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

Position of the Balkani Wildlife Society on the response of the Party concerned regarding communication ACCC/C/2010/58

Dear Ms Smagadi,

We would like to express our position on the response of the Party concerned regarding communication ACCC/C/2010/58 about alleged non-compliance with Art. 9 (2)-(3) of the Århus Convention.

On first place, we have to admit that the response of the Party concerned addresses the alleged non-compliances issues raised by the communication quite correctly. In that respect we suppose that the alleged "*confusion in the reference to non-compliance with certain articles of the Convention*", "*unclearly formulated texts*", etc., originate from the versatile interpretation of the Århus Convention on national level as would be demonstrated below.

Secondly, we would like to clarify that our initial communication addresses issues of non-compliance of the national legislation with the Århus Convention. Administrative practice and national courts jurisprudence cited, while being in violation of the Convention nonetheless, have resulted from the faults on legislative level. All the case-law in our communication serves as exemplary cases, only to illustrate the fact that several national law provisions fail to implement or prevent the due implementation of

Balkani Wildlife Society
Reg 5150/1992 in SCC, BULSTAT 831467860
Address: 8, Dragan Tsankov Blvd., 1164 Sofia
Tel/Fax: +359 2 9631470, e-mail: office@balkani.org
http://www.balkani.org

the Convention in Bulgaria. Those cases were chosen amongst a mass of many others such cases to show violations we deem to be typical. Upon request, we could easily bring a list of all publicly known cases of infringements upon the rights, guaranteed by the Århus Convention – please note, however, that they are hundreds. In fact, even a brief search of the SAC web-site http://www.sac.government.bg shows a great number of court rulings related to environmental rights of the public abused by the provisions of the Spatial Planning Act (SPA).

Hereby we submit our position and clarifications to the response of the Party concerned, by following the points addressed by the MoEW:

1. **Alleged non-compliance with Article 9, par. 2 of the Aarhus Convention**

1.1. Alleged non-compliance of the EPA with Article 9, par. 2 of the Aarhus Convention:

1.1.1. Environmental impact assessment (EIA) under the EPA:

First of all, the non-compliance with the Convention's article 9, par. 2 has not been referred in the communication, concerning the matter of challenging an EIA decision by the general public. We stated in par. 50 of the communication that the national legislation does not violate the requirements under art. 9 (2) of the Convention related to Access to justice connected with EIA, since the EPA does not prevents appeal against EIA decisions.

1.1.2. Environmental assessment (EA) under the EPA:

Our communication concerns the Environmental assessment of plans and programmes (EA). Particularly, it addresses two very specific issues of infringements upon the rights of the public concerned under art. 9 (2), as follows:

First issue is related to the unclear text of the EPA which allows vague, broad and rather frivolous interpretation of the law concerning whether or not the EA are individual administrative acts and subject to appeal under art. 120 of the Constitution and the Administrative Procedure Code;

Second issue: As a result of the first issue comes the second one, namely the contradictory and totally unpredictable practice of the administrative authorities, as well as the jurisprudence of the national courts.

That unclear text of the EPA concerns two specific provisions, related to the prerogatives of the authorities to conduct an EA of plans and programmes and determining the very final act on the EA, as follows:

- art. 82 (4),;
- art. 88 (2), related to the integrated permits of industrial facilities.

Those provisions uses wording as '*становище'* that allows a rather too ambiguous and versatile interpretation as 'opinion' or 'position'. In contrast to that, the entire national administrative legislation uses wordings as 'order' or 'decision' when referring individual administrative acts that are compulsory for their recipients and thus are subject to appeal before a court of law under art. 120 of the Constitution and the Administrative Procedures Code.

What is more, the EPA does not specify what the consequences of such opinion or position are and whether it is obligatory for the other authorities to implement it – namely the authorities approving GSPs and DSPs under the SPA. Further confusion creates art. 82 (1) of the EPA stipulating the EA proceedings shall be combined (or merged) with the GSPs and DSPs proceeding under the SPA.

Quite the contrary is the legislative approach when providing the final act of the EIA under art. 82 (5) of the EPA: the wording uses 'решение' ('decision') and it explicitly stipulates that any EIA decision shall be binding ands compulsory for any authorities or other recipients. Thus, while interpreting both rules *PER ARGUMENTUM A CONTRARIO* the implementing authorities may conclude the 'opinion' of the EA is not a 'decision', i.e. it is not final individual administrative act, it is not subject to appeal before a court of law and even that it is not compulsory.

In practice, the interpretation given by the national authorities contradicts art. 9 (2) of the Convention more often than not. There are numerous cases when the authorities decide that the EA 'opinion' is not subject to appeal, such as the notorious case before the MOEW, cited in the initial communication[1]. The authorities adopting GAPs and DSPs under the SPA usually do not wait entry into force of the EA 'opinion' or 'position' – i.e. after the appealing proceedings or after the deadline expires if there is no appeal within the deadline.

The national courts again more often than not rule the appeals against EA 'opinions' inadmissible, without going in the merits of the cases present before them. The usual reasoning includes the argument that the 'opinion' or 'position' on the EA is not a final act of the administration, but rather being a preliminary one shall not be subject to appeal. As e preliminary act, review of its lawfulness shall be conducted upon appeal against the final act, according to art.21 (5) of the APC – i.e. the act of the authorities under the SPA for approval of a GSP or a DS which is not subject to appeal.

Thus Ruling No. 821/23.1.2008 of the Supreme Administrative Court (SAC), confirming Ruling of 25.06.2007 of the Blagoevgrad Administrative Court, finding appeal against an

[1] Decision No. 79/15.03.2010 of the MoEW (att. 6 of the Communication).

EA 'opinion' inadmissible on grounds that it was not a final administrative act; Ruling No.7060/30.5.2009 of the (later revoked by the higher 5-member jury of the SAC); in adm. case No. 12421/2008 before the SAC the MOEW argues inadmissibility of the appeal reasoning that the 'opinion' of the EA is not a final administrative act (overruled by the court); Decision 11514/3.11.2008 of the SAC distinguishes clearly 'decision' on an EIA from 'opinion' on an EA. There were also many earlier decisions of the national courts finding an EA 'opinion' to be not an administrative act subject to appeal.

There are also many decisions on cases where the national courts have found such appeals admissible and reviewed the merits of the cases. Their number, however, is less then a half of all case-law of the courts on that matter. In that respect, the jurisprudence of the national courts could only be described as contradictory, unpredictable and that it cannot be relied upon by the public concerned.

In view of our arguments *supra*, par. 55-56 of the initial communication shall be viewed as stating that the alleged non-compliance with Art. 9 (2) of the Convention concerns the unclear texts and lack of explicit text in the Environmental Protection Act (EPA) governing the appeal of positions and decisions on Environmental assessments (EA) and resp. the orders for adoption of general spatial plans (GSP) issued on the base of the EA procedure (under Art. 7 of the Convention). The initial communication also states points out lack of explicit text in the Spatial Planning Act (SPA) towards the binding effect of the EA for the authorities adopting spatial plans under the SPA procedures.

The case, cited by the Party concerned was also mentioned in our initial communication. It is the famous Ruling in court hearing of 29.04.2009 by the Supreme Administrative Court on administrative case No 14767/2008 (Att.5 of the communication). With this Protocol decision the court finds that "*the Order for the adoption of the GSP of Tsarevo Municipality issued by the MRDPW is an act which (acc. to Art. 127 (1) of the SDA****) is subject to the provisions of Article 6[2] within the meaning of p.20 of Annex I of the Convention*****"**. In that regard, obviously, the court allowed the judicial review of the GSP solely on behalf of direct application of **Art. 9, par. 2 of the Århus Convention!** We share the court opinion in that case that the EA position/opinion is also an act which is subject to the provisions of Art. 6 (either by virtue of Art. 7 or within the meaning of p.20 of Annex I of the Convention) and thus subject to judicial review under Art. 9 (2) of the Convention.

Further, the implication of the lack of specific legal texts particularly in the EPA regarding the access to justice connected with EA can be demonstrated by decision No. 79/15.03.2010 of the MoEW (cited in att. 6 of the Communication). In that decision the MoEW states officially that "*the Position on Environmental Assessment No BD-02-*

[2] According ot Art. 127 (1) of the SPA "The General Spatial Plans are subject to public consultation before adoption". The public consultations of GSP (can) go apart from the public consultations of the SEA report!

EO/2009 of the Director of the Regional Inspectorate of Environment and Water in Blagoevgrad regarding the General Spatial Plan of Blagoevgrad Municipality has not an independent legal action impact, with it are not directly affected any rights and legal interests of citizens and organizations, due to which ***the Position on the Environmental Assessment is not subject to independent administrative control****"*.

Curiously, this decision of the MoEW comes one year after the issuance of Rulling No.10129/28.07.2009 on admissibility of adm. case No. 9127/2009 of the SAC, cited by the MoEW on behalf of the Party concerned in their response. This fact, besides the case-law cited in the communication, indicates once again that the lack of specific legal texts in the EPA regarding the access to justice connected with EA leads to a broad, unreliable and versatile interpretation of Art. 9, par. 2/3 of the Convention by the MoEW and the court. Not only before but also after 2009.

Finally, it is worth to note that unlike the EA matter and thanks to the existence of article 99, par. 6 of the EPA (cited in the response of the Party concerned), as well as art. 82 (5), there is unambiguous administrative and court practice in the interpretation and application of Art. 9, par. 2 of the Convention with respect to the right of the public to appeal EIA decisions on activities under art. 6 of the Convention.

2. Alleged non-compliance with Article 9, par. 3 of the Aarhus Convention

2.1. Passing of spatial plans without EA/EIA:

According to the Party concerned the non-compliance with the Convention's article 9, par. 3 referred in the communication is irrelevant and inapplicable in the area of challenging the lawfulness of administrative acts for spatial planning adoption (incl. acts regarding Annex I development projects).

In our opinion, the position of the MoEW could be valid only if the Party concerned is able to prove that the adoption of decisions of the Ministry of Regional Development and Public Works and the municipalities related to spatial planning and authorisation of Annex I activities under the SDA can not contravene provisions of the national law relating to the environment (Art. 9, par. 3 of the Convention).

In this respect, we would like to note that the case-law provided in the communication (incl. the referred infringement procedures of the EC) gives some exemplary cases of plans and projects adopted, approved or authorised by the MRDPW or the municipalities without preliminary EA/EIA procedure and public participation in the decision-making process. In our opinion, those cases illustrate a wide-spread practice that contravenes the following provisions of the national Environmental Protection Act (EPA)[3]:

[3] In addition, we would like to cite Decision No. 3216/20.3.2008 of the SAC, reviewing such case of adoption of a detailed spatial plan (DSP) of a motel without any EA.

- article 85 of the EPA which stipulates that the EA is mandatory for plans and programs regarding development projects of Annex I and II of the act;

- article 92-93 of the EPA which stipulate that EIA is mandatory for development projects of Annex I and a case-by-case examination is mandatory for Annex II development projects.

2.2. Judicial review of acts passing spatial plans in cases when EA/EIA is applicable:

We do not agree with the Party concerned in the opinion expressed by the MOEW in arguing that the procedures of the Spatial Planning Act fall without the scope of the Århus Convention. Indeed, there are cases of spatial plans outside the scope of 'environmental matters' under the meaning of the Convention. Nonetheless, there are numerous types of cases when such 'environmental matters' lay the core of some spatial planning cases. Isn't the spatial planning a chief prerequisite of any construction in a lawful country, is it? Aren't construction activities often in conflict with the environmental protection, anywhere in the world? Frequently, special planning and the subsequent constriction affect protected areas for nature conservation or involve high- or law-risk industrial facilities.

In fact, the national legislation very neatly and correctly distinguishes both cases and provides when EIA/EA shall be conducted as a prerequisite for spatial planning. In that respect national law is in line with the convention.

What is not in line with the Convention is the lack of any safeguards for proper implementation of the national law and the Convention, as well as particular provisions of the SPA that clearly contradict to art. 9 of the Århus Convention.

With regard to the thesis of the Party concerned that Article 9, par. 3 of the Convention is not clear and detailed enough to allow the access to judicial review of decisions of the MRDPW and the municipalities, we would rather expect and accept the official position of the Århus Convention Compliance Committee on this issue.

Furthermore, the Party concerned arguments that the Convention's article 9, par. 3 is not applicable with regard to the contestations of spatial planning acts since the SDA provides for „*the legally guaranteed possibility for public organisations to express their standpoints on the proposed project and to participate in the procedure of its adoption*". However, this contradicts the concept of the Århus Convention expressed in the concern *"that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced*" (preamble 18 of the Convention). In this regard, we would like to once again refer to the case-law provided in the communication, which clearly demonstrate that the lack of

specific legal texts in the SPA providing for access to judicial review of spatial planning acts can not guarantee that the national and EU environmental law is enforced. In that respect, the national procedures legislation cannot be perceived as providing for 'effective judicial mechanisms' under the meaning of the Convention. Quite the contrary!

For instance, in 2008 the amendment of the *General Spatial Plan* of the Perelik Tourist Center, despite the fact it affects protected areas and forests, was approved by the Municipality of Smolyan without Environmental Assessment classified in 2009 by DG Environment as breach of the EU legislation. Still the court ruled that the order for the adoption of the spatial plan cannot be appealed by virtue of article 127 of the SPA. It makes the enforcement of the environmental law impossible by the national means of judicial remedy. Despite the opinion of the Party concerned that the spatial plan "*has no direct investment application*" it does have direct effect on the environment through its implementation what is namely the reason for subjecting the spatial plans to mandatory strategic environmental assessment by virtue of Article 3, par. 2 of Directive 2001/42/EC on the assessment of the effect of certain plans and programmes on the environment, as well as by virtue of the national law resp. Article 85 of the EPA.

All other cases cited in our initial communication concern cases when the spatial planning in question affects or poses a direct threat to protected areas for nature conservation.

Finally, in its response the Party concerned admits that in the field of spatial planning and construction „*in accordance with the legislative approach adopted by the SDA the right to appeal is bound in any case, without exceptions, to the direct and immediate effect on property rights or other limited real rights*". In our opinion, this approach adopted by the SPA is not in line with the provisions of the Convention as read in article 9, par. 2:

"… *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 for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. …"*

In conclusion, we believe the national legislation will be in compliance with the provisions of the Århus Convention as long as:

- the EPA explicitly allows the members of the public concerned to have access to administrative and judicial procedures to challenge positions and decisions on EA taken under the provisions of Chapter 6, Section 2 of the EPA - „Environmental assessments on plans and programs“;

- the SDA explicitly allows members of the public concerned[4] to have access to administrative and judicial procedures to challenge acts issued under the SDA when these acts contravene provisions of the national environmental legislation (EPA, Biodiversity act, Protected areas act, etc.).

Yours faithfully,

Alexander Dountchev,

On behalf of the Balkani Wildlife Society

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[4] Within the meaning of Article 9, par. 2 of the Convention