TO

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

Subject:

Re: First progress report of MOEW on Decision VII/8d (Bulgaria)

Reference:

Communication ACCC/C/2011/58 and ACCC/C/2012/76

Dear Mrs Marshall,

We would like to provide you with our position on the First progress report by the Party concerned (Bulgaria) on the implement of decision VII/8d on communication ACCC/C/2011/58[1] and ACCC/C/2012/76[2].

On the first place, we sustain our position that since 2012 the Bulgarian government has not taken a single legislative step towards fulfilling any of the recommendations of the ACCC, in specific the monitored violations of the Convention listed in paragraph 2 (a) and (b) of decision VII/8d[3]. All the arguments in their progress report are the same as the ones in all their statements in the last 11 years. The only progress shown until now was the submitting in ACCC of a Plan of action for decision VII/8d (of Bulgaria), but this plan has been unfortunately fully abolished.

In the same time, the violations of Art. 9 (3) and (4) of the Convention are going on. In addition to the evidences sent with regard to the non-implementation of decision VI/8d[4] by Bulgaria, now we would like to provide you with an up-to-date analysis of the recent case-law concerning the access to justice under the Spatial Development Act having regard to par. 2

[1] https://unece.org/env/pp/cc/accc.c.2011.58_bulgaria
[2] https://unece.org/env/pp/cc/accc.c.2012.76_bulgaria
[3] https://unece.org/sites/default/files/2021-11/Decision_VII.8d_eng.pdf
[4] https://unece.org/DAM/env/pp/compliance/MoP6decisions/Compliance_by_Bulgaria_VI-8d.pdf

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

(a) of decision VII/8d, as well as the injunctive relief under the Environmental Protection Act having regard to par. 2 (b) of decision VII/8d. The analysis has been prepared by the Bulgarian envi-NGO „Инициатива Зелени Закони" (Green Laws Initiative).

I. PARAGRAPH 2 (a) OF DECISION VII/8d

With regard to the implementation of paragraph 2 (a) of decision VII/8d the government has made any progress. On the contrary, in 2023 two amendments to the Spatial Development Act (hereinafter referred as the 'SDA') were adopted (on 20.01 and 13.10), with none of them addressing the recommendations of paragraph 2 (a) of decision VII/8d. Even if the end-term for amending the SDA according to the Action Plan was July 2023, currently the Party concerned has not undertaken any single measure to fulfil its well-wished promises in the Plan: "*Amendment of the Spatial Planning Act would be needed and in particular those provisions (Art. 127, Art. 131, Art. 149, Art. 177, Art. 215 – 219) which regulate the challenging of general spatial plans, detailed spatial plans and construction and exploitation permits, as well as the interested persons entitled to appeal. Standing should be granted to the public according to the definition in §1, p. 24 of the Additional Provisions of the Environmental Protection Act (EPA) where is stated that "public" is defined as one or more natural or legal persons, and associations, organisations or groups thereof established in accordance with national legislation*." As evident from their progress report, the current government from 06.06.2023 has once again taken the position that no access to justice will be provided in the SDA on the issues referred by ACCC. Similarly, in numerous cases the court also consistently ruled in violation of art. 9 (3) of the Convention that by virtue of various articles in the SDA members of the public do not have no access to judicial procedures to challenge acts and omissions by the public authorities under the SDA which contravene provisions of its national law relating to the environment:

1. Struma Highway

With EIA Decision №3-3/2017 of MoEW is approved the project for "Improvement of the route of Lot 3.2 of Struma Highway" in the Kresna Gorge. With SEA statement №4-3/2021 of MoEW[5] is approved the Program "Transport connectivity" 2021-2027. Upon request from EC, the SEA statement includes condition I.Б.5.18 that an additional EIA for the construction of the two routes of Lot 3.2 should be commissioned, which should include an objective

[5] https://www.moew.government.bg/static/media/ups/articles/attachments/St_EO%204-3-2021dc1009579e53443bfc9be45bfb298c69.pdf

evaluation of the alternatives, a proposal of measures with proven effectiveness and evaluation of the cumulative effect, in compliance with Art. 6.3 of the HB.

In violation of condition I.Б.5.18 of SEA statement №4-3/2021, however, on 06.03.2023, the Road Infrastructure Agency submitted in MoEW a Detailed Spatial Plan (DSP) regarding the construction of the "Kresna" road junction at the southern end of the route of Lot 3.2. With a non-public letter №ЕО-8/13.03.2023 the MoEW decided that the DSP is not subject to a SEA procedure, disregarding the condition of SEA statement №4-3/2021. On basis of this screening decision and an order of the regional minister of 2017, the DSP was approved by Order №РД-02-15-51/19.04.2023 of the minister of regional development. What is more, the Order was accompanied by a decision for Preliminary Enforcement under art. 60 of the Administrative Procedure Code[6] (APC). On basis of the order of, the Minister issued also a Construction Permit №РС-36/03.05.2023, accompanied with a decision for Preliminary Enforcement. The construction of the "Kresna" junction started on 16.05.2023, which triggered an immediate protest of the appealing citizens and the Balkani Wildlife Society[7].

Arguing that the way the DSP and the construction permits were approved contravene provisions of its national law relating to the environment (***art. 9(3) of the Convention***), a group of citizens and Balkani Wildlife Society appealed before the court the ministerial order of 2017, the ministerial order with the preliminary enforcement of 2023 as well as the construction permit of 03.05.2023 with its preliminary enforcement.

All complaints of the Balkani Wildlife Society were motivated by the provisions of Art. 9(2-3) of the Aarhus Convention and the findings of ACCC regarding communication ACCC/C/2011/58. The environmental grounds for the complaints were the facts that:

- no new construction activities on the Lot 3.2 of the Highway can take place until condition I.Б.5.18 of SEA statement №4-3/2021 is fulfilled (i.e. until a new EIA with additional alternatives of the Highway project is approved),

- the DSP for the "Kresna" junction had never been subject to the compulsory SEA procedure under the Environmental Protection Act, since EIA Decision №3-3/2017 of MoEW is not applicable to this DSP.

The court ruled out the complaint against the order of 2017 regarding the DSP as inadmissible (see case 485/2023[8]) on the ground that "*the appellants don't have legal interest under Art. 131, para. 3 of the Spatial Development Act to challenge the DSP, because they are not land owners, affected by the plan*".

[6] https://lex.bg/laws/ldoc/2135521015
[7] https://btvnovinite.bg/bulgaria/protest-na-kresna-shte-predopredeli-li-parvata-kopka-badeshtata-magistrala.html
[8] http://213.91.166.147/courts/adc/blagoevgrad/wa.nsf/ActionVew/A4662EB47013C8A0C22589C1002ECC2A

The complaint against the order of 2023 and its preliminary enforcement was also ruled out as inadmissible (see case 5455/2023[9]) on the ground that "*the legal interest in contesting the DSP for the appellants does not derive directly from the norms of the Aarhus Convention*", that "*the appellants are not from the group of persons under Art. 131, para. 3 of the Spatial Development Act* (i.e. land owners, who are the only group having the right to appeal a DSP)*"* and that *"the DSP is part of the highway project approved by EIA Decision №3-3/2017 of MoEW".* In this way, the court did not allow the appellants to participate in a hearing and to substantiate their claims for the lack of valid SEA procedure.

The higher court instance (see case 7272/2023[10]) upheld the first instance ruling under case 5455/2023 with the remarkable argument that it does not accept "*the reference in the complaint to Art. 9, par. 3 of the Aarhus Convention and on an independent basis, outside the law of the European Union and as part of the national law, when substantiating a legal interest in contesting the DSP by environmental non-governmental organizations in the hypothesis when it was adopted in violation of the environmental assessment procedure, in particular of the conclusions of the Committee on Compliance with the Convention, incl. and on appeal C-58/Bulgaria."*

The complaint against the Construction permit failed technically (case 5312/2023[11]), while two complaints against the preliminary enforcement of the Construction permit were ruled out as inadmissible (see case 4850/2023[12] and case 4944/2023[13]) on the ground that "*the appellants don't have legal interest under Art. 149, para. 2 (1-3) of the Spatial Development Act to challenge construction permits*", and curiously that "*the construction permit does not affect directly environmental issues*". The ruling under case 4850/2023 has been upheld by the second instance (see case 6449/2003[14]), which further insisted that "*according to the practice of ECJ - Decision of the Court, large panel, from March 8, 2011 in the case Lesoochranbrske zoskupenie VLK, C-240/09/, the provision of art. 9(3) of the Aarhus Convention relied on by the applicant has no direct effect under EU law*", that "*the appellants don't have legal interest under Art. 149, para. 2 (1-3) of the Spatial Development Act to challenge construction permits*" and "*that judicial control regarding compliance with the law in the field of environment, at the initiative of the "public concerned", is admissible and possible in relation to programs and projects* (e.g. under SDA) *only in relation to the administrative acts issued at other stages of their realization* (e.g. the EIA/SEA procedures under the Environmental Protection act)".

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[9] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2119907&code=vas&guid=1419620653
[10] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2161630&code=vas&guid=1415243522
[11] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2138964&code=vas&guid=1417782387
[12] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2088917&code=vas&guid=1441814917
[13] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2091432&code=vas&guid=1441104030
[14] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2138660&code=vas&guid=1417805455

This case is an example of the consistent national case-law totally blocking access to justice under the SDA and it clearly demonstrates the need for concrete legal measures in order to bring effective compliance with Art. 9, par. 3 of the Aarhus Convention and paragraph 2 (a) of decision VII/8d.

2. Yadenitsa Dam

With EIA Decision №2-2/2017 of MoEW[15] is approved the construction of a new dam for energy production – the Yadenitsa Dam. The EIA had been appealed in 2017, but upheld by the Court. The Detailed Spatial Plan of the dam has been approved by Order №РД-02-15-105/21.12.2018 of the deputy minister of regional development. However, a year later, with a governmental decision №177/03.04.2019 two new Natura 2000 sites were designated within the area of the planned dam - "Niska Rila" SCI under the HD and "Rila-buffer" SPA under the BD of EC. This means that the construction of the dam cannot start without appropriate assessment under art. 31 of the Biodiversity Act (i.e. art. 6(3) of the HD) on its impact on the new Natura 2000 sites. No such assessment have ever been undertaken. In the same time, only two further steps are needed before the start of the dam construction:

- the issuance of a Water Use Permit under art. 60 of the Water Act[16], allowing the usage of the Yadenitsa River for dam construction and energy regeneration, and
- the issuance of a Construction Permit under art. 148 of the Spatial Development Act[17].

Here, it is very important to stress that both the Water Use Permit and the Construction Permit can only be issued if a valid EIA-decision is available (**see art. 60 (1)-5 of the Water Act** and art. 148 (8) of the SDA)! In the referred Yadenitsa Dam case, the EIA-decision was not actual any more, since it lacked an assessment of the project impact on the two new Natura 2000 sites. This means that the only way to prevent the construction of the dam until the MOEW adopts such an assessment is to appeal either the Water Use Permit, or the Construction Permit. In fact, the Eastern Water Basin Directorate issued the Water Use Permit №31140123 on 17.10.2022, while the minister of regional development issued the Construction permit on 20.01.2023, both acts in clear violation of art. 31 of the Biodiversity Act (BA).

According to the anglers' "Balkanka" NGO the way that the Water Use Permit and the Construction Permit were approved contravene provisions of its national law relating to the environment (**art. 9(3) of the Convention**). Therefore, the NGO decided to appeal at least the Water Use Permit.

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[15] https://www.moew.government.bg/bg/reshenie-po-ovos-2-2-2017-g/
[16] https://lex.bg/laws/ldoc/2134673412
[17] https://lex.bg/laws/ldoc/2135163904

Paradoxically and in contradiction to the arguments and manipulations of the Party concerned in its progress report and in all previous positions, it proves that the Bulgarian law already includes legal procedures which already lead to the feared by the Party concerned "*duplication of review procedures on environmental issues, which have already been the subject of separate independent administrative and judicial procedures for issuing decisions on EIA of investment proposals*" and which "*create prerequisites for delay and deterring the investment activities in the country*" (the citations are from the progress report of Bulgaria). In essence, art. 71 of the Water Act provides for access to justice with respect to Water Use Permits, despite the fact that this type of permits can be issued (similarly to the GSP/DSP and the construction permits) only on basis of a valid EIA/SEA decision of the MoEW (which are also subject to another individual appealing procedure under the Environmental Protection Act).

Surprisingly, in case 10187/2022[18] the court really admitted the *locus standi* of the public concerned under the meaning of the convention (in particular the anglers' "Balkanka" NGO) to challenge the legality of the Water Use Permit under the Water Act on environmental grounds – the lack of appropriate assessment under the BA. This proves the manipulative character of the governmental arguments for not implementing paragraph 2 (a) of decision VII/8d with respect to the access to justice under the Spatial Development Act.

What is more, despite the on-going judicial procedure under case 10187/2022 against the Water Use Permit, which is still not over (it is pending decision of the second instance Supreme Court under case 6962/2023), the minister of regional development issued the Construction permit №РС-3/20.01.2023 even before the first court hearing, i.e. both without valid EIA and Water Use Permit. This example proves another manipulative aspect of the governmental arguments, that the judicial procedures "delay and deter the investment activities".

Moreover, we remind once again that any SEA/EIA decision, as well as any Water Use Permit, Construction Permit or a General/Detailed Spatial Plan can all be provided with an order for Preliminary Enforcement under Art. 60 of APC, so that the investment process cannot be halted by unreasonable civil actions. The opposite, in the case of environmental violations the public concerned has no right to challenge the illegal developments under the SDA.

In conclusion, we can argue that the only reason for not appealing the Construction Permit (as was done for the Water Use Permit) is that the public concerned has no access to review procedures to challenge acts under the SDA.

[18] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=9955e4d8-8ab1-4a63-b4e0-baba5df034ef

3. Turkish Stream Pipeline

Similarly to the Yadenitsa Dam Case, the anglers' "Balkanka" NGO found that the Water Use Permit №12170799 for the Turkish Stream Pipeline construction, issued on 02.10.2020 by the Danube Water Basin Directorate, was in violation of the EIA screening decision №7-5/2013[19] of MoEW on the project. In particular, with regard to the intersection of the pipeline with the Vit River the EIA considers only the intersection method with a horizontal directional drilling (HDD) under the riverbed, while the Water Use Permit (which should be based on the EIA), allows for an open, trench method of crossing the riverbed. Therefore, the NGO appealed the Water Use Permit in the Court, arguing that the way it had been issued contravened provisions of its environmental legislation (art. 9(3) of the Convention).

In fact, the Court in case 10642/2020[20] once again admitted the *locus standi* of the NGO to challenge the legality of the Water Use Permit under the Water Act on environmental grounds: the detected violation of the EIA for the Pipeline. As witnessed in this case, the Water Permit Act is an act of higher hierarchical order in comparison to the EIA decision, nevertheless the Court allowed for a review procedure, ignoring the arguments of the government for "*duplication*" of the legal procedures and "*delay*" of the investment activities. The Court referred to art. 9 (2) of the Aarhus Convention when analyzing if the environmental NGO has *locus standi* under the Water Act!

What is more, being in a hurry, the exploitation of the pipeline has been approved by Exploitation Permit №СТ-05-1090/23.12.2020, issued under the SDA by the director of the National Construction Control Directorate. Since the Water Use Permit was challenged before the Court, the Control Directorate was forced to issue the Exploitation Permit with the manipulation that the pipeline crossed the Vit River "by means of a horizontal directional drilling". The goal was to put the pipeline in exploitation without waiting for the court decision on case 10642/2020, and thus without referring to the appealed Water Use Permit.

A joint video investigation of "Balkanka" NGO[21] and the national bTV[22] revealed, however, that due to technological and environmental problems the pipeline was actually laid down by means of the open, trench method of crossing the riverbed of the Vit River. This video investigation was the perfect evidence to appeal not only the Water Use Permit, but also the Exploitation Permit, **but the NGO restrained from appealing the last act since the Spatial Development Act forbids the access to justice for the public concerned.**

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[19] https://www.moew.government.bg/static/media/ups/tiny/PD/-7-5-2013.pdf
[20] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=4642984f-6270-483c-a4ae-d98cdb901089
[21] https://balkanka.bg/колко-незаконен-би-могъл-да-бъде-турск/
[22] https://btvnovinite.bg/predavania/tazi-sutrin/promenjat-proekta-na-balkanski-potok-zaradi-zamatvane-na-chast-ot-vodata-za-pleven.html

4. Micro Hydropower Plant "Ogosta-9"

With EIA screening decision №МО-61-ПР/2009[23] RIEW-Montana approved a project for the construction of Micro Hydropower Plant (mHPP) „Ogosta-9" on the Ogosta River. In 2015, the Danube Water Basin Directorate issued Water Use Permit №11140092/16.05.2015 allowing the usage of the river for the construction and energy regeneration by the mHPP. **This case once again demonstrates that as per art. 60 (1)-5 of the Water Act the valid EIA decision is a precondition for the issuance of the Water Use Permit.**

In 2019, RIEW-Montana issued an additional EIA decision №2587/02.10.2019 allowing modification of the mHPP project, approved initially by the EIA screening decision №МО-61-ПР/2009. A year later, on its turn, the Danube Water Basin Directorate issued decision №3100/23.11.2020 amending respectively the initial Water Use Permit №11140092/17.06.2010 of the mHPP. Only on basis of these two new administrative acts, the local municipality may amend the initial Construction permit of the project, and respectively the investor can make changes during the construction process. It is worth noticing that neither of the two referred acts is provided with an order for Preliminary Enforcement.

In order to protect the river, the "Balkanka" NGO appealed both the additional EIA decision №2587/02.10.2019 (case 1499/2023[24]), and the decision №3100/23.11.2020 amending the initial Water Use Permit (case 12117/2020[25]). The appeal against the Water Use Permit was based on the environmental grounds that the EIA decision is appealed and thus sill not valid, and mainly that the Permit was issued in violation of the environmental restrictions of art. 188ж of the Water Act.

In essence, case 1499/2023 is still pending, while case 12117/2020 finished as late as 12.05.2023, when the higher instance Supreme Court came out with its final decision №5056 on case 7678/2022[26]. This means that the construction activities of the modified mHPP project could not have commenced until both court cases were finished. Nevertheless, a document evidence cited by the court in case 12117/2020 reveals that "the construction of the modified mHPP project has been already started by 02.08.2021 and the mHPP was about to be put in exploitation".

In conclusion, the three cases of "Balkanka" NGO above show that thanks to Art. 9 of the Aarhus Convention the court systematically allowed the appealing of Water Use Permits despite the fact that these acts are of higher hierarchical order in comparison

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[23] https://registers.moew.government.bg/ovos/file?fileKey=11318419-8b06-4a78-9613-6c2aa29a3459&fileName=%d0%bc%d0%be+61.pdf
[24] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=7d66e806-876e-4f36-ac11-edc13611569b
[25] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=eef0b236-3da8-4706-a1ba-2ae301602c91
[26] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=2086125&code=vas&guid=1441882158

to the subordinate EIA decisions, similarly to the hierarchical relation between the GSP/DSP/construction/exploitation permits and their subordinate EIA/SEA decisions. The main precondition for this favorable case-law with respect to the access to justice under the Water Act is the lack of clear prohibition on the access to justice in this act, what is in contrast to the way access to justice is prohibited under the SDA. The three cases show also that the competent authorities under the Spatial Development Act (as well the municipalities as the minister of regional development) effectively continue to issue construction and/or exploitation permits under the SDA in violation of the environmental laws (e.g. lacking valid EIA decisions). The only explanation is the fact that the SDA prohibits the public concerned to appeal their illegal acts, what we still refer as a non-compliance with Art. 9 (3) of the Convention.

5. Amendment of the General Spatial Plan of Pernik Municipality

On 19.11.2020, RIEW Sofia issued SEA Decision №СО-28-ЕО/2020[27] allowing amendment of the GSP of Pernik Municipality aimed at expansion of the open coal mines on the border of the city. A group of citizens and the "Za zemiata" NGO (a Greenpeace member) appealed the SEA Decision - see case 934/2021[28]. One of the arguments of the complainants was that according to the national climate plans the coal-fired power plants should close by 2038-2040. The court, however, rejected this argument by the statement that "*all arguments for the illegality and/or inexpediency of the amendment to the General Spatial Plan are irrelevant to the subject of this dispute*" (in Bulgarian: "*Всички доводи за незаконосъобразност и/или нецелесъобразност на изменението на ОУП са ирелевантни към предмета на настоящия спор.*"). In other words, the court implied that any environmental issues concerning the GSP-amendment other than the legality of the SEA should be addressed through a review procedure to challenge the GSP amendment itself (which is of course impossible according to the SDA).

Despite the arrogance of the court, its ruling proves once again the position of the communicant and ACCC that the Party concerned should implement paragraph 2 (a) of decision VII/8d with respect to the access to justice under the Spatial Development Act as soon as possible.

[27] https://www.riew-sofia.org/files/PD2020/Pernik/EO/-28----cutted.pdf
[28] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=da33c967-8b3d-4e96-8472-1db2878dad23

II. PARAGRAPH 2 (b) OF DECISION VII/8d

With regard to the non-implementation of par. 2 (b) (i) and (ii) of decision VII/8d we can say that the arguments of the government in its latest progress report are also quite manipulative. The government argues that the implementation of these paragraphs will affect negatively the independence of the court and no law can impose an obligation to consider all aspects of a contested act. However, the referred by us case-law in ACCC/C/2012/76 clearly demonstrates that the prevailing court decisions under art. 60 (4) of APC are totally "dependent" – dependent on the conclusions of the contested EIA/SEA decisions. Moreover, par. 2 (b) (i) and (ii) require from the Bulgarian government exactly the opposite – the court and its decisions to be independent, i.e. "not to rely on the conclusions of the contested environmental impact assessment/strategic environmental assessment decision", so that "the courts in such appeals make their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case…".

Further, we strongly regret that based on manipulative arguments the Party concerned has decided to suspend the planned amendments in APC and the Environmental Protection Act envisaged in the Action Plan. We fully agree with the position in the Action Plan that par. 2 (b) of decision VII/8d can be fully implemented as long as the Party concerned makes the referred in the Plan legal amendments. In particular, we consider that the amendments should not focus directly on the court, but should on first place require from both the competent authorities (under art. 60 of APC) and also the court (under art. 167 of APC) to issue orders for preliminary enforcement in full compliance with par. 2 (b) of decision VII/8d. Once this is done, the court will have more legal grounds to make independent decisions on complaints against illegal orders for preliminary enforcement. Therefore, we fully support the reasoning of the Party concerned in the Action Plan that:

- possible amendments to APC could introduce some more common conditions like: assessment by the competent authorities and the courts of all risks of damages (including but not explicit refer to the risk of environmental damage), to be taken into account by the competent authorities and the courts all public interests (incl. the public interest in the protection of the environment) and to set out their reasoning to clearly show how they have balanced the interests (incl. the public interest in the protection of the environment);
- "in addition, amendment to the Environmental Protection Act should be considered to regulate the conditions and procedure for allowing preliminary enforcement of SEA/EIA decisions, which should be in line with the recommendations of the Committee, namely: assessment of the risk of environmental damage, taking into account the particularly important public interest in the protection of the environment

and the need for precaution with respect to preventing environmental harm, motivation based on a balance of interests and, last but not least, the guarantee that the administrative authority requires to protect the interests of the parties. The basis for taking such a measure is the provision of Art. 167, para. 1 of the Administrative Procedure Code, according to which, in any situation of the case, at the request of a party, the court may allow preliminary enforcement of the administrative act under the conditions under which it can be allowed by the administrative body, i.e. identical conditions are defined in terms of administrative and judicial practice".

With regard to the above, we would like to also provide you with an analysis of the latest case-law on art. 60 of APC, which fully justify the recommendations in par. 2 (b) of decision VII/8d and fully supports the above-mentioned intentions of the Party concerned in the Action Plan, which the current government plans to abandon:

1. **The Asarel Medet Industrial Area**

On 04.05.2012, with EIA decision №7-3/2012[29] MoEW approved expansion of the Asarel Medet Industrial Area for extraction and processing of copper ore. Immediately, the Green Movement Party and the Balkani Wildlife Society appealed the EIA decision. The investor, however, required a preliminary enforcement but not from the court under the provisions of art. 167 of APC, but under art. 60 of APC so that the complainants have less chance to find out and thus to challenge also the preliminary enforcement. As a result, on 01.02.2013 (nine months later), the MoEW issued a decision №22/01.02.2013[30] for Preliminary enforcement of the appealed EIA decision №7-3/2012, which was not appealed. Not surprisingly, decision №22/01.02.2013 did not include any balance of the interests and any assessment of the potential risk of environmental damage. It took into account only the economic interests of the investor.

Nevertheless, **on 12.12.2019,** the court under case 9419/2019 finally decided to dismiss the EIA decision. However, as result of the controversial preliminary enforcement of the EIA decision, in 2021 the MoEW admitted[31] that the expansion of the Asarel Medet Industrial Area have been long ago realized with all the negative environmental impacts, attacked by the appellants of the EIA decision in the court. However, this was not the only fatal consequence of the controversial preliminary enforcement of the EIA decision. On 20.07.2022, despite the fact that both the EIA decision and its preliminary enforcement had

[29] https://www.moew.government.bg/static/media/ups/tiny/PD/OVOS_7-3-2012.pdf
[30] https://www.moew.government.bg/static/media/ups/tiny/PD/Res._pr._izp.-Asarel.pdf
[31] https://www.moew.government.bg/bg/mosv-ste-iziska-nov-doklad-za-ovos-za-razshirenieto-na-asarel-medet-ad/

been cancelled, the Pazardzhik administrative court under case 513/2022[32] decided that RIEW-Pazardzhik has not the right to stop the exploitation of the expansion of the Asarel Medet Industrial Area. In this way, RIEW-Pazardzhik was also not able to force the company to restore the initial natural conditions before the approval of the EIA decision.

2. Controversial decisions of MoEW and RIEW for preliminary enforcement of EIA decisions

Currently, not only the court, but also the environmental MoEW continues to issue decisions for preliminary enforcement of EIA/SEA decisions (based on art. 60 of APC), disregarding the recommendations in par. 2 (b) of decision VII/8d and its own intentions made in the Action Plan:

On 06.10.2023, the MoEW issued decision №205/06.10.2023[33] that allows the preliminary execution of EIA decision №7-ПР/2023 of MOEW, concerning the expansion of a gas reservoir through drilling. The decision includes only economic arguments, and no single assessment of the potential risk of environmental damage. Absolutely the same is valid for MoEW decision №80/02.05.2023[34] that allows preliminary execution of EIA decision №2-ПР/2023 of MOEW, concerning the construction of a gas interconnection, as well as for MoEW decision №150/19.09.2022[35] that allows preliminary execution of EIA decision №3-ПР/2022 of MOEW, concerning the construction of a highway.

On 28.07.2023, RIEW-Sofia issued decision №9/2023[36] for preliminary enforcement of EIA decision №СО-115-ПР/2023 of RIEW-Sofia, concerning the reconstruction of a football stadium. The decision includes only economic arguments, and no single assessment of the potential risk of environmental damage. It was appealed by a citizen. Unsurprisingly, the court (see case 7478/2023[37]) upheld the decision for preliminary enforcement, justifying its ruling with the conclusions of the EIA decision №СО-115-ПР/2023 that “no negative impact on habitats and species is expected”.

In contrast to the cases above, the preliminary execution for another EIA decision of MOEW (№2-ПР/2021 concerning the construction of an international gas interconnection,

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[32] https://legalacts.justice.bg/Search/GetActContentByActId?actId=GUFzJ69cU7g%3D

[33] https://www.moew.government.bg/static/media/ups/articles/attachments/%D0%A0%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%20205%20%D0%BE%D1%82%20202374ec976693424f17363a350d6bc5f3b4.pdf

[34] https://www.moew.government.bg/static/media/ups/articles/attachments/%D1%80%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%2080%202023350d21f794e9474e1a00d4d4fba3c483.pdf

[35] https://www.moew.government.bg/static/media/ups/articles/attachments/%D0%A0%D0%B5%D1%88%D0%B5%D0%BD%D0%B8%D0%B5%20150%202022%20%D0%B3.c629bd61b175d1b629b2385629bc93d6.pdf

[36] https://www.riew-sofia.org/files/PD2023/resh2023/resh-9-2023.pdf

[37] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=058559af-f039-49fa-a836-6e6fcd5b6498

appealed by local citizens) was allowed by the court by virtue of art. 167 of APC under case 3465/2022[38]. Nevertheless, it also includes only economic arguments, and no single assessment of the potential risk of environmental damage. The first instance ruling under case 3465/2022 is upheld by the higher instance Supreme Court under case 5206/2022[39], whereby the potential risk of the environmental damage is once again totally disregarded.

3. Controversial case-law

3.1. Positive examples:

In case 2822/2020[40] the court refused the preliminary enforcement of EIA screening decision №ОВОС-1353-3/26.08.2020 of RIEW Plovdiv, concerning extraction activities in a riverbed. It was requested by the investor on basis of art. 167 of APC in connection with art. 60. The second instance court (see case 5781/2021[41]) upheld the first instance ruling, stating even that "*the possibilities for the plans or projects to be realized before the end of the appealing of the acts under Art. 31 of the Biodiversity Act would mean a preliminary resolution of the main dispute on the merits within the subsidiary preliminary enforcement proceedings, which is legally impermissible*" and that "*allowing preliminary implementation of a project could be procedurally possible only in cases where there will be no deterioration of the state of the natural habitats of the species, as well as disturbance of the species protected in the respective protected areas under the two directives*".

On 28.10.2021, the MoEW refused the preliminary enforcement[42] of EIA decision №19-ОС/2021 of MOEW, concerning a project for exploration of metallic minerals. The decision was justified by the lack of concrete evidences for potential financial losses for the investor. The investor appealed the decision. Fortunately, both the first instance (see case 11794/2021[43]) and the second instance court (see case 389/2022[44]) upheld the appealed decision without further arguments (incl. any environmental arguments).

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[38] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=bc5b8a8e-38be-4572-bcbf-f30a227ae027

[39] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1938328&code=vas&guid=2076279578

[40] https://ecase.justice.bg/act/getactpublicfile?guid=432a81b7-8b51-4f3d-915a-d019b2176fa1

[41] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1662929&code=vas&guid=2135418702

[42] https://www.moew.government.bg/static/media/ups/articles/attachments/Reshenie_19-OSc00087ee45b1072e48ab64df5d4deca8.pdf

[43] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=a9d4a840-3d66-4f2e-b609-f59839bd2b3f

[44] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1766220&code=vas&guid=2130827868

3.2. Semi-positive examples:

On 24.03.2021, the Administrative court of Rousse under case 112/2021[45] allowed on basis of art. 167 APC preliminary execution of the appealed SEA statement №RU-1-EO/2021 of RIEW-Rousse, concerning a DSP for construction of a power plant. The ruling of the court includes only economic arguments, and no single assessment of the potential risk of environmental damage. Fortunately, the higher instance Supreme Court (see case 6258/2021[46]) dismissed the ruling of the lower instance court under case 112/2021, stating that the preliminary enforcement should be based on thorough balance of the interests. The court noted further that the balance of interests should include assessment "*not only of the economic interests of the private investor, but also the harmful consequences for the environment, which have not been discussed*".

On 26.04.2021, the Administrative court of Dobrich under case 108/2021[47] allowed on basis of art. 167 APC preliminary execution of the appealed EIA decision №ВА-21/ПР/2021 of RIEW-Varna, concerning the construction of a wind turbine. The ruling of the court includes only economic arguments, and no single assessment of the potential risk of environmental damage. Fortunately, the higher instance Supreme Court (see case 5142/2021[48]) dismissed the ruling of the lower instance court under case 108/2021, stating that the preliminary enforcement should be based on thorough balance of the interests. The court insisted further that "*the realization of a commercial profit cannot oppose the protectable, particularly important state or public interest justified by the Convention for the Conservation of Migratory Species of Wild Animals (Bonn Convention), the Convention for the Conservation of Wild European Flora and Fauna and Natural Habitats (Bern Convention), in connection with the Guidelines for assessing the likely impact of investment proposals (IP) for the construction of wind generators (VG)*".

On 12.01.2018, the Administrative court of Plovdiv under case 3419/2017 allowed on basis of art. 167 APC preliminary execution of the appealed EIA screening decision № ПВ-193-ПР/2017 of RIEW-Plovdiv, concerning the construction of a compost installation. The ruling of the court includes only economic arguments, and no single assessment of the potential risk of environmental damage. Fortunately, the higher instance Supreme Court (see case 1878/2018[49]) dismissed the ruling of the lower instance court under case 3419/2017, stating that the preliminary enforcement could lead to significant and hardly recoverable environmental damages.

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[45] https://ecase.justice.bg/act/getactpublicfile?guid=3da75be4-3f3f-4f06-8ed2-729852dc10b3
[46] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1612095&code=vas&guid=2130772459
[47] https://ecase.justice.bg/act/getactpublicfile?guid=eb690e0d-96b7-4c74-95ce-6367b8607ecd
[48] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1612095&code=vas&guid=2130772459
[49] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=881938&code=vas&guid=1656486855

In case 9025/2022[50] the court allowed preliminary execution of the appealed SEA statement №СО-01-01/05.08.2022 of RIEW-Sofia concerning the construction of a big solar farm. In fact, it did made a balance between the developer's interest and the environmental risks, whereby it required a financial guarantee of EUR 70 000 in case the affected nature should be restored if the appealed SEA statement is cancelled by the court. However, the court neither considered the irreversible and unrecoverable potential loss of biodiversity (as reasoned by the court under see case 5781/2021), nor calculated the amount of the financial guarantee on the basis of the potential costs to recover the affected nature. The guarantee was simply calculated as 0,1% of the total amount of the planned investment what is ridiculous.

3.3. Negative examples:

On 21.10.2021, the Executive Environmental Agency refused the preliminary enforcement of Complex Permit № 40-Н2-И0-А0/2021 of the Agency, concerning the Brikel Coal-firing Power Plant. The decision was justified by the lack of concrete evidences for potential negative consequences for the investor, as well as by the systematic pollution of the air by the plant. The investor appealed the decision. Interestingly, the first instance court (see case 651/2021[51]) upheld the decision of the Agency, arguing that the investor had not provided concrete evidence for the need of preliminary enforcement of the Complex Permit. Nevertheless, the second instance court (see case 11703/2021[52]) allowed the preliminary enforcement of the Complex Permit, whereby two judges argued that no air pollution is expected based on the relevant EIA decision №СЗ-61-ПР/2018 of RIEW-Stara Zagora. Curiously, the third judge of the panel disagreed with his two colleagues and insisted that the appealed decision is well founded, that the arguments of the investor are not accompanied with concrete evidences, and most importantly, that the information in the Complex Permit revealed that the Power Plant is systematically polluting the air in violation of the previous permits.

[50] https://search-sofia-adms-g.justice.bg/Acts/GetActContent?BlobID=942c11e7-ae28-496d-9c2d-cdff744eaa6b

[51] https://legalacts.justice.bg/Search/GetActContentByActId?actId=XVhUP9tu84Q%3D

[52] https://info-adc.justice.bg/courts/portal/edis.nsf/e_act.xsp?id=1755742&code=vas&guid=2131775660

In view of the above, we consider that the Party Concerned fails to make any progress on decision VII/8d on communications ACCC/C/2011/58 and ACCC/C/2012/76. We hope that with case-law provided all manipulations in the progress report are properly addressed and refuted. In essence, the case-law on the access to justice under the SDA proves to be consistently in violation of art. 9 (3) of the Convention, while the slight progress made some judge panels on art. 9 (4) of the Convention with regard to the injunctive relief, is often nullified by the competent authority MoEW itself. Therefore, we strongly insist that the Compliance Committee keeps urging the Party Concerned to execute its Action Plan from 2022 and take the legislative measures needed for timely and effective implementation of decision VII/8d.

Yours faithfully,

Andrey Kovatchev,

On behalf of the Balkani Wildlife Society

Vera Staevska and Alexander Dountchev,

On behalf of the Green Laws Initiative

Date: 6th November 2023