

Additional information regarding communication ACCC/C/2018/161 concerning compliance by Bulgaria with provisions of the Convention concerning public participation, access to justice and protection against penalization, persecution and harassment

Communicant:

Organization name: Non-profit Association Civil Control – Animal Protection

Permanent address: [REDACTED]

Telephone: [REDACTED]

E-mail: [REDACTED]

1. Non-profit Association Civil Control – Animal Protection has been invited to submit comments on Bulgaria's reply on communication ACCC/C/2018/161 of 13 July 2020 ("Bulgaria's reply of 13 July 2020"). Bulgaria's reply of 13 July 2020 includes certain misrepresentations of Bulgarian law, which we considered important to correct to ensure that the Committee can have a full understanding of the facts and national legal framework.

Answer to question 3 in Bulgaria's reply of 13 July 2020

2. The Party concerned lists Articles 124b of the Spatial Development Act ("SDA") and Article 22 of the Local Government and Local Administration Act ("LGLAA") in its response to question 3. These legal provisions are not relevant to the question posed, as they set out the legal regime of announcing adopted administrative decisions. These provisions are not related to the public participation procedures in the course of issuing the relevant administrative decisions.
3. At the bottom of p. 2 of Bulgaria's reply of 13 July 2020, it is noted that "*the conciliation regime upon approval of the general spatial act allows a wide range of control bodies to competent institutions to carry out administrative control at various stages.*" This statement is wrong. Under Bulgarian law, executive bodies (ministers, district governors, mayors, directors of directorates, etc.) exercise administrative control towards their subordinates. The body in higher position has the power to annul or quash the administrative decisions of its subordinate bodies.
4. The General Spatial Development Plan ("GSDP") is adopted by the Municipal Council. Under Bulgarian law, the Municipal Council represents the local self-government (Article 138 of the Bulgarian Constitution). No state body can exercise administrative control over the acts of the Municipal Council. This is clearly exemplified in the case of the GSDP, where the District Governor can only veto or challenge the GSDP before court (Article 127 (6) of the SDA). Only the court can quash or annul the GSDP and this court challenge may be initiated only by the District Governor under the terms of Article 127 (6) of the SPA.

Answer to question 4 in Bulgaria's reply of 13 July 2020

Proposals and alerts under Chapter 8 of the APC

5. The legal provisions provided by the Party concerned miss one very substantial feature of the proposals and alerts under Chapter 8 of the Administrative Procedure Code ("APC"). The decision on proposals and alerts may not be subjected to review by court or other tribunal (Article 124 (2) APC). There is no review mechanism available to the party who submitted the proposal or alert to ensure whether the proposal or alert has been lawfully decided. This is the main reason why the proposals

and alerts under Chapter 8 APC are relatively weak tool for the public to exercise vigilance over the deeds of the public bodies.

The claim that members of public are entitled to alert the District Governor and the District Governor may challenge the GSDP before court

6. Bulgaria claims that the members of the public concerned are not deprived of access to court with regard to GSDPs, as they may submit alerts under the rules of Chapter 8 of the APC to the District Governor and the District Governor may challenge the GSDP before court. It has been proven that in the case at hand that the competent bodies refused to apply this mechanism (Annex No. 14 to Communication). Such a route has been refused to the Communicant.
7. The Committee asks for the authority's discretion to undertake substantive review following submission of alert or proposal. For this reason, we find it important to note the legal and practical barriers to exercising the right that Bulgaria claims members of the public are entitled to.
8. The District Governor may challenge the GSDP before court within 14-days from receiving it (Article 127 (6) SPA). It is very unlikely that by the time this period elapses, the public will be notified of the GSDP, members of the public will be able to submit an alert, the District Governor will review this alert and submit a court challenge.
9. The decision of the GSPD shall be submitted to the District Governor within 7 days after it has been adopted. This means that in the general case, the District Governor shall be able to challenge the GSDP within 21 days after the GSDP is adopted.
10. The GSDP is to be announced to the public in two ways (Article 127 (6) SPA):
 - (i) By publication in the State Gazette. According to Article 127 (6) SPA, the GSDP will be published in the State Gazette if the GSPD is not vetoed or challenged before court, or if challenged before court, only after the court proceedings are closed. This means that that the public cannot be notified of the GSDP before the time-bar for the District Governor has elapsed.
 - (ii) By publishing the GSDP on the website of the municipality. There is no time-limit set by law to ensure when the GSDP is to be published. Technically, depending on the situation, it could be possible for the members of the public to be informed of the GSDP before the time bar for the District Governor to challenge it has elapsed. In this case, the considerations listed below will take place.
11. Under the Article 121 of the APC, decisions on the alerts from the public shall be decided on within two months from receipt of the alert. This period may be prolonged with one more month. Considering this, it is very likely, that even if the GSDP has been timely published on the website of the municipality, that once the District Governor takes a decision on the alert, the time-bar to challenge the GSDP will not have elapsed.
12. It is entirely within the District Governor's discretion to decide whether to challenge an administrative decision (such as a GSDP) before court or not. There is no legal mechanism based on which the District Governor's decision to challenge or not to challenge an administrative decision is subjected to any type of control other than political one.
13. Even if the District Governor challenged GSDP in court, the member of the public will not be a party to this procedure.

The claim that members of public are entitled to alert the competent authorities and the competent authorities issue a CAM to seize the legal effect of the GSPDD

14. Bulgaria claims that the members of the public concerned are not deprived of access to court with regard to GSDPs, as they are entitled to submit an alert under the rules of Chapter 8 of the APC and the competent authorities may impose coercive administrative measure (CAM) to suspend the legal effect of the GSDP. The communicant already proved that in the case at hand no access to justice has been granted under this mechanism (Annex 13 to the Communication).
15. As the Committee poses specific questions on the applicable national law, we find it important to clarify that the suggested approach is not only hard to attain in practice, but also lacks legal grounds.
16. In its response of 17 August 2017, Bulgaria claims that the competent authorities may suspend the legal effect of the GSDP by means of a CAM on the grounds of Article 158 (3) and (4) in conjunction with Article 160 of the Environmental Protection Act ("EPA"). According to Art. 158 EPA, The Minister of Environment and Water or persons authorized by him, the directors of RIEW, the directors of the national parks and the directors of the basin directorates shall apply CAM in the cases of:
 - "3. occurrence of an immediate danger for pollution or damage of the environment or for damage of the health or the property of the people;*
 - 4. prevention or cessation of administrative violations related to the protection of the environment, as well as prevention and / or elimination of the harmful consequences of these violations."*
17. Under Article 158 EPA, the competent authorities subject may impose CAM only subject to proving immediate danger for pollution, damage of the environment or damage of the health or the property of the people. CAM are a type of administrative coercion and it is general legal theory that they can be applied only in strict interpretation of law. It is difficult to imagine how the failure to carry out a SEA alone will amount to immediate danger for pollution or immediate danger for the health and property of people. If such a CAM is issued, it is almost certain that it will be quashed by the court.
18. CAM under Article 158 (4) EPA may be applied to prevent or seize administrative violations or to prevent damage of such violations. Similarly, the CAMs under Article 121 of the Biodiversity Act are to be applied in identical situations. The general definition of CAM under the Law on Administrative Violations and Administrative Sanctions ("LAVAS") links CAM to administrative violations. CAM may be imposed to prevent or seize administrative violations, as well as to prevent or eliminate harmful consequences of such violations (Article 22 of LAVAS).
19. Under Bulgarian law, administrative violation is an act (action or omission) which violates the established order of the state administration, which has been committed culpably and has been declared punishable by an administrative penalty imposed by an administrative penalty (Article 6 of LAVAS). It is well established in the case-law and legal theory that administrative violations shall be specifically set out in law in order for legal responsibility to be sought or any negative consequences to be borne. Quashing the SEA for violation of law results in a gross failure in the procedure to issue a GSDP, based on which the GSDP shall be quashed (Article 146 APC). It is difficult to imagine how the failure to conduct a SEA is an administrative violation.
20. The competent authority has discretion to decide whether to impose a CAM. It is well established in Bulgarian case-law, that the assessment whether the specific situation represent "immediate danger for pollution, damage of the environment or for damage of the health or the property of the people" is within the operational independence (in

Bulgarian “оперативна самостоятелност”) of the body. Similarly, the assessment under Article 121 of the Biodiversity Act whether a situation represents imminent danger of damage or destruction of protected areas or parts of them is also subject to the operational independence of the body. When acting with operational independence, the assessment whether to impose a CAM or not is within the discretion of the competent body. Judicial control may not be exercised over such an assessment. The court review is limited to a check whether the administrative body has had operational independence and has complied with the requirement for legality of the administrative acts (article 167 of the APC).

21. Given the above analysis, it not surprising that Bulgaria does not present a prove of CAM seizing the legal effect of a GSDP being uphold by a court. The fact that the Director of the Regional Inspectorate of Environmental and Water Plovdiv refused to issue a CAM when requested only proves it is very doubtful whether Bulgarian law provides legal grounds for a CAM to seize the legal effect of a GSPD at all (Annex No. 4 to the Communication).
22. Even if the competent authority imposes a CAM, the member of the public will not be a party this procedure.

Answer to question 5 in Bulgaria's reply of 13 July 2020

23. The party concerned claims that the mayor may challenge the GSDP. This statement is wrong. Generally, the mayor may challenge acts of the Municipal Council before court (Article 45(5) of the LGLAA). The SPA, however, limits the bodies that may challenge the GSDP only to the District Governor. Bulgarian law is continental law system and applies the principle *lex specialis derogat legi generali*. Article 45 of the LGLAA sets the general legal framework for control over acts of local bodies. The SPA is *lex specialis* and sets out specific rules for the control over GSDP, namely that only the district governor may challenge such acts before court. This interpretation of the law is established in the case law.¹
24. Bulgaria claims that when GSPD is suspended by means of a CAM “*no further actions can be taken on the implementation of the GSDP/GSPDD amendment, and the current once are frozen*”. It is important to note that the CAMs may be challenged before court and if they are found to be illegal, they will be annulled and quashed. If the competent authorities are ever to issue a CAM to seize the legal effect of a GSDP under the current legal framework, it is highly likely that such an act will be found illegal for the reasons stated above. Furthermore, the preliminary execution of all administrative decisions, including CAM, may be suspended if the court finds that the decision causes significant damage that is difficult to repair (Article 166 (2) and (4) of the APC). Last but not least, CAM cannot quash or annul the GSDP and the illegal administrative decision will continue to exist indefinitely together with the risk of entering into legal effect again.

Answer to question 7 in Bulgaria's reply of 13 July 2020

25. The Party concerned did not provide full answer to the question posed.
26. The content of the GSDP has been provided only at the public consultation that took place on 12th, 13th and 14th of December 2013. No documents or other material were provided to the public concerned before that. This is evident from the fact the public

¹ Ruling of 20 October 2016 on adm. case No. 448 / 2016 of the Administrative Court of Stara Zagora;
Ruling of 25 October 2017 on adm. Case No. 518 / 2017 of the Administrative Court of Stara Zagora

notice of 10 December 2013 does not inform the public how to access the relevant documentation.

27. The public notice of 10 December 2013 is misleading. It states that the GSDP is amended in part "Zone for sport and attraction". In fact, it is the "Zone for public green" that was being changed to "Zone for sport and attraction".
28. The protocol of the public discussions does not list the specific objections made during the discussions. This protocol is the only document evidencing the result of the public discussions. During the public discussions, members of the public noted specific legal violations that the proposed amendment to the GSDP had. The protocol could not inform the body entitled to take the decision on the GSDP, namely the members of the Municipal Council and members of the Expert Council on Spatial Development, of the specific objections made during the public discussion. This is in violation of Article 6 (8) of the Aarhus Convention.

Annex No.1: Provisions of legal acts referred to in the comments

Dated: 17 September 2020



Georgi Serbezov

Annex No. 1: Provisions of legal acts referred to in the comments

Constitution of the Republic of Bulgaria

Art. 138. A body of the local self-government in the municipality shall be the municipal council, which shall be elected by the population of the respective municipality for a term of four years by an order determined by law.

Administrative Procedure Code

Art. 121. The decision on the alert shall be taken no later than within two months from its receipt. Where particularly important reasons so require, the time limit may be extended by the higher authority, but by no more than one month, of which the sender shall be notified.

Article 124 (2) The decision, rendered on a submitted signal, shall not be subject to appeal.”

Art. 166. (Amended and supplemented, SG No. 39/2011) (1) The appeal shall suspend the execution of the administrative act.

(2) (Amended, SG No. 39/2011) In any situation of the case until the entry into force of the decision at the request of the disputing court, the preliminary execution may be suspended, admitted by an order of the body that has entered into force. , issued the act under Art. 60, para. 1, if it could cause to the disputant significant or difficult to repair damage.

Enforcement may be suspended only on the basis of new circumstances.

(3) (Amended, SG No. 39/2011) The request under para. 2 shall be considered in closed session. The court shall rule immediately with a ruling, which may be appealed with a private appeal within 7 days of its announcement.

(4) (New, SG No. 39/2011) The admissible preliminary execution of an administrative act by virtue of a separate law, when no explicit prohibition for judicial control is provided, may be suspended by the court at the request of the disputant under the conditions of para. 2.

Environmental Protection Act

Art. 158. The Minister of Environment and Water or persons authorized by him, the directors of RIEW, the directors of the national parks and the directors of the basin directorates shall apply coercive administrative measures in the cases of:

1. emergency situations, caused by actions or inactions of owners or users of sites and territories;
2. disaster situations;
3. occurrence of an immediate danger for pollution or damage of the environment or for damage of the health or the property of the people;
4. prevention or cessation of administrative violations related to the protection of the environment, as well as prevention and / or elimination of the harmful consequences of these violations.

Art. 159. (1) The coercive administrative measures shall be preventive, suspensive and restorative.

(2) In the application of the compulsory administrative measures the Minister of Environment and Water or persons authorized by him, the directors of RIEW, the directors of the national parks and the directors of the basin directorates with the assistance of the regional governor shall suspend with motivated order the production activity territories, as well as access to the territories of owners and users, including by sealing or sealing.

(3) The marking of the seal and the manner of sealing and sealing under para. 2 shall be approved by an order of the Minister of Environment and Waters.

Art. 160. (1) The application of a compulsory administrative measure shall be carried out with a motivated order of the body under art. 158.

(2) In the order under par. 1 shall be determined the type of the compulsory administrative measure and the manner of its application.

(3) The order under para. 1 shall be served on the interested person by the order of the Civil Procedure Code.

(4) (Amended, SG No. 30/2006, effective 13.07.2006) The order under para. 1 may be appealed by the interested persons by the order of the Administrative Procedure Code.

(5) The appeal of the order under para. 1 does not stop its action.

Biodiversity Act

Art. 121. (1) (Renumbered from Art. 121, amended, SG No. 88/2005) In order to prevent and terminate the administrative violations under this Act and the harmful consequences thereof, the competent authorities or persons authorized by them shall impose coercive administrative measures under this section.

(2) (New, SG No. 88/2005) The bodies under Art. 122 impose coercive administrative measures under this law in the cases of imminent danger of damage or destruction of protected areas or parts of them.

Art. 122. (Amended, SG No. 88/2005; SG No. 19/2011, effective 09.04.2011; supplemented, SG No. 101/2015, effective 22.12.2015) (suppl., SG 77/2018, in force from 01.01.2019) (1) (suppl. - SG 77/2018, in force from 01.01.2019) The Minister of Environment and Water or an official appointed by him from the Ministry:

1. suspend orders of bodies of the executive power, which are in violation of this law;
2. suspend the implementation of plans and projects, started or approved in violation of this law;
3. close zoos or parts of them, which do not function in accordance with the requirements of this law;
4. revoke licenses of zoos in the cases of art. 62, para. 4.
5. (New, SG No. 101/2015, effective 22.12.2015) revokes permits issued in accordance with Regulation (EU) № 1143/2014, when the conditions and requirements set therein or in Art. 8 of the Regulation, and / or suspends actions that are in violation of the same Regulation.

(2) The directors of the regional bodies of the Ministry of Environment and Water:

1. (amended, SG No. 88/2005; amended, SG No. 19/2011, effective 09.04.2011) suspend activities for the use of forests, lands and water areas and other resources, as well as the construction in protected areas, which are in violation of the orders for their announcement or of the management plans, development, technical and forestry programs and plans approved by the respective order;

2. (amended, SG No. 88/2005) suspend activities or sites that damage or pollute the environment above the admissible norms in protected areas;
3. (supplemented, SG No. 88/2005) suspend orders of the regional forest directorates, the state forestry holdings, the state hunting holdings, the directors of natural parks and the municipal bodies, which are in violation of this law;
4. issue prescriptions for measures for prevention and / or elimination of violations.

(3) (Amended, SG No. 88/2005; amended, SG No. 19/2011, effective 09.04.2011) The directors of the regional forest directorates, the directors of the state forestries, state hunting farms and directors of nature parks, as well as mayors of municipalities suspend activities and construction in forests, lands and water areas - state, municipal and private property, carried out in violation of approved management plans and development and technical plans and projects.

Art. 123. (amend. SG 88/05) (1) The application of the compulsory administrative measures shall be carried out with a motivated order of a body of art. 122, which shall indicate the grounds for imposition, the type and the manner of application of the respective coercive administrative measure.

(2) (Amended, SG No. 30/2006, effective 12.07.2006) The orders under para. 1 and under Art. 122, para. 1 may be appealed by the order of the Administrative Procedure Code.

(3) The appeal of the order under para. 1 does not suspend its implementation.

Law on Administrative Violations and Administrative Sanctions

Art. 6 Administrative violation is an act (action or omission) which violates the established order of the state administration, which has been committed culpably and has been declared punishable by an administrative penalty imposed by an administrative penalty.

Art. 22. Coercive administrative measures may be applied for prevention and cessation of administrative violations, as well as for prevention and elimination of their harmful consequences.