jurisprudence and administrative practice are not in compliance with article 9, paragraph 2, of the Convention with respect to access to justice regarding SEA statements.

30. Moreover, the communicant asserts that neither the EPA nor the SDA specify exactly what the consequences of the SEA statements are, in particular whether they are binding on the authorities approving the General and Detailed Spatial Plans under the SPA. Further confusion, according to the communicant, is caused by article 82, paragraph 1, of the EPA, which stipulates that SEA proceedings "shall be combined (or merged)" with the proceedings for the adoption of General or Detailed Spatial Plans under the SDA. The situation is, according to the communicant, furthermore complicated by the fact that, under certain conditions, the SEA statement for a "small scale" Detailed Spatial Plan can substitute for the EIA decision for projects in the area regulated by the plan.[7] The communicant alleges that this happens also with respect to tourism and recreation projects ("village complexes"), which would otherwise be subject to an EIA procedure according to the EPA,[8] and thus are covered by paragraph 20 of annex I to the Convention.

31. The communicant notes that two provisions of the EPA are in particular unclear: article 82, paragraph 4, and article 88, paragraph 2. These provisions use the wording "становище", which may be translated as either "opinion" or "position". The communicant alleges that national administrative legislation elsewhere uses the word "order" or "decision" to refer to individual administrative acts that are compulsory for their recipients and subject to appeal before a court of law. For example, to describe the final act of the EIA procedure, article 82, paragraph 5, of the EPA refers to a "решение" (decision) and it explicitly stipulates that any EIA decision shall be binding and compulsory for any authorities or other recipients.

32. The communicant submits that, on the basis of the legal principle *per argumentum a contrario*, the use of the word "opinion" or "position" rather than "decision" leaves it open to the implementing authorities to conclude that the SEA statements are not final individual

[7] The communicant refers to article 91, paragraph 2, of the EPA, according to which "Upon request of the developer or upon its own opinion, the competent authority may require the execution of only one of the assessments types (e.g., EIA or SEA) under Chapter Six, when for development project listed in Annexes 1 and 2 hereto, an individual plan or a program under art. 85 (1) and (2) should be prepared" (translation by the communicant).

[8] See article 81, paragraph 4 and annex 2, item 12, of the EPA.

administrative acts, that they are not subject to appeal before a court of law and even that they are not compulsory. The communicant alleges that this is in fact what often happens in practice, i.e., that the courts often hold appeals against SEA statements ("opinions") to be inadmissible on the basis that they are not final administrative acts but rather preliminary ones.[9]

33. The communicant notes that according to article 21, paragraph 5, of the Administrative Procedure Code, the review of the lawfulness of a preliminary act shall be conducted upon appeal against the final act. However, as outlined in paragraphs 21 and 22 above, orders for the adoption of a General Spatial Plan are not subject to appeal and orders for the adoption of a Detailed Spatial Plans may be appealed only by investors and "direct neighbours". According to the communicant, the right of the neighbours to appeal is further limited in some cases, e.g., if the Detailed Spatial Plan provides for a change of designation of the land plot in question. In practice this means that the SEA statements cannot be appealed by the environmental organizations or other members of the public concerned at any stage.

34. The Party concerned claims, in general, that the requirements of article 9, paragraph 2, of the Convention are fully met by the right of the public to appeal the EIA decisions (see para. 28 above). It further explains that while there is no legislation regulating the possibility to appeal the SEA statements, there is no explicit prohibition in that respect and the general provisions of the Administrative Procedure Code are fully applicable. According to the Party concerned, recent case-law of the Bulgarian courts shows that SEA statements are subject to judicial review, and therefore the allegations of the communicant in this respect are "obsolete".

2. Access to justice with respect to acts under the SDA

35. The communicant alleges that as a result of the provisions of the SDA (see paras. 21-23 above) the Party concerned fails to ensure that members of the public have access to review procedures in accordance with article 9, paragraphs 2 and 3, of the Convention. More specifically, it asserts that provisions of the SDA prevent environmental organizations and members of the public from challenging decisions regarding General Spatial Plans, Detailed Spatial Plans and construction and exploitation permits that may contravene national and EU environmental legislation. The communicant provides case-law to illustrate each of its allegations. It remarks that the case law referred to in its communication was selected to provide typical examples from among many other such cases.

(a) Access to justice with respect to General Spatial Plans

36. Among others, the communicant refers to two 2007 court decisions[10] and one 2006 decision[11] in which the courts denied standing to, respectively, a public authority, an environmental organization and individuals who had sought to appeal orders adopting General Spatial Plans or amendments thereto. In all three cases, standing was denied on the grounds that under article 127 of the SDA, the final decision adopting the General Spatial Plan could not be appealed before a court.

[9] See, for example, Decision No. 79/15.03.2010 of the Ministry of Environment and Waters (annex 6 to the communication); as well as Decisions of the Supreme Administrative Court (SAC) Nos. 821/23.1.2008 and 11514/3.11.2008 referred to by the communicant in his response received or posted by the secretariat on 28 September 2011.

[10] SAC Decisions Nos.12151/3.12.2007 and 2310/7.3.2007 (annexes 1 and 2 to the communication).

[11] SAC Decision No.10617/31.10.2006 (annex 3 to the communication).

37. The communicant claims that to its knowledge there has been one case only in which the Supreme Administrative Court ruled that an environmental organization had locus standi to seek judicial review of an order adopting a General Spatial Plan.[12] In that 2009 case, the court found that the order for the adoption of the General Spatial Plan was an act which was subject to the provisions of article 6 of the Convention, through paragraph 20 of annex I, and thus also subject to judicial review in accordance with article 9, paragraph 2, of the Convention. The court concluded that article 127 of the SDA contravened article 9, paragraph 2, of the Convention and that legislative amendment was needed.[13] The communicant notes that the court's call for legislative amendment demonstrates that article 9, paragraph 2, is not properly implemented in either the SDA or the EPA. [14]

38. The Party concerned submits that the communicant's allegation of non-compliance regarding article 9, paragraph 3, of the Convention is irrelevant and inapplicable with respect to orders adopting spatial plans. It argues that the fact that decisions related to the adoption of a General Spatial Plans cannot be appealed does not mean that the Party concerned is not in compliance with article 9, paragraph 3, of the Convention, because that provision is not clear and detailed enough. Moreover, the Party concerned states that General Spatial Plans approved under the SDA have "no direct investment application" but only define the general framework and guidelines for land development and construction. It adds that the SDA requires that regulatory procedures for the adoption and amendment of General Spatial Plans include mandatory public consultation with the participation of all relevant stakeholders.

(b) Access to justice with respect to Detailed Spatial Plans

39. The communicant refers to a 2004 case in which the environmental organization sought to appeal an order for the approval of the Regulation and Construction Plan (a type of Detailed Spatial Plan) of Zlatni Pyasatsi Seaside resort. The Plan would affect the Zlatni pyasatsi ("Golden Sands") Nature Park. The court dismissed the application under article 131 of the SDA on the grounds that the organization was not an "interested party" (despite the fact that the association managing the affected nature park was a member of the applicant).[15]

40. The Party concerned states that, with the aim of ensuring the right balance of relevant public interests in the field of spatial planning and construction, the SDA confers a right to contest administrative acts issued within its scope (including the Detailed Spatial Plans) only on persons with a direct and immediate legal interest. Article 131, paragraph 1, of the SDA provides an imperative and exhaustive list of the stakeholders who can contest Detailed Spatial Plans, namely the owners and holders of limited real rights (according to the Land Registry) whose real estates are directly affected by the provisions of the Detailed Spatial Plan.

(c) Access to justice regarding construction permits

41. With respect to access to justice to challenge construction permits granted under the SPA, the communicant refers to a 2008 case in which the Supreme Administrative Court held that. On the basis of article 149 of the SPA, the applicant (a neighbour) was not

[12] See SAC Proceedings of 29 April 2009 (annex 5 to the communication).

[13] Ibid.

[14] In the comments of 21 September 2012, the communicant further informed the Committee that the SAC has overruled its previous interpretation of the Convention as being directly applicable and having priority over the SDA by its Decision No. 9074/2012.

[15] SAC Decision No. 218/14.1.2004 (annex 7 to the communication).

considered an "interested party" who could seek judicial review of a construction permit for a development project.[16] According to the communicant, this approach was in breach of article 9, paragraph 3, of the Convention.

42. The Party concerned responds to this part of the communication in general in the context of its comments regarding access to justice with respect to the Detailed Spatial Plans (see para. 40 above). It stresses the nature of the EIA decision as a mandatory act for both the authority issuing the construction permit and for the developer, and the fact that the EIA decision can be subject to judicial review initiated by members of the public.

(d) Access to justice regarding exploitation permits

43. The communicant refers to two cases in support of its allegation that the Party concerned failed to ensure access to justice also with respect to exploitation permits. In a 2007 case, an environmental organization sought to appeal an exploitation permit for a landfill on the grounds that the landfill had been built and put into operation without an EIA decision, and therefore was in breach of the EPA. The application was dismissed by the Supreme Administrative Court on the grounds that the exploitation permit was granted to the investor and it therefore concerned only the rights of the investor.[17]

44. The second case relates to the construction and exploitation of a lift in Rila National Park (a Natura 2000 zone). Environmental organizations and other members of the public sought to appeal the exploitation permit on the grounds that the lift was built (a) without an EIA decision; (b) without a construction permit; and (c) on an unstable landslide. In their appeals they relied on article 9, paragraph 3, of the Convention, which in their view should be directly applicable by the national courts by virtue of article 5, paragraph 4, of the Constitution (see para. 12 above). However, the Supreme Administrative Court dismissed the applications without referring to article 9, paragraph 3, of the Convention. The court confirmed that the only party having locus standi to appeal an exploitation permit was the project investor.[18]

45. The Party concerned does not respond to these allegations.

(e) General remarks of the communicant with respect to review of the decisions under the SPA

46. With respect to the assertion of the Party concerned that article 9, paragraph 3, is not applicable to orders adopting spatial plans (para. 38 above), the communicant emphasizes[19] that many of the spatial plans mentioned in its communication relate to cases in which spatial plans were authorized without carrying out an SEA procedure and issuing a SEA statement. The communicant alleges that those cases illustrate breaches of national environmental law, namely article 85 of the EPA, which stipulates that an SEA procedure is mandatory for plans and programmes regarding development projects under annexes I and II of that Act.

47. With respect to the argument of the Party concerned that it is appropriate to limit access to justice with respect to spatial planning decisions and construction/exploitation permits to persons with a direct and immediate legal interest (whose property rights or other limited real rights are affected), the communicant alleges that this approach is not in line with the article 9, paragraph 2, of the Convention, namely:

[16] SAC Decision No. 4927/23.4.2008 (annex 8 to the communication).
[17] SAC Decision No. 949/29.1.2007 (annex 9 to the communication).
[18] SAC Decisions Nos. 2397/23.2.2010 and 2155/18.2.2010 (annexes 10 and 11 to the communication).
[19] In the response from the communicant of 28 September 2011.

> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient.

48. The communicant concludes that it would consider the legislation of the Party concerned to be in compliance with the Convention so long as it is amended as follows:

(a) The EPA explicitly allows members of the public concerned to have access to administrative and judicial procedures to challenge SEA statements adopted under the provisions of chapter 6, section 2, of the EPA, concerning environmental assessments on plans and programmes;

(b) The SDA explicitly allows members of the public concerned to have access to administrative and judicial procedures to challenge acts issued under the SDA that they allege contravene provisions of the national environmental law.

III. Consideration and evaluation by the Committee

49. Bulgaria ratified the Convention on 17 December 2003. The Convention entered into force for Bulgaria on 16 March 2004.

50. The Committee notes the information from the communicant that the European Commission has launched infringement proceedings for several of the cases referred to in the communication.

51. The Committee examines the communicant' allegations and the relevant aspects of the legislation and practice of the Party concerned as follows:

(a) Access to justice with respect to SEA statements;

(b) Access to justice with respect to spatial plans;

(c) Access to justice with respect to construction and exploitation permits.

52. When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (Convention, preambular para. 18; cf. also findings on communication ACCC/C/2006/18 concerning Denmark (ECE/MP.PP/2008/5/Add.4), para. 30). Therefore, in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organizations, in different stages of the decision-making ("tiered" decision-making).

53. In addition, in examining access to justice with respect to the different types of acts before it (SEA statements, spatial plans or construction and exploitation permits), the Committee bears in mind that whether a decision should be challengeable under article 9 is determined by the legal functions and effects of a decision, not by its label under national law (c.f. findings on communication ACCC/C/2005/11 concerning Belgium (ECE/MP.PP/C.1/2006/4/Add.2), para. 29 and findings on communication ACCC/C/2006/16 concerning Lithuania (ECE/MP.PP/2008/5/Add.6), para. 57).

A. Access to justice with respect to Strategic Environmental Assessment statements

54. According to the communicant, the legislation as well as the court practice of the Party concerned is unclear and ambiguous as to whether the SEA statements (which represent mandatory prerequisites for the adoption of spatial plans) are subject to judicial review. In most cases mentioned by the communicant, the appeals against SEA statements were found inadmissible by the courts on the basis that such statements did not represent a final act, but a preliminary administrative act, which would be subject to review together with the final act (e.g., the spatial plans). At the same time, since according to the communicant environmental organizations and other members of the public do not have standing to challenge a decision to adopt a spatial plan (see paras. 37 ff. above), SEA statements cannot be appealed by members of the public at all, at any stage.

55. The Party concerned explained that that SEA procedure is, according to the EPA, integrated into the procedure for the elaboration and adoption of spatial plans. The authorities responsible for approving the plan or programme are obliged to take into consideration ("reckon")[20] the SEA statement. With respect to judicial review of the SEA statements, the position of the Party concerned seems to be that the SEA statements are (or should be) subject to judicial review, under the general standing provisions of the Administrative Procedure Code, as confirmed by recent case law.

56. The Committee considers it necessary to distinguish between the cases when an SEA statement substitutes the EIA decision for activities (projects) listed in annex I to the Convention and other cases when the SEA procedure takes place.

57. In cases where the SEA procedure substitutes the EIA procedure for annex I activities (and consequently, an SEA statement is issued instead of an EIA decision), the SEA procedure should be considered as an integral part of the decision-making procedure in the sense of article 6 of the Convention. Consequently, the members of the public concerned should have access to judicial review of the SEA statement under the conditions of article 9, paragraph 2, of the Convention.

58. In other cases, the SEA procedure forms a part of the process for the preparation of a plan relating to the environment according to article 7 of the Convention. The possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention.

59. The case-law of the Bulgarian courts concerning judicial review of SEA statements as presented to the Committee seems to be contradictory (see para. 32 and footnote 9 above), since the courts do not seem to distinguish between the situations where an SEA statement substitutes an EIA decision for a specific activity and other cases in which SEA statements are issued. In this respect, the Committee is concerned that Bulgarian law does not make fully clear whether judicial reviews of SEA statements as such are admissible.

60. At the same time, the fact that the SEA statement cannot be reviewed separately does not amount to non-compliance with the requirements of article 9, paragraphs 2 and 3, of the Convention, provided that members of the public can actually challenge the SEA statement together with the decision adopting the subsequent plan or programme (e.g., spatial plan). This issue will be further addressed in the next section.

[20] See EPA article 82, paragraph 4 (translation provided by the communicant).

B. Access to justice with respect to spatial plans

61. The communicant asserts that neither the legislation (relevant provisions of the SPA) nor prevailing case-law ensure that environmental organizations and other members of the public have access to judicial review procedures to challenge spatial plans, which is, according to the communicant, not in compliance with article 9, paragraph 3, of the Convention. The Party concerned contends that the Convention does not require that environmental organizations or other members of the public have standing to challenge either General or Detailed Spatial Plans in court.

1. General Spatial Plans

62. Based on the information received from the Party concerned and the communicant, the Committee understands that the General Spatial Plans provide a basis for the overall planning of spatial development of municipalities or their sections: they determine the general structure and the prevailing purpose of the spatial development of the area and provide the framework for the future development of the respective areas.

63. On the basis of these characteristics, the Committee concludes that the General Spatial Plans do not have such legal functions or effects so as to qualify as "decisions on whether to permit a specific activity" in the sense of article 6, and thus are not subject to article 9, paragraph 2, of the Convention.

64. However, the characteristics of the General Spatial Plans indicate that that these plans are binding administrative acts, which determine future development of the area. They are mandatory for the preparation of the Detailed Spatial Plans, and thus also binding, although indirectly, for the specific investment activities, which must comply with them. Moreover, they are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area. Consequently, the General Spatial Plans have the legal nature of acts of administrative authorities which may contravene provisions of national law related to the environment and the Committee reviews access to justice in respect to these plans in the light of article 9, paragraph 3, of the Convention.

65. While referring to "the criteria, if any, laid down in national law" in article 9, paragraph 3, the Convention neither defines these criteria nor sets out the criteria to be avoided and allows a great deal of flexibility in this respect. On the one hand, the Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations, from challenging acts or omissions that contravene national law relating to the environment. The phrase "the criteria, if any, laid down in national law" indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception (cf. findings on communication ACCC/C/2005/11 concerning Belgium, paras. 34–36).

66. As mentioned above, the SDA explicitly prevents any person from challenging the General Spatial Plans in court (see para. 21 above). Such explicit provision can hardly be overcome by jurisprudence. Therefore, the Committee concludes that Bulgarian legislation effectively bars all members of the public, including environmental organizations, from challenging General Spatial Plans. As a result, members of the public, including environmental organizations, are also prevented from challenging the SEA statements for General Spatial Plans, as these statements are considered as "preliminary acts", which are not subject to judicial review in a separate procedure (see paras. 58–60 above). Therefore, the Party concerned fails to comply with article 9, paragraph 3, of the Convention

2. Detailed Spatial Plans

67. As the Committee understands, the Detailed Spatial Plans provide details for the development of specific areas. These Plans are mandatory for the development projects and the permits which are necessary for the implementation of such projects.

68. Under the law of the Party concerned, the Detailed Spatial Plans do not have the legal nature of "decisions on whether to permit a specific activity" in the sense of article 6 of the Convention, as a specific permit (construction and/or exploitation permit) is needed to implement the activity (project). Therefore, article 9, paragraph 2, of the Convention, is not applicable.

69. Bearing in mind their characteristics, as summarized above, the Committee considers Detailed Spatial Plans as acts of administrative authorities which may contravene provisions of national law related to the environment. In this respect, , article 9, paragraph 3, of the Convention applies also for the review of the law and practice of the Party concerned on access to justice with respect to the Detailed Spatial Plans. It follows also that for Detailed Spatial Plans the standing criteria of national law must not effectively bar all or almost all members of the public, especially environmental organizations, from challenging them in court (cf. findings on communication ACCC/C/2005/11 Belgium).

70. The SDA provides standing to challenge Detailed Spatial Plans to the directly affected owners of real estate. Environmental organizations and other members of the public do not have the possibility of challenging these plans in court. The case-law presented by the communicant confirms this approach (see paras. 22 and 40 above). Besides, members of public have no possibility to challenge the SEA statements for the Detailed Spatial Plans within the scope of an appeal challenging these plans: they can challenge neither the fact that an SEA statement was not issued prior to approval of the Detailed Spatial Plan nor the disrespect of conditions set out in the SEA statement. This situation constitutes non-compliance of the Party concerned with article 9, paragraph 3, of the Convention.

71. The communicant also alleges that, under certain conditions, the SEA statements for the "small scale" Detailed Spatial Plans can substitute individual EIA decisions for specific activities and that this includes activities listed in annex I. In such a situation, the SEA statement together with the small scale Detailed Spatial Plan has the legal function of a decision whether to permit an activity listed in annex I to the Convention. If such is the case, and the scope of persons entitled to challenge the Detailed Spatial Plan excludes environmental organizations, this also implies a failure to comply with article 9, paragraph 2, of the Convention.

C. Access to justice with respect to construction and exploitation permits

72. With respect to activities listed in annex I to the Convention, members of the public concerned, including environmental organizations, can challenge before the courts the relevant EIA decisions issued by the environmental authorities according to the EPA. To that extent, according to the communicant, Bulgarian legislation is in compliance with the Convention. However, for the activities (projects) to be implemented, subsequent permits must be issued after the EIA decisions, namely the construction and/or exploitation permits according to the SPA. With respect to these permits, legislation (for the construction permits) and case-law (for the exploitation permits) limit access to the judicial review to the investor and directly affected neighbours. This, according to the communicant, constitutes non-compliance with the Convention.

73. The communicant emphasizes that although all environmental aspects of the project are evaluated and decided upon at the stage of issuing the EIA decision, it is only the permit

issued according to the SDA which finally approves the activity. All the requirements and conditions of the EIA decision should be incorporated into this final permit. After the construction or exploitation permit is issued, the EIA decision is not independently enforceable (it is subsumed by the subsequent permit). According to the law, the authority issuing the final permit should respect the EIA decision and the conditions contained in it. In practice, however, when the construction or exploitation permit does not fully follow the conclusions of the EIA decision, environmental organizations or other members of the public concerned cannot ask the court to annul the final permit for that reason.[21] The same applies, according to the communicant, in situations when the construction or exploitation permit is issued while an EIA decision does not exist at all, either because it has never been issued or because it was cancelled by the court.

74. The Party concerned stresses that the developer, as well as the administrative authority issuing the final permit, must comply with all the conditions, clauses and measures of the EIA decision. The Party concerned is therefore convinced that, as members of the public concerned, including environmental organizations, can challenge the EIA decisions in court, it is not contrary to the Convention that they cannot appeal the subsequent permits, authorizing the activities listed in annex I of the Convention.

75. The EIA decisions, issued for the activities listed in annex I to the Convention and the subsequent decisions issued according to the SPA, form different stages of a tiered decision-making. The Committee has dealt with the concept of tiered decision-making in a number of its findings, with respect to the requirements in article 6, paragraph 4, of the Convention, regarding "early public participation when all options are open". In that respect, the Committee holds that each Party has certain discretion as to which range of options is to be discussed at each stage of the decision-making. Nevertheless, as each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage, the Parties must, to comply with the requirement of article 6, paragraph 4, of the Convention, provide for early public participation in every procedure where some decision concerning relevant options is taken (cf. findings on communication ACCC/C/2006/16 concerning Lithuania, para. 71). A mere formal possibility, de jure, to turn down an application at the latter stage of the tiered decision-making is not sufficient to meet the criteria of the Convention if, de facto, that would never or hardly ever happen (cf. findings on communication ACCC/C/2007/22 concerning France (ECE/MP.PP/C.1/2009/4/Add.1), para. 39 and findings on communication ACCC/C/2009/41 concerning Slovakia (ECE/MP.PP/2011/11/Add.3), para. 63).

76. In the present case, since the communicant does not allege non-compliance with article 6 of the Convention with respect to the final stage of the tiered decision-making for the activities listed in annex I to the Convention, i.e., the permits according to the SPA, the Committee will not deal with this issue. However, it is appropriate to apply the above reasoning concerning the tiered decision-making also when examining which decisions, issued in the tiered decision-making processes, shall be subject to judicial review upon an appeal by the members of the public concerned. For this examination, article 9, paragraph 4, of the Convention, according to which the procedures for challenging acts and omissions that may contravene national law relating to the environment must provide adequate and effective remedies, is also relevant (cf., e.g., findings on communication ACCC/C/2004/6 concerning Kazakhstan (ECE/MP.PP/C.1/2006/4/Add.1), para. 31).

77. If activities listed in annex I to the Convention are permitted by a number of tiered decisions, it may not be necessary to allow members of the public concerned to challenge each such decision separately in an independent court procedure. Accordingly, if one or

[21] See examples provided by the communicant gives examples in its letter of 6 March 2012.

more of the decisions have a preliminary character and are in some way integrated into a subsequent decision, a Party may remain in compliance with the Convention if the previous decision is subject to judicial review upon appeal of the final decision (see also para. 60 above). Nevertheless, the system of judicial review as a whole must comply with the requirements of article 9, paragraph 4, of the Convention, also with respect to each of the tiered decisions.

78. The current case differs from the hypothetical situation outlined in the previous paragraph. The members of the public concerned, including environmental organizations, can challenge in court the EIA decision, i.e., the first decision issued in the tiered process. However, they are not entitled to appeal the final permit, which, after it is issued, subsumes the EIA decision, i.e., it includes the conditions and measures of the EIA decision. This situation gives rise to a number of concerns with respect to access of members of the public concerned to effective judicial review with regard to permitting the activities listed in annex I to the Convention.

79. First, the communicant informs the Committee of situations in practice where construction or exploitation permits for activities listed in annex I to the Convention were issued without a prior EIA procedure, although this was required by law (see the cases referred to above in paras. 43–44). The communicant asserts that in these cases there was a lack of access to justice for the members of the public concerned. The Party concerned emphasizes that a construction or exploitation permit, issued without a prior mandatory EIA decision, as well as implementation of an activity on the basis of such permits, would be illegal. Be that as it may, since environmental organizations, as well as other members of the public concerned, do not have access to a review procedure before a court of law or another independent and impartial body established by law to challenge such final permits for annex I activities, when EIA decisions are missing, the Party concerned fails to comply with article 9, paragraph 2, of the Convention.

80. Secondly, there are situations where the EIA statements are issued and these are subject to appeal, but the subsequent/final decisions are not subject to appeal by members of the public concerned, including organizations, even if those decisions are not in conformity with the conditions and measures contained in the EIA decision. This means that even if all the environmental aspects of a proposed activity were covered by the EIA decision, there is no possibility for members of the public, including environmental organizations, to challenge the legality of a final permit that did not respect that EIA decision. Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention.

81. Thirdly, at least for one category of annex I activities (tourism and recreation projects according to annex 2, para. 12, of the EPA), it was demonstrated to the Committee that the EIA decision can be substituted by the SEA statement (see para. 30 above). Since the SEA statements are not subject to judicial review, there is, in such cases, absolutely no possibility for the members of the public concerned to challenge any decision during the permitting process of such activities in court. This, according to the Committee, also constitutes failure by the Party concerned to comply with article 9, paragraph 2, of the Convention.

IV. Conclusions and recommendations

82. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

83. The Committee finds that:

(a) By barring all members of the public, including environmental organizations, from access to justice with respect to General Spatial Plans (para. 66), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;

(b) By barring almost all members of the public, including all environmental organizations, from access to justice with respect to Detailed Spatial Plans (para. 70), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;

(c) By not ensuring that all members of the public concerned having sufficient interest, in particular environmental organizations, have access to review procedures to challenge the final decisions permitting activities listed in annex I to the Convention, (paras. 79–81), the Party concerned fails to comply with article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention.

B. Recommendations

84. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the meeting of the Parties to the Convention, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned undertake the necessary legislative, regulatory and administrative measures to ensure that:

(a) Members of the public, including environmental organizations, have access to justice with respect to General Spatial Plans, Detailed Spatial Plans and (either in the scope of review of the spatial plans or separately) also with respect to the relevant SEA statements;

(b) Members of the public concerned, including environmental organizations, have access to review procedures to challenge construction and exploitation permits for the activities listed in annex I to the Convention.