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Mrs Fiona Marshall

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

Re:Third progress report on the implementation ofDecision VI/8d onConvention compliance by Bulgaria referring to communications ACCC/C/2011/58and ACCC/C/2012/76

Dear Mrs Marshall,

With regard to the third progress report, provided by Bulgaria on 30.09.2020, concerning the implementation of Decision VI/8d on Convention compliance by Bulgaria referring to communications ACCC/C/2011/58 and ACCC/C/2012/76we would like to present our comments and statements.

The delay in our response is due to the recent decision of the Constitutional Court of Republic of Bulgaria (CCRB), in relation with the completeprohibitionon appealing against general spatial plans (GSP) in art. 215 (6) of the national Spatial Planning Act. The decision was reached by the CCRB on 15 October 2020[1]and it was necessary for us to analyse it and evaluate its probable impact on implementation of the Århus Convention and the related Committee's Decision VI/8d, based onfindings of 28 September 2012 on case C58 (ACCC/C/2011/58). Please note, that the prohibition of appealing in art. 215 (6) of the national Spatial Planning Act takes core place in the Committee's findings of 28 September 2012.

1. **Communication ACCC/C/2011/58**

The progress report shows that there was no progress on the implementation of Decision VI/8d of the Meeting of the Parties to the Convention in 2017 concerning our 2 complaints addressing the access

[1] Decision No. 14 of 15.10.2020 on case 2/2020 of the CCRB.

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to justice in the spatial planning and the applications of orders for preliminary enforcement of EIA decisions of the MoEW. For instance, the last amendments of the Spatial Planning Act in 2019 and 2020 introduced none of the legislative measures to provide access to justice for members of the public and NGOs with regard to spatial planning, submitted by the “ZaZemiata”-Greenpeace NGO. Neglected were also similar proposals submitted in the parliament in previous years by the ForTheNature Coalition of environmental NGOs, addressing the recommendations of the Aarhus compliance committee.

Lastly, we point out once again that in our previous statements we have provided plenty of evidence for the adoption of spatial plans and building permits in violation of the environmental legislation (e.g. the plans/permits are adopted without prior SEA/EIA procedure or when the conditions set by the respective SEA/EIA decisions are not respected) as result of that the lack of direct civil access to justice to the final acts for the adoption of spatial plans and building permits under the Spatial Planning Act. Therefore, we consider that the Spatial Planning Act should allow environmental NGOs to challenge spatial plans, as well as construction and exploitation permits concerning Annex I projects, which contravene provisions of the national law relating to the environment (par. 9 (3) of the Convention).

2. Amendments in the law

The national legislation is in a significantly worst state in comparison to the date of the findings of 28 September 2012 and ofDecision VI/8d.

The Environmental Protection Act (EPA or ЗООС) was amended in 2017 in a way that allows only one court instance in court cases in concern to construction projects designated as “of national significance”. Art. 88 of the EPA was supplemented with additional paragraph (4), art. 99 with additional paragraph (7), later amended as (9)and art. 93 (10) was supplemented with additional sentence. Art. 31 (19) of the Biodiversity Act (BA or ЗБР) was supplemented with additional sentence too. Those four amendments of both EPA and BAprohibit any appeal before the second court instance (cassation) before the Supreme Administrative court if the project concerned is declared “of national significance”. All other projects may continue to be reviewed by the courts in two-instance procedure, including cassation instance.

Since the entry into force of those amendments, the government and more precisely the Council of Ministers immediately began adopting decisions for ‘national significance’ of variety of project that may have severely negative environmental impact. Many of those projects are local investments or concern small or local improvements. Nonetheless, all those local projects faced serious opposition from local communities or subsequently were declared ‘of national significance’ by the Council of Ministers.

One of the notorious cases that suffered the negative effect of those legislative amendments is the 'Yadenitza case', listed as No. 2 of the list of cases in the appendix bellow. It concerns construction high altitude artificial lake and dam in area with serious seismic risk. The first instance court ignored at the official evidence for seismic risk presented on the case. Cassation appeal before second instance was prohibited by the recent amendment in art. 93 (10) of the EPA.

3. Decision of the CCRB on the prohibition of appealing of GSPs

Recent decision of the Constitutional Court[2] declares the provision of art. 215 (6) of the national Spatial Planning Act as unconstitutional. The issue of art. 215 (6) is one of the main concerns of the Committee's findings of 28 September 2020 on communications ACCC/C/2011/58.

Said provision completely prohibits any appeal against GSPs by anyone on any grounds whatsoever. Please note that it is not the first time the Bulgarian courts challenge the legality of art. 215 (6) of the national Spatial Planning Act. Relevant case-law of the national Supreme Administrative Court was provided by us before the Committee in relation with communications ACCC/C/2011/58. It is reviewed in the Committee's findings of 28 September 2020. Prior to adoption of those findings, the Supreme Administrative Court had found that the provision of art. 215 (6) of the national Spatial Planning Act is in gross violation of the Århus Convention in relation to the rights of the public concerned to appeal any action of the executive branch authorities that may have harmful effect on the environment or public health. That case-law, however, was not maintained by the national courts - neither by the Supreme Administrative Court, nor by any other court in Bulgaria. There were no more court rulings with similar reasoning. What is more, later the Supreme Administrative Court has reversed its case-law and imposed very narrow, strict and prohibitive application of the art. 215 (6) of the national Spatial Planning Act.

Now, that art. 215 (6) of the national Spatial Planning Act was declared unconstitutional last week on October 15, said provision can no longer be applied by the national courts, as per art. 151 (2) of the Bulgarian Constitution.[3]

This, however, cannot resolve the non-compliance of the prohibition of appeal in art. 215 (6) of the national Spatial Planning Act with the Århus Convention, as declared by the Committee in its findings of 28 September 2012 on communications ACCC/C/2011/58 and ACCC/C/2012/76.

The reasoning of the CCRB's decision of 15.10.2020 is based solely on the property rights protected by the Constitution. More precisely, the CCRB assumes that the prohibition of appeal in art. 215 (6) of

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[2] Decision No. 14 of 15.10.2020 on case 2/2020 of the CCRB. Text in Bulgarian may be obtained from the official web-site of the CCRB: http://www.constcourt.bg/bg/Acts/GetHtmlContent/42228ede-2a70-4229-9ed7-2117fafe14a9

[3] More to the effects of an unconstitutional provision in Decision No. 3 of 28.04.2020 of the CCRB.

the national Spatial Planning Act violates the protective remedies guaranteed by art. 56 of the Constitution, in relation with the property right. All merits in the decision are based on the fact, that the GSPs application upon real estate property plots may have negative impact on the property rights of their owner. In that respect, the real estate property owner shall have a protective remedy under art. 56, in relation with art. 120 of the Constitution.

Without applying the provision that have been declared as unconstitutional, the national courts shall evaluate the lawful interest of the applicant in accordance with art. 159 (4) of the Administrative Proceedings Act, or the so called 'general clause'. In such evaluation whether the applicant have lawful interest or not, the courts shall follow the reasoning of the merits of the Constitutional Court in Decision No. 14 of 15.10.2020. This is particularly true since that same decision provides the grounds for admissibility of any application against a GSP. Thus, the national courts are expected to admit only appeals submitted by owners of real estate plots. What is more, those plots should have been impacted in a negative way by the respective GSP, so that the owner's appeal to be ruled admissible in court. In that respect, appeals from owners of a neighbouring plots or representatives of public concerned with environmental or public health issues of the respective GSP will continue to be ruled inadmissible.

We will review the future case law on cases of appealing against GSPs and will you notify you on any development in the jurisprudence of the national courts. In particular interest would be cases of direct application of the Århus Convention by the national courts when ruling upon admissibility of such appeals. Perhaps the recent decision of the CCRB will once again open the door for such direct application of the Convention.

4. Relevant case-law of the national courts in the recent years:

In appendix to the present communication we providea list of court decisions relevant to the implementation of Decision VI/8d on Convention compliance by Bulgaria referring to communications ACCC/C/2011/58 and ACCC/C/2012/76.

5. Communication ACCC/C/2012/76

The report shows that no progress was made on the recommendations made by the Committee with respect to its findings on communication ACCC/C/2012/76, concerning appeals under article 60, para. 4, of the Administrative Procedure Code of orders for preliminary enforcement. While the Government repeats its arguments that *"the courts are free to exercise their powers in the conditions of independence"*, the court practice of implementing article 60, paragraph 4 of the Administrative

Procedure Codeclearly shows the opposite. The national courts systematically fail to balance the interests of the parties and alwaysrule in favour of the administration, in all cases, without objective assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, considering the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm. The case-law, both that previously provided by us or the more recent new case-law,[4]is still very contradictorywith regard to the implementation of Art. 60 of APC as result of the lack of concrete and unambiguous legal requirements. Even though a requirement for motivation of the orders for preliminary enforcement was introducedin 2019 by an amendment of art. 60 of the Administrative Procedure Code, no further requirements were included. There is still no requirement for competent authorities or the court to balance the interests, e.g. assessment of the risk of environmental damage and taking into account the particularly important public interest in the protection of the environment.

With regard to the above, we consider that further appropriate measures are needed to bring about full compliance with the Convention.

Date: 26.10.2020 Yours faithfully,

Andrey Kovatchev,

Member of the Managing Board ofBalkani Wildlife Society

<u>Appendix</u>: Relevant case-law of the national courts in the recent years

1. Decision No. 14 of 15.10.2020 on case 2/2020 of the CCRB. Text in Bulgarian may be obtained from the official web-site of the CCRB: http://www.constcourt.bg/bg/Acts/GetHtmlContent/42228ede-2a70-4229-9ed7-2117fafe14a9
2. Decision No. 842/22.01.2018 on case 10630/2017 of the Supreme Administrative Court (Yadenitza case); the last sentence in the decision explicitly states that it is final and it is not subject to cassation appeal, in accordance with art. 99 (7) of the EPA (3OOC);
3. Ruling No.10864/17.09.2018 of the Supreme Administrative Court, where the court found that the order article 60 of APC should take into accountthe environmental risks.
4. Ruling No.10025/27.07.2017 of the Supreme Administrative Court, where the court found that the order under article 60 of APC is lacking concrete arguments.

[4] See numbers 3-8 of the list provided in the appendix bellow.

5. Ruling No.7928/30.06.2015 of the Supreme Administrative Court, where the court found that the order under article 60 of APC should take into account the environmental risks.
6. Ruling No.2291/20.02.2018 of the Supreme Administrative Court, where the court found that the order under article 60 of APC has no environmental risks, referring to the conclusions of the appealed SEA statement
7. Ruling No.2187/21.02.2017 of the Supreme Administrative Court, where the court found that the environmental risks from the implementation of article 60 of APC should be proven in very detail, while this is a subject of the EIA procedure.
8. Ruling No.5957/18.05.2016 of the Supreme Administrative Court, where the court found that the order under article 60 of APC has no environmental risks, referring to the conclusions of the appealed EIA decision
9. Ruling of 13.3.2019 on case 13270/2018 of Administrative Court of Sofia City - denies admissibility and any access to the case of the dwellers of building “Shishman 4” in spite of the right of construction (superficio) those dwellers have on the whole plot; the case itself concerns demolition of building in the same plot initiated by the owners of the plot; the plot itself is a garden adjacent to the building “Shishman 4” and the owners and dwellers in that building own rights on the superficies of that plot.
10. Decision No. 3514/20.03.2018 on case 9513/2017of the Supreme Administrative Court - inadmissibility of the application of the dwellers of building “Shishman 4” against demolition permit for a building in their yard and garden, initiated by the owners of the plot; the plot itself is a garden adjacent to the building “Shishman 4” and the owners and dwellers in that building own rights on the superficies of that plot.