



TO

Ms Aprhrodite Smagadi

Secretary to the Århus Convention Compliance Committee

United Nations Economic Commission for Europe

Environment and Human Settlement Division

Room 332, Palais des Nations

CH-1211 Geneva 10

Switzerland

Answers to the questions of the Compliance Committee

The communicant hereby answers the questions of the Compliance Committee, which were annexed to the letter of the acting Secretary to the Århus Convention Compliance Committee, dated 02 February 2012.

Question 1. Please explain if and why General Spatial Plans shall be considered to be binding administrative acts, or if not, why not.

The General Spatial Plans (GSPs) are imperative acts of the Bulgarian authorities – issued either by the governmental or by the municipal authorities. Disrespecting the GSPs is not allowed by the law. All acts, deeds, actions or behavior contradicting the GSPs is considered unlawful, according to the national legislation.

The GSPs shall be considered as superior towards the Detailed Spatial Plans (DSPs), *per argumentum a* art. 103, para. 2 and para. 3 of the SPA. According to art. 104, para. 4 of the Spatial Planning Act (SPA), all inferior plans shall be in full compliance with the superior ones, as being more detailed at the same time.

Per argumentum a contrario, deriving from art. 102, para. 1 of the SPA, all spatial plans, including the GSPs, shall have direct investment applicability – i.e. an investor should base his investment project on the spatial plans when filing them for approval before the respective authority. In other words, a construction permit shall be in compliance with the DSP, according to art. 142, para. 2 of the SPA. The DSP, respectively, shall be in compliance with the GSP, as described above.

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The GSPs usually provides frameworks and not detailed provisions. The authority issuing the DSP may exercise some discretion within those frameworks of the GSP, provided the thresholds and limitations of the GSP are respected.

In that sense, the General Spatial Plans are considered rather as a general administrative acts under the meaning of art. 65 of the Administrative Procedure Code or in some cases as normative acts under the meaning of the Normative Acts Act. They are not considered as an individual administrative act.

Question 2. Please explain why the spatial plans shall be, in your opinion, considered as acts which can contravene provisions of national law related to the environment. Please give reasons with respect to both General and Detailed Spatial Plans.

First of all, we would like to state that the national law related to the environment includes the Environmental Protection Act (EPA), the Biodiversity Act (BA), the Protected Areas Act (PAA) and some others, as well as the EU *acquis communautaire* and the international treaties, ratified by Bulgaria and related to the environment.

In this respect, we need to point out that all plans in the area of spatial planning and land use (thus the spatial plans under the Spatial Planning Act) shall be subject to mandatory Environmental Assessment under Article 85 (1)¹ of the Environmental Protection Act. The adoption and the implementation of the plan should take account of the Environmental Assessment². Further, the spatial plans are considered plans which require an Appropriate Assessment under Art. 31 (1)³ of the Biodiversity Act.⁴

¹ Art. 85 (1) of the EPA:

An environmental assessment shall be mandatory for any plans and programmes and for significant modifications thereof in the areas of agriculture, forestry, fisheries, transport, energy, waste management, water resources management, and industry, including extraction of subsoil resources, telecommunications, tourism, spatial planning and land use, where these areas set the framework for future development of any development proposals listed in Annexes 1 and 2 hereto.

² Art. 82 (4) of the EPA: (4)

The environmental assessment of plans and programmes shall be completed when an opinion of the Minister of Environment and Water or of the competent RIEW Director is issued; the form and contents of the said opinion shall be determined in the regulation referred to in Article 90 herein. The authorities responsible for adoption and implementation of the plan or the programme shall reckon with the said opinion.

³ Art. 31 (1) of the Biodiversity Act:

Plans, programmes, projects and building-development proposals that are not directly related or necessary for the management of the special areas of conservation and that, either individually or in interaction with other plans, programmes, projects or building-development proposals, are likely to have a significant negative impact on the special areas of conservation, shall be assessed as to the compatibility thereof with the protection purposes of the relevant special area of conservation.

⁴ Art. 31 (14) of the Biodiversity Act:

In the cases of par. 7 u 12, p.1, the conditions, the requirements and the measures in the AA decision of the competent authority are compulsory for the developer of the development proposal, the plan, project or the program and for the referred competent authorities authorizing the last under other acts.

Consequently, the spatial plans as administrative acts would contravene provisions of the national law related to the environment in two cases:

- (1) In case that a spatial plan is adopted and implemented without prior environmental assessment/appropriate assessment, thus in violation of Art. 85 of the EPA and resp. Art. 31 of the Biodiversity Act;
- (2) In case that by the adoption and/or implementation of a spatial plan the EA/AA conditions are not respected, thus in violation of Art. 82 (4) of the EPA and Art. 31 (14) of the Biodiversity Act;

The spatial plans can be considered as acts which can contravene provisions of national law related to the environment, because it is the practice more often than not. There are numerous examples when the spatial plans in specific cases are adopted in clear contradiction with the EPA, BA and the PAA, as well with the Convention itself.

The legal reasons why it happens in practice lay purely in the legislation, in the SPA in particular. There are no safeguards in the Spatial plans adoption procedures or in the construction permit procedure that could ensure compliance with the environmental law, as described *supra*. There is absolutely no procedural guaranties for that. In addition, there is no legal remedy, available for the public concerned⁵ or to the interested parties⁶ to challenge the lawfulness of any given spatial plan or construction permit. What is more, in such cases falling under a hypothesis in the SPA, unlike other national proceedings, it is explicitly forbidden any access to information, public participation or right of appeal.

The practical reasons why spatial plans can contravene provisions of the national law related to the environment with respect to General and Detailed Spatial Plans can be deduced from the Spatial Planning Act. The law itself provides incentives for the authorities to disrespect the environmental legislation in practice.

First, according to Art. 103 (2-3)⁷ of the SPA the General Spatial Plans define the predominant designation and development type in the different structural elements of the territories in the domain of the plan, while the Detailed Spatial Plans define the concrete designation and development type in the different land plots in the domain of the plan.

In more detail, Art. 106⁸ of the SPA stipulates that the General Spatial Plan of a Municipality or part of it defines:

⁵ As defined in art.2. point 5 of the Convention.

⁶ As defined in art. 9, para. 2 and para. 3 of the Convention.

⁷ Art. 103 of the SPA:

(2) *A master plan shall determine the prevailing intended purpose and manner of planning of the separate structural parts of the areas comprehended into the plan.*

(3) *A detailed plan shall determine the specific intended purpose and manner of planning of the separate lots comprehended into the plan.*

⁸ Article 106 of the SPA:

The master plan of a municipality or of a part thereof shall determine:

1. The general structure of the territory, the subject of the plan and the predominant designation of the structural elements – situation and boundaries of the settlements; the agricultural territories; the forest territories; the nature protection territories, etc.
2. The general regime of planning of each of the territories under p.1.
3. The particular situation of the technical infrastructure (roads, rail roads, water-canals, ski lifts and ski runs, etc.) on the territory of the municipality and its connection with the territories of the adjacent municipalities and the technical infrastructures of national importance.
- 4-6. Other regimes.

In this respect, the General Spatial Plans define the land-use and the exact situation of future development projects, incl. the ones listed in Annexes 1 and 2 of the EPA, whereof the implementation is likely to have significant effects on the environment.

Further, according to Art. 108 (1)⁹ of the SPA, the Detailed Spatial Plans provide details for the development and urbanization of the territories of the settlements, whereby the prescriptions of the detailed spatial plans shall be mandatory in the design of the referred development projects, incl. the ones listed in Annexes 1 and 2 of the EPA, whereof the implementation is likely to have significant effects on the environment. In particular, the DSPs define the spatial structure, the planning zones and the specific intended purpose of each plot under development as stipulated in Art. 112 (1) of the SPA¹⁰.

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1. (supplemented, SG No. 65/2004) the general spatial structure of the spatial-development area subject to the plan, and the prevailing intended purpose of the constituent and structural parts of the said area: location and boundaries of the nucleated settlement and dispersed-settlement areas; the agricultural areas; the forest areas; the nature-conservation areas; the cultural and historical conservation areas, the disturbed areas for rehabilitation, and the areas of special, other, or mixed intended purpose;
 2. the general planning mode of each of the spatial-development areas covered under Item 1, with the requisite rules and standard specifications;
 3. the sitting of the physical-infrastructure networks and facilities within the territory of the municipality, and the connections of the said networks and facilities to the spatial development areas of the surrounding municipalities and to the infrastructure networks, facilities and projects of national importance;
 4. the spatial-development areas constituting public state and public municipal property, and the planning mode thereof;
 5. the spatial-development areas susceptible to predictable natural hazards and the requisite precautions and a manner of planning and protection;
 6. the spatial-development areas for active application of landscaping and aesthetically effective arrangement.

⁹ Article 108 (1) of the SPA:

Detailed plans shall particularize the planning and building development of nucleated-settlement areas and of the land-use areas of nucleated settlements, as well as of the dispersed settlements. The projections of detailed plans shall be mandatory in development project designing.

¹⁰ Article 112 (1) of the SPA:

A detailed plan referred to in Item 1 of Article 110 (1) herein shall determine: the spatial structure, the planning zones and planning-mode areas, and the specific intended purpose of each lot.

Question 3. 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 you are aware of cases in which construction permits/exploitation permits were issued even though the EIA decision's conditions were not respected and not promoted by the authorities, please provide the Committee with such examples.

The legal effects of the EIA decision shall be two, as follows:

- 1.) It is compulsory to the construction authorities in the proceeding for reviewing and approving the investment projects (along with the blueprints) and for issue of a construction permit.
- 2.) It is compulsory to the investor (developer) in relation to all condition and measures provided in the EIA decision

The EIA decisions are independently enforceable with respect to the developer for the appliance of the conditions and measures provided in, as far as the developer is subject to administrative sanction (fine) under art. 166, point 2 of the EPA. Those sanctions are imposed by the MOEW/RIEW in case the developer's breach of the measures provided in the EIA decision.

There is, however, an exception when imposing sanction on the developer for violation of the measures provided in the EIA decision is not possible. These are the cases when those activities and perpetrations infringing the EIA measures and conditions are allowed/permitted by another authority. It is namely one of the hypotheses in practice that lay in the very core of our communication to the Århus Compliance Committee – cases when the DSP and/or the construction permit allow activities otherwise forbidden by the EIA decision. In other words, when the construction permit is not in full compliance with the EIA decision prescriptions.

We would like to outline some exemplary cases of construction/exploitation permits which do not respect the EIA decisions:

1. Construction of a holiday village in the “Irakli-Emine” Site of Community Importance

The first example concerns the illegal construction of a holiday village in the Irakli-Emine Site of Community Importance. The facts on this case are provided in the answer of the Minister of Environment and Waters Mr. Djevdet Chakarov on a Parliamentary session of 23.05.2008 w.r.t. a parliamentary question of the MP Maria Capone concerning the illegal construction (see Att.1).

According to official investigations of the RIEW Bourgas, on 5 September 2007 the Nessebar Municipality has authorized the development project of “Swiss properties” LTD for a holiday village by issuing a construction permit which does not respects the conditions of the enclosed

EIA screening decision No. BC-281-IIP/2005 of the RIEW Burgas. Actually, the EIA screening decision No. BC-281-IIP/2005 of the RIEW Burgas concerns a development project of “IMO” LTD for a holiday base. So, it turns out that “Swiss properties” LTD has changed the initial development project of “IMO” LTD for a holiday base while the EIA screening decision No. BC-281-IIP/2005 of the RIEW Burgas does not reflect and cover these changes.

Currently, this case is being investigated by DG Environment of the EC under infringement procedure 2008/2046.

2. Uncontrolled development of urban areas in the vicinity of Bansko ski zone

The second case concerns the over-development of urban areas in the vicinity of Bansko ski zone, Pirin National park. According to condition 6 of the EIA decision No. 57-13/2000 of the MoEW (Att. 2) on the General spatial plan of Bansko ski zone the Municipality of Bansko may authorise the construction of hotels with a number of beds which does not exceed the capacity of the ski zone. According to the Management plan of the Pirin NP and the EIA report, the capacity of the ski zone is not more than 7 800 persons. According to an official inquiry of the Bansko Municipality (see Att. 3), the number of beds in hotels in 2010 is 17 500, while the Municipality gives no official information on the real number of beds in the apartment-hotels and the unfinished buildings, which in our estimation exceed 40 000 beds.

3. Exploitation of a tourist lift in Rila National park

In 1998, the Municipality of Sapareva banya authorised the construction of the the chair lift “Pionerska” hut – “Rila Lakes” hut in Rila National park on basis of the EIA Decision No.73/1995 of the MoEW (Att. 4). On 04.04.2009, the Directorate for national building control issues the exploitation permit No. CT-05-310/04.04.09 of the lift. According to public information from the MoEW, the lift is put in exploitation in violation of condition No.2 of the EIA Decision No.73/1995 of the MoEW.

First, the exploitation permit was issued before the adoption and implementation of a project concerning the restoration of the damaged areas during the construction of the lift. Such a project was authorised by the MoEW in 2010 with Decision No. 135-OC/2010 (see Att. 5).

Second, the exploitation permit was issued before the adoption and implementation of a project concerning the construction of infrastructure for the management of the visitors in the vicinity of the lower and upper lift station. Such a project was proposed not bu the developer but by the Rila National park Directorate in the beginning of 2010.

Currently, this case is being investigated by DG Environment of the EC under Infringement procedure 2009/2301.

Question 4. 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?

Yes, it does apply.

Yours faithfully,



Alexander Dountchev,
On behalf of the Balkani Wildlife Society

Date: 06.03.2012

Attachments:

1. Answer of the Minister of Environment and Waters Mr. Djevdet Chakarov on a Parliamentary session of 23.05.2008 w.r.t. a parliamentary question of the MP Maria Kapon concerning the illegal construction of a holiday village in Emine-Irakli SCI.
2. Decision No. 57-13/2000 of the MoEW on the General spatial plan of Bansko ski zone
3. Official inquiry of the Bansko Municipality on the number of beds in Bansko town
4. EIA Decision No.73/1995 of the MoEW for the Rila lakes lift
5. Decision No. 135-OC/2010 of the MoEW