

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:

Environmental Association Za Zemiata

Permanent address: Sofia 1164, 25 Krastyo Sarafov Street, Ground Floor, Bulgaria

Telephone : +359 (0) 896 62 88 08; +359 2 9431123

E-mail: info@zazemiata.org

1. On 1 October 2018, Environmental Association Za Zemiata (“Za Zemiata”) submitted a communication (“the Communication”) to the Aarhus Convention Compliance Committee concerning the systemic failure of Bulgaria to enforce the Convention (ACCC/C/2018/161). The Communication includes allegations related to five separate violations of the Convention, as follows:

Date	Event	Consequence
19 September 2017	Amendments to the Environmental Protection Act (EPA).	Limiting court review of Environmental Impact Assessment (EIA) appeals against objects of national importance to one court instance only. (“ Amendment to the EPA of 2017 ”) ¹
18 September 2018	Amendments to the Administrative Procedure Code (APC)	Significantly increasing the court fees for cassation appeal for NGOs and for EIA cases. (“ Amendment to the APC of 2018 ”) ²
18 September 2018	Amendments to the APC	Limiting court review of appeals for access to environmental information to one court instance only.
1 November, 2017	Supreme Administrative Court of Bulgaria (SAC) ruling.	Denying legal standing to citizens and ENGOs to challenge Air Quality Plans (“ AQPs ”).
2017/2018	[Statements made by officials]	Insinuation that ENGO-s are engaged in illegal activities

¹ Law amending the Environmental Protection Act and the Biodiversity Act, Promulgated in State Gazette No.76 of 19 September 2017.

² Law amending the Administrative Procedure Code, Promulgated in State Gazette No. 77 of 18 September 2018.

1. Request to proceed without a hearing

2. Four of the violations in the Communication concern legislative barriers or restrictive court practice. We consider that compliance with the Convention can be determined based on written submissions as there should be no disagreement as to the underlying facts. These are as follows:
 - (1) Violation No.1 of the Communication: Amendment to the EPA of 2017: One instance court review for EIA objects of national importance
 - (2) Violation No.2 of the Communication: Amendment to the APC of 2018: High fees for cassation appeal and for EIA cases
 - (3) Violation No.3 of the Communication: Amendment to the APC of 2018: One instance court review for appeals against refusals to provide access to environmental information
 - (4) Violation No.5 of the Communication: Court practice denying legal standing to citizens and ENGOs to challenge Air Quality Plans (AQPs)
3. Violation No.4 of the Communication: Derogatory public statements of high officials with regards to ENGO-s and insinuation of ENGOs being engaged in illegal activities, inevitably concerns facts of the political life in Bulgaria. These facts are demonstrated through official sources and media publications. To verify the statements usually more than one source is provided. Accordingly, we equally consider that there should be no disagreement as to the underlying facts, even though there may be disagreement (as in the Response of the Party concerned) as to how these facts are to be evaluated in light of the Convention requirements. We therefore consider that this aspect can be resolved without a hearing as well.
4. Determining the compliance of these matters with the Aarhus Convention in an expedient manner is of crucial importance for access to justice on environmental matters in Bulgaria. We therefore consider that any steps that can be undertaken to accelerate resolution of the Communication, such as resolving it by written submissions only, could have a real positive impact.
5. Based on the above, we request the Committee to proceed without a hearing. We stand ready to reply to any questions or to further elaborate on our request either in writing or orally during the next Committee meeting.

2. Comments on the Response of Bulgaria

6. On 17 June 2019, Za Zemiata received the statement of the Party concerned (“the Response”). The Response 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. Our observations below are strictly limited to these aspects. We do not engage on any of the points where we disagree with the argumentation of the Party concerned as to compliance with the Convention. The fact that we do not address all aspects of the Party’s argumentation should therefore not be taken as an indication of our agreement with these points.
7. Moreover, we provide additional information and evidence that have come to our attention after the submission of the Communication but that immediately relate to claims included in the Communication.

2.1. Amendment to the EPA of 2017

8. In para. 4 of the Response, the Party concerned claims that the decisions in the scope of the 2017 EPA Amendment may be subject to administrative review. Indeed (as per Art. 81(1) of the APC, Annex No. 1), certain administrative decisions may be reviewed by the public authority superior to the authority that issued the decision. For example, decisions of the Regional Inspectorates of Environment and Water may be appealed to the Minister of Environment and Water. However, decisions in the scope of the 2017 EPA Amendment cannot be subject to such a review.
9. The 2017 EPA Amendment applies to decisions of Minister of Environment and Water only.³ The Administrative Procedure Code, however, excludes all acts of the ministers from administrative review procedure in order not to overburden their superior body – the Council of Ministers (Article 82 (2), point 2 of the APC). Accordingly, large-scale projects in the scope of the 2017 EPA Amendment may be reviewed only by court subject to the legislative restrictions.
10. In para. 7 of the Response, the Party concerned claims that “*access to the cassation phase is not absolute and can be judged by the supreme court on the basis of statutory criteria for the selection of the cassation complaints*”. However, this statement only holds true as regards cases before the regular courts (responsible for civil/private cases) but not for cases before the administrative courts. This is because the civil judiciary in Bulgaria is based on three-tier court review, while the administrative judiciary is two-tiered. In civil/private law cases, access to the cassation review of a second-instance court decision to the Supreme Court of Cassation is indeed conditional on there being a question of whether the second instance decision complies with settled case-law. In contrast, the Supreme Administrative Court is obliged to review all complaints against first instance decisions of lower administrative courts. This is unless the case is restricted to one court instance only, as per the new rules challenged in this Communication. Due to these differences, comparison between the cassation review under the administrative and civil judiciary is not appropriate.
11. We agree with the statement in para. 9 of the Response that the 6-months period for completion of court proceedings is “instructional” meaning that the court may issue a decision with binding legal effect even after this period expires. Delaying proceedings, however, may have negative consequences for a judge. The professional development of judges in Bulgaria is based on the evaluation of the Supreme Judicial Council (Articles 196-209 of the Law on Judiciary). One of the four indexes for evaluation is compliance with statutory deadlines (Article 198, para 2, point 1 of the Law on the Judiciary). Moreover, a judge that fails to close proceedings in time may be subjected to a disciplinary sanction (Articles 30 (5), point 3 and 54 (1), points 2 and 6 of the Law on the Judiciary and the Methodology of the Inspectorate to the Supreme Judicial Council). Only a few days prior to submission of this document, on 11 February 2020, the Supreme Judicial Council rejected a judge from Vratsa District Court to be appointed a President of the court for delaying 10 cases [Annex No. 2]. In 2014, a judge in district court was demoted to regional court for delaying cases [Annex No. 3].
12. Equally in para. 9 of the Response, the Party concerned submits that the Communication “provides subjective and hypothetical conclusions regarding the impact on the judicial system” of the introduction of the 6-months’ time limit. This

³ Article 93 (2), point 4, EPA; Art. 94. (1), point 4 EPA and Article 31 (4) of the Biodiversity Act.

statement appears to be based on an incorrect reading of the communication. The communicant's submissions (paras 63-70 of the Communication) are grounded on the empirical fact that the length of the judicial proceedings in EIA cases is now usually longer than 6 months, rather than being merely "subjective" or "hypothetical". In order to demonstrate this, we have conducted a survey on the screening and EIA decisions reviewed by the Supreme Administrative Court acting as a court of first instance in the period 2007-2019.⁴

13. By way of background, in Bulgaria administrative decisions of ministers and other high officials are reviewed by a three-member chamber of the Supreme Administrative Court acting as a court of first instance (Article 132 (2), point 2 and Article 165 of the APC). A five-member chamber of the Supreme Administrative Court reviews such cases as a cassation court (Article 217 (1) APC). The decisions in scope of the 2017 EPA Amendment are issued by the Minister of Environment and Water and are reviewed by a three-member chamber of the Supreme Administrative Court with no option for cassation review.
14. Our survey shows that on average, the Supreme Administrative Court review procedure takes 14.3 months for EIA cases and 12.4 months for screening cases [Annex No. 4]. In some cases, the proceedings took longer than 40 months.

2.2. Amendment to the APC of 2018: High fees for cassation appeal and for EIA cases

15. To update the Committee on relevant developments concerning this claim since the Communication has been submitted, the Constitutional Court of the Republic of Bulgaria has held that the proportional fees for cassation appeals on EIA cases (paras 24 – 27 of the Communication) are unconstitutional.⁵ As of 6 May 2019, the proportional fees for cassation appeal have no legal effect. For this reason, we drop our claim in paras 24 – 27 of the Communication.
16. The Constitutional Court did not form majority on the motion against flat fees for cassation appeal (paras 18-23 of the Communication).⁶ As a result of this, all environmental cases continue to be subject to cassation fees of BGN 70 (EUR 35.75) for individuals and BGN 370 (EUR 188.98) for ENGOs (paras 18-23 of the Communication). We maintain our claim that the flat fees for cassation appeal are prohibitive and unfair to ENGOs and violate Article 9 (4) of the Aarhus Convention (paras 71-95 of the Communication).
17. In para. 14 of the Response, the Party concerned submits the 10 time increase of the minimum monthly wage since 1998 as a relevant economic indicator to assess the fee increase for cassation appeals. The minimum wage in Bulgaria is, however, not an economic indicator. It is determined by a decision of the Council of Ministers and there are no formal criteria that link it to economic development.⁷ The average monthly salary has for example only increased 6-fold - from BGN 183.25 in 1998

⁴ The survey includes all court cases reviewed on the merits available in a paid court practice database (Ciela) <https://web6.ciela.net/>

⁵ Decision No. 5 of 19 April 2019 on constitutional case No. 12/2018.

⁶ Article 151 (1) of the Bulgarian Constitution requires simple majority for decisions of the Constitutional Court (7 out of 12 judges). Only six judges voted the flat fees for cassation appeal unconstitutional and the motion did not carry (the flat fees for cassation appeal remain in legal effect).

⁷ Art. 244 of the Labour Code "*The Council of Ministers shall determine:*
1. *the minimum wage for the country*"

(according to the Law on Redenomination of the Bulgarian Lev BGN 183,250 in 1998 equaled BGN 183.25 as of 5 July 1999⁸), to BGN 1 095 for the third quarter of 2017.⁹ At the same time, inflation in the period January 1998 – December 2017 has been 118.9%. For comparison, the cassation fees for environmental NGOs were increased 74 times (from BGN 5 to BGN 370).

18. To further give the Committee a full picture of the currently applicable cost regime in Bulgaria as a whole,¹⁰ access to court on environmental matters is additionally hindered by the financial burden of mandatory representation by attorney-at-law introduced by the 2018 APC amendment (Article 212 (2) APC). This further increases the cost of cassation appeal for ENGOs, as the minimum attorney remuneration on administrative cases is BGN 500 (EUR 255.6). The Compliance Committee has already found that mandatory legal representation may potentially entail prohibitive expenses for the public in violation of Article 9 (4) of the Convention.¹¹ The contribution to the prohibitive expense of the mandatory legal representation introduced by the APC 2018 was recognised by the Bulgarian constitutional judges as well:

„Thirdly, access to a court can be indirectly restricted in two ways: firstly, by imposing relatively high fees, which are a condition for admissibility of the cassation appeal, and second, by lawyer's remuneration. The amendment to the APC used both methods, once substantially increasing the amount of the flat charges for cassation appeal (...), and by introducing a new condition for admissibility of the cassation appeal - co-signature by an attorney-at-law. According to Art. 212, para. 2 APC, the cassation appeal (with few exceptions) shall be signed by an attorney-at-law or a legal advisor (...). As a result of this, the cassation instance has become significantly more expensive (...).“¹²

2.3. Derogatory public statements of high officials with regards to ENGO-s and insinuation of ENGOs being engaged in illegal activities

19. Section 4 of the Communication concerns Article 3(8) of the Convention and the increasingly hostile environment in which environmental NGOs and individuals operate when they rely on their rights under the Convention to protect the environment. The Communication limits itself to certain examples that were immediately connected with the decision-making procedure on the 2018 APC amendment (para. 31 of the Communication).

⁸ According to the Law on the Redenomination of the Bulgarian Lev, Promulgated in State Gazette No. 20 of 5 March 1999, as of 5 July 1998, old BGN 1,000 are equal to new BGN 1.

⁹ Trud I Pravo quoting the National Statistics Institute: <http://trudipravo.bg/index.php/znanie-zavas/1054-srednomesechna-rabotna-zaplata-i-srednomesechen-osiguriteln-dohod>
National Statistics Institute:

https://www.nsi.bg/sites/default/files/files/pressreleases/EmplsSalary2017q4_LFZ0SQE.pdf

¹⁰ As this is the standard for assessment of whether costs are prohibitively expensive – see ACCC/C/2012/77 (UK), ECE/MP.PP/C.1/2015/3, para. 72.

¹¹ ACCC/C/2009/36 (Spain), ECE/MP.PP/C.1/2010/4/Add.2, para. 67

¹² In part 4.3.1 of the decision on case No. 12 of 2018, the Constitutional Court analyses the role of the mandatory legal representation to the prohibitive effect of flat fees for cassation appeal. Article 212 (2) APC introducing mandatory representation by an attorney-at law was not appealed to the Constitutional Court.

20. As an update regarding these examples, by the time of the harassing statements quoted in para. 31(b) of the Communication, Mr. Danail Kirilov was a Member of the Parliament and a Chair of the Committee of Legal Affairs to the National Parliament. As of April 2019, Mr. Danail Kirilov is the Minister of Justice in Bulgaria.
21. Moreover, since the Communication has been submitted, further instances of the same kind of derogatory and openly threatening statements by politicians and public officials have come to the attention of the communicant. To provide the Committee with a full picture as to these persistent attacks aimed at curtailing civil society space, a number of further examples are included below.

(i) **The Deputy Prime Minister insulting Member of European Parliament Ska Keller**

22. On 29 December 2017, the Bulgarian Council of Ministers amended the Management Plan of Pirin National Park allowing construction works in protected areas.¹³ The amendment was not subjected to EIA or a screening procedure. Against the background of previous attempts to authorize construction works in protected areas, the decision sparked protests in defence of the National Park.
23. On 8 and 9 February 2018, Ska Keller was in Sofia and supported the local public concerned in their protests [Annex No.5]. In response to her visit, the Deputy Prime Minister of Bulgaria, Valery Simeonov, who was also a lead supporter of the amendment to the Management Plant of Pirin, signed an insulting declaration to the Bulgarian Foreign Ministry requesting Ms. Keller to be extradited from the country. The declaration was also sent to the European Parliament and the federal government of Germany. It named Ms. Keller a “green Jihadist” and asked that she be expelled “in a van” from Bulgaria to the Turkish border. The declaration is extremely insulting and contains elements which can be interpreted as threats against Ms. Keller’s life [Annex No. 6 and 7].
24. Albeit the declaration having been issued on behalf of the political party National Front for Salvation of Bulgaria, it was signed by Valeri Simeonov while he was Deputy Prime Minister of Bulgaria and is still posted on his Facebook page [Annex No.8].
25. In taking part in the protests against the project, Ms. Keller was exercising her rights in the conformity with the Convention. As the Committee has clarified in its findings on communication ACCC/C/2017/102 (Belarus), Article 3(8) “encompasses the broad range of rights granted to members of the public by article 1 of the Convention” and is not limited to a specific provisions of Articles 3-9 of the Convention apply.¹⁴ Rather, Article 3(8) applies “to all situations in which members of the public seek access to information, public participation or access to justice in order to protect their right to live in an environment adequate to their health or well-being.”¹⁵ Ms. Keller participation in the process constitute an example of public participation to protect her right to live in an environment adequate to her health and well-being.

¹³ Decision No. 821/29.12.2017 of the Council of Ministers.

¹⁴ ECE/MP.PP/C.1/2017/19, para. 66.

¹⁵ Ibid.

26. Moreover, Ms. Keller was seeking to amplify the message of the local public concerned (persons affected or having an interest in the project and environmental NGOs) that were exercising their rights to act against this project. The above-cited attacks were therefore not only directed against her person but were intended to intimidate those persons that she supported and sought to give credibility and visibility.
27. On 16 January 2019, the Supreme Administrative Court quashed the amendment to the plan of Pirin for failure to comply with environmental law.¹⁶

(ii) Derogatory statements of high officials against ENGO-s and protesters who protected Pirin National Park

28. The protesters in defence of Pirin National Park were also themselves subjected to insults from high officials. The declaration signed by the Deputy Prime Minister against Mrs. Keller also contains direct attacks to members of the public enforcing their rights under the Convention, namely Andrey Kovachev and Toma Belev who are members of the organizations that challenged the Plan for Pirin National Park and organized the protests.
29. In January 2018, the Minister of Environment and Waters, Mr. Neno Dimov, accused the protesters of acting contrary to the democratic principles and hindering the economic development of the country. *"Throughout the years, they (the greens) have tried, avoiding democratic representation, to pass decisions that halt Bulgaria's development. In fact, winter tourism in Bulgaria is blocked for decades."* [Annex No. 9] The quote's reference to "the greens" refers to the organizers of the protests and complainants against the amendment to the Plan for Management of Pirin National Park,¹⁷ members of the public exercising their rights under the Convention.
30. After the court quashed the amendment to the Management Plan of Pirin, Mr. Valeri Simeonov, Deputy Prime Minister, accused ENGOs and protesters of blackmailing state institutions and businesses for personal profit. He used the derogatory Bulgarian word „tarikat” (in Bulgarian “тарикат”) which means a unscrupulous and arrogant person and may imply that one is doing illegal and immoral things for profit¹⁸ [Annex No. 10, 11 and 12].

(iii) Mr. Dimov`s accusations of ENGOs

31. Throughout his mandate as a Minister of Environment and Water, Mr. Dimov has been systematically accusing ENGOs of hindering the economic development of Bulgaria and causing costs to the Bulgarian tax payer. In the end of 2018, he assigned a report to calculate the financial loss of environmental law suits [Annex No. 13].¹⁹ He presented the outcomes of this report saying that environmental activists and ENGOs cost more to the state than natural disasters [Annex No. 14 and 15]. The

¹⁶ Decision No. 656 of 16 January 2019, on administrative case No. 12379/2018 of the Supreme Administrative Court.

¹⁷ Complainants are the WWF World Wildlife Fund, Danube - Carpathian Program Bulgaria, the Association of Parks in Bulgaria and Mr. Belev.

¹⁸ <http://rechnik.info/%D1%82%D0%B0%D1%80%D0%B8%D0%BA%D0%B0%D1%82>

¹⁹ https://ime.bg/var/images/Costs-of-delays-in-environment-protection_analysis.pdf

“damage” calculated in the report is the presumed financial loss for projects in Annex I of the Convention caused by members of the public who exercise their rights to court challenge (Article 9(2) of the Convention). The report evidences a systemic policy of Bulgarian government officials and institutions to harass members of the public who exercise their rights under the Convention.

(iv) **Derogatory statements against ENGO-s and activists protecting the Kresna Gorge**

32. Similar accusations have been circulating in the mass media against ENGOs and activists who protect the Kresna Gorge in the ongoing project to construct a motorway through it [Annex No. 16]. In November 2018, a decision of the Standing Committee to the Convention on the Conservation of European Wildlife and Natural Habitats sparked derogatory publications.²⁰
33. The Chair of the Management Board of Road Infrastructure Agency to the Ministry of Regional Development and Public Works claimed that ENGOs protecting the Gorge are driven by business interests and have no environmental goal [Appendix No. 17]. In an article reflecting this statement, an online media accuses the green organisations of sharing lies and defamations and of hidden financial interests. The online media conveys that the Standing Committee decision says that the ENGOs are liars. The same media published another defamatory article with the names and pictures of some of the activists in the Kresna Gorge case, thus infringing their private life [Annex No. 18].
34. These examples demonstrate how statements of public officials are reproduced and exaggerated by the media leading to serious risks for persons seeking to exercise their Convention rights in Bulgaria. This demonstrates the ever-shrinking civil society space and the increasingly hostile environment in which ENGOs are forced to operate.

2.4. Court practice denying legal standing to citizens and ENGOs to challenge air quality plans (AQPs)

35. In para. 24 of the Response, the Party concerned claims that the ruling of the Supreme Administrative Court on the AQP of Sofia is not representative of the legal system of Bulgaria. However, following the submission of the Communication, the Supreme Administrative Court issued two more rulings denying a resident of Plovdiv and an environmental NGO the right to challenge the AQP of Plovdiv [Annex No. 19 and 20].
36. The two rulings on the AQP of Plovdiv reiterate that the AQP is an “internal act” and does not affect the rights and interests of citizens and organisations. Based on this, the Court concluded that the AQP was not an act of a public authority that could be challenged by members of the public. The Supreme Administrative Court dismissed the arguments that a right to appeal an AQP is granted by the case law of the Court of Justice of the European Union²¹ and by Article 9(3) of the Aarhus Convention. The

²⁰ Decision of the 38th meeting of the Standing Committee decided to keep the file as a possible one: <https://rm.coe.int/list-of-decisions-and-adopted-textes-of-the-38th-meeting-of-the-bern-c/16808fde8d>

²¹ Case C-404/13 *ClientEarth* and Case C-237/07 *Janecek*.

three rulings evidence a systemic and consistent practice of Bulgarian courts to deny members of public the right to challenge AQPs.

37. The Party concerned further claims that the court ruling on the AQP of Sofia is not representative of the Bulgarian legal system, as it concerns only one out of the 356 municipalities of Bulgaria (also para 24). AQPs are prepared only in municipalities with exceeded levels of air pollution (Article 27 of the Clean Air Act, cited in para 32 of the Response). According to the National Air Quality Plan of Bulgaria, in the period 2011-2016, 28 municipalities prepared AQPs.
38. It is also relevant to note that Sofia and Plovdiv are the municipalities with the largest population in Bulgaria. In 2018, the population of the two municipalities was 1,643,227 people, which amounted to approximately 23.47 % of Bulgaria's total population (7,000,039).²²

3. Supporting documentation (copies, not originals)

The following documents are attached in support of this communication:

No. 1: Selected parts of quoted legislation

Annex No. 2: Article in <https://defakto.bg/> of 11 February 2020

Annex No. 3: Article in capital.bg of 27 March 2014

Annex No. 4: Survey on the length of court proceedings of EIA and screening cases

Annex No. 5: Article in <https://www.euractiv.com> of 12 February 2018

Annex No. 6: Article in offnews.bg of 9 February 2018

Annex No. 7: Article in actualno.com of 9 February 2018

Annex No. 8: Status on the Facebook page of Mr. Valeri Simeonov

Annex No. 9: Article in nova.bg/ of 26 January 2018

Annex No. 10: Article of 17 January 2019

Annex No. 11: Article in <https://www.novinite.bg/> of 17 January 2019

Annex No. 12: Article in www.clubz.bg of 17 January 2019

Annex No. 13: Article in <https://www.dnevnik.bg/> of 4 October

Annex No. 14: Article in <https://www.dnevnik.bg/> of 6 October 2018

Annex No. 15: Article in <https://novini.bg/> of 6 October 2018

Annex No. 16: Article in <http://vchas.net/> of 9 December 2019

Annex No. 17: Article in <https://trud.bg/> of 29 November 2018

Annex No. 18: Article in <https://trud.bg/> of 18 August 2019

Annex No. 19: Ruling No. 16049 of 20 December 2018 on administrative case No. 14184/2018 of SAC

Annex No. 20: Ruling No. 9614 of 21 June 2019 on administrative case No. 6249/2019 of SAC

Dated: 20.02.2020

²²According to the National Statistics Institute, in 2018, the population of Sofia is 1,269,384 people and the population of Plovdiv is 346,893 people: <https://www.nsi.bg>