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Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Compliance Committee

Fifty-second meeting

Geneva, 8–11 March 2016

Item 9 of the provisional agenda

Communications from members of the public

Findings and recommendations with regard to communication ACCC/C/2012/76 concerning compliance by Bulgaria*

Adopted by the Compliance Committee on 9 October 2015

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* This document is a late submission owing to the Committee's meeting schedule: the deadline for submission of the present document (28 December 2015) fell very soon after the Committee's fifty-first meeting (Geneva, 15-18 December 2015) and consultations were required with various parties prior to the document's submission.



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I. Introduction

1. On 25 July 2012, the Bulgarian non-governmental organization (NGO) Balkani Wildlife Society (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a systemic failure of Bulgaria to comply with article 9, paragraph 4, of the Convention.¹

2. Specifically, the communication alleges that the Party concerned fails to comply with article 9, paragraph 4, of the Convention, because it fails to meet the Convention's requirements regarding injunctive relief with respect to challenges to environmental permits issued under three European Union directives: the Environmental Impact Assessment (EIA) Directive;² the Strategic Environmental Assessment (SEA) Directive;³ and the Habitats Directive.⁴

3. At its thirty-eighth meeting (Geneva, 25–28 September 2012), the Committee determined on a preliminary basis that the communication was admissible.

4. Pursuant to paragraph 22 of the annex to decision I/7 of the Meeting of the Parties to the Convention, the communication was forwarded to the Party concerned on 30 October 2012.

5. The Party concerned responded to the allegations on 22 May 2013.

6. At its fortieth meeting (Geneva, 25–28 March 2013), the Committee agreed to discuss the content of the communication at its forty-first meeting (Geneva, 25–28 June 2013).

7. The Committee discussed the communication at its forty-first meeting, with the participation of representatives of the communicant. The Committee confirmed the admissibility of the communication and expressed its concern that the Party concerned had chosen not to participate in the discussion of the communication. At the same meeting, the Committee agreed on a set of questions to be sent to the parties.

8. The communicant and the Party concerned submitted their responses on 21 and 22 August 2013, respectively.

9. The Committee completed its draft findings at its forty-ninth meeting (Geneva, 30 June–3 July 2015), save for some minor editing points which it agreed to finalize through its electronic decision-making procedure after the meeting. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and the communicant on 4 September 2015. Both were invited to provide comments by 2 October 2015.

¹ The communication and related documentation from the communicant, the Party concerned and the secretariat is available on a dedicated web page on the Committee's website (<http://www.unece.org/env/pp/compliance/compliancecommittee/76tablebulgaria.html>).

² Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended. (See Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification)).

³ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

⁴ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended.

10. Both the Party concerned and the communicant provided comments on 2 October 2015.

11. At its fiftieth meeting (Geneva, 6–9 October 2015), the Committee proceeded to finalize its findings in closed session, taking into account the comments received. The Committee then adopted its findings and agreed that they should be published as a formal pre-session document for its fifty-second meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

II. Summary of facts, evidence and issues⁵

A. Legal framework

12. According to the Bulgarian Environmental Protection and Biodiversity Act, all projects and plans falling within the scope of the EIA Directive, the SEA Directive and article 6, paragraph 3, of the Habitats Directive require an authorization from the Party's environmental authorities (the Ministry of Environment and Water and its regional branches). Such authorizations are known respectively as EIA decisions, SEA decisions and decisions on Assessment of Compatibility with the Special Protected Zones of Natura 2000.⁶ For simplicity, all three decisions will henceforth be referred to in these findings as "EIA/SEA decisions".

13. EIA/SEA decisions constitute individual administrative acts and may be subject to administrative and judicial review.⁷ According to the Administrative Procedure Code, administrative acts may not be executed prior to the expiration of the time limit for contesting them or where an appeal or a protest has been lodged, until resolution of that dispute by the relevant authority (Administrative Procedure Code, art. 90, para. 1).⁸

14. Under the Administrative Procedure Code (APC),⁹ any appeal or protest lodged in an administrative¹⁰ or a judicial¹¹ procedure has immediate and automatic suspensive effect. Authorities and courts may, however, discharge the suspensive effect of an appeal by issuing an order ("разпореждане за предварителното му изпълнение") granting immediate enforceability to an administrative act. This order is known as an order for preliminary enforcement.¹²

⁵ This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

⁶ Response to the communication from the Party concerned, 28 March 2013, p. 1. In communication ACCC/C/11/58 submitted by the same communicant, the authorizations related to an EIA procedure are called "EIA decisions" while those related to an SEA procedure are called "SEA statements".

⁷ Communication, p. 2. In communication ACCC/C/11/58 submitted by the same communicant, the communication alleged that the legal nature of the "SEA statements" and the possibility to judicially review them was doubtful. In its findings on communication ACCC/C/11/58, the Committee found that indeed "Bulgarian law does not make fully clear whether judicial reviews of SEA statements as such are admissible" (ECE/MP.PP/C.1/2013/4, para. 59).

⁸ Communication, p. 2 (footnote 3).

⁹ For any direct references or citations, see Administrative Procedure Code (English version) from the Party concerned, 1 March 2016.

¹⁰ Article 90, para. 1, of the Administrative Procedure Code.

¹¹ Article 166, para. 1, of the Administrative Procedure Code.

¹² Response to the communication from the Party concerned, 28 March 2013, p. 1.

15. An order for preliminary enforcement may be issued with respect to various types of administrative acts including, inter alia, EIA/SEA decisions as well as decisions ordering cessation of an illegal activity.

16. According to article 60, paragraph 1, of the Administrative Procedure Code, an order for preliminary enforcement may be issued as long as one of the following conditions is met, namely that the preliminary enforcement is required:

- (1) to ensure life or health of individuals,
- (2) to protect particular State or public interests,
- (3) to prevent a risk of the frustration or material impediment of the enforcement of the act, or,
- (4) where delay in enforcement may lead to a significant or irreparable detriment, or,
- (5) at the request of some of the parties in protection of a particularly important interest thereof (in the latter case, the administrative authority shall require a relevant guarantee).¹³

17. An order for preliminary enforcement of any administrative act may be challenged within three days after its publication regardless of whether the administrative act itself has been contested (APC, art. 60, para. 4). The court examines the legality of the order according to article 60, paragraph 1, of the Code and, if it finds that the conditions set out in that provision are not met, it may repeal the order, resulting in the suspension of the underlying administrative act. Once the three-day period ends, the right of appeal against the order for preliminary enforcement lapses (*ibid.*), but not the right of appeal against the administrative act.

18. In contrast to an appeal of an EIA/SEA decision, which has suspensive effect, an appeal against an order for preliminary enforcement does not have suspensive effect unless the court decides otherwise (APC, art. 60, para. 5). The applicant may request suspension of the execution of the activity as part of its appeal against the order for preliminary enforcement.

19. An appeal of an order for preliminary enforcement is considered immediately *in camera*, and transcripts of the appeal are not served on the parties (*ibid.*).¹⁴

20. An applicant can also request a higher administrative body to stop the execution of an order for preliminary enforcement, if not necessitated by the public interest or if it would cause irreparable damage to the person concerned (APC, art. 90, para. 3).

21. Article 6 of the Administrative Procedure Code requires administrative authorities to exercise their powers reasonably, in good faith and fairly (para. 1). An administrative act and the enforcement thereof may not affect any rights and legitimate interests to a greater extent than the minimum necessary for which the act is issued (para. 2). Where an administrative act affects any rights of individuals or organizations, the measures that are more favourable to the said individuals or organizations shall be applied as long as the purpose of the law can be achieved. The administrative bodies “shall restrain themselves from acts and actions, which may cause damages obviously incommensurated to the

¹³ Communication, p. 3.

¹⁴ Communication, p. 3, footnote 5.

pursued aim” (para. 5). Article 6 is commonly referred to as the “proportionality principle”.¹⁵

22. Article 7, paragraph 2, of the Administrative Procedure Code requires that all the facts and arguments, significant for the case, be subject to assessment.

23. Article 172a, paragraph 2, of the Code requires that, in its judgement, the court must present its reasoning, stating the positions upheld by the parties, the facts in the main proceedings and the legal conclusions of the court.

24. Pursuant to articles 180 and 181 of the Law on Obligations and Contracts, a guarantee that may need to be issued further to an order for preliminary enforcement under article 60, paragraph 1, of the Administrative Procedure Code may take the form of cash, bonds or mortgage.¹⁶

25. As an alternative to appealing the order for preliminary enforcement, at any stage of an appeal of an EIA/SEA decision, the applicant may request the Court to issue an injunction to stop the execution of the EIA/SEA decision if there is a risk of irreparable damage to the applicant (APC, art. 166, para. 2). However, this option may only be used if the order for preliminary enforcement has not itself been challenged.

B. Substantive issues

26. The communicant alleges that the Party concerned in general does not provide for effective and equitable injunctive relief with respect to orders for preliminary enforcement, and therefore fails to comply with article 9, paragraph 4, of the Convention. The communicant submits that the courts tend to refuse to consider environmental concerns when an order for preliminary enforcement is challenged and look at the conditions under article 60 of the Administrative Procedure Code rather narrowly and without properly balancing the interests involved, resulting in review procedures being ineffective. It also claims that financial guarantees imposed in such cases do not provide sufficient protection for the environment. It further claims that the courts are biased in resolving such disputes and tend to follow the views of the authorities. It states that, though there is room for authorities and courts to interpret the existing legislation in a way that the protection of the environment is recognized as a particularly important State or public interest, a legislative amendment would be needed to provide clear guidance in this respect. The communicant’s allegations are set out in more detail in later paragraphs.

27. The Party concerned refutes the communicant’s allegations. It claims that it is in general in full compliance with article 9, paragraph 4, of the Convention because its legislation provides for adequate and effective remedies with respect to challenging orders for preliminary enforcement. It points out that members of the public have the possibility to seek review of EIA/SEA decisions (APC, art. 90, para. 1, and art. 166, para. 1); to seek review of the order for preliminary enforcement separately from the EIA/SEA decision (APC, art. 60, para. 4); and also to request suspension of the preliminary enforcement at any time prior to the entry into force of the decision in case of potential irreparable damage (APC, art. 166, para. 2). It contends that both the authorities and the courts properly apply the applicable legal provisions.

¹⁵ Response to the communication from the Party concerned, 28 March 2013, p. 4.

¹⁶ Response to the communication from the Party concerned, 28 March 2013, p. 2.

1. Recent practice regarding orders for preliminary enforcement

(a) Role of the public authorities

28. The communicant alleges that environmental authorities usually grant an order for preliminary enforcement either without giving any reasoning at all or with a blanket reference to article 60 of the Administrative Procedure Code or “the protection of a particularly important interest of the developer”, and without undertaking a proper balancing of the interests in the light of the precautionary principle. Moreover, the communicant contends that the authorities routinely grant an order for preliminary enforcement making only a formal reference to the conditions in article 60 of the Administrative Procedure Code, without providing any reasons to show that the actual situation satisfies these conditions. It states that there is no obligation on the competent authority to perform an objective test in this respect.

29. The Party concerned submits that, when considering whether to issue orders for preliminary enforcement of EIA/SEA decisions, the competent authorities take into account the results of the independent procedures leading to those decisions, including the public participation procedure. It submits that quite often in such cases the public have not raised any objections to the proposed activity, in particular environmental concerns, during the public participation procedure and that in many cases the reasons for challenging the EIA/SEA decision were related to its alleged illegality and not to environmental concerns.

(b) Role of the courts and other review bodies

30. The communicant alleges that, in the period 2010–2012, NGOs appealed a number of EIA/SEA decisions issued by the Ministry of Environment and Water and the Regional Inspectorates for Environment and Waters under the Ministry and, where granted, the accompanying orders for preliminary enforcement. The communicant contends that in the majority of cases the courts systematically held that suspension of the order for preliminary enforcement was not necessary pending the review of the challenged EIA/SEA decision.

31. The communicant provided summaries of a number of cases to illustrate the courts’ recent practice. Five of these cases are summarized below, as these particular five cases were also cited by the Party concerned.¹⁷

(i) *Ski lifts in Pirin National Park (decisions No. 31-PR/2010 and No. 33-PR/2010 of the Ministry of Environment and Water)*

32. In 2010, NGOs brought legal action against two EIA decisions and their related orders for preliminary enforcement concerning the replacement and upgrading of ski lifts in Pirin National Park, a project that would, inter alia, result in the logging of trees in the national park. The NGOs argued that the EIA decisions’ evaluations of the environmental impacts were flawed and that the orders for preliminary enforcement were neither supported by facts nor relevant guarantees, and did not take into account the precautionary principle.

33. The project was the subject of five court cases before the Supreme Administrative Court. In the proceedings to appeal the order for preliminary enforcement, the Court rejected the NGO submissions and evidence that a number of trees had already been logged and that the ongoing construction had led to irreversible environmental damage. In its reasoning, the Court referred to the conclusion in the EIA decisions that no significant

¹⁷ Communication, pp. 6–12.

environmental impacts were expected, even though the EIA decisions themselves were at that time under challenge for substantive flaws.

34. The second instance court ultimately found the EIA decisions to be illegal but, meanwhile, due to the orders for preliminary enforcement, the trees had been logged.

(ii) *Ada Tepe Goldmine on Mount Ada Tepe in the Eastern Rhodopes (Iztochni-Rodopi) (EIA decision No. 18-8,1/2011 of the Ministry of Environment and Water)*

35. In 2011, NGOs brought legal action against the EIA decision and the related orders for preliminary enforcement concerning the exploitation of a goldmine on Mount Ada Tepe in the Eastern Rhodopes (Iztochni-Rodopi). The NGOs argued that the EIA decision's evaluation of the environmental impacts was flawed and that the order for preliminary enforcement was neither based on a proper evaluation of the interests at stake nor took into account the precautionary principle. Rather, the Ministry had issued its order for preliminary enforcement on the basis of the protection of the developer's interests, the State interest (regional development) and to prevent significant delays for the investment. It had not taken into account environmental impacts.

36. The case was reviewed at two instances. At first instance, the court held that the order for preliminary enforcement was valid and in compliance with article 60 of the Administrative Procedure Code, and environmental concerns should not be examined during the review of the order for preliminary enforcement but rather during the review of the EIA decision. The court's ruling was upheld by the Court of Cassation. The applicants requested the court to submit a request for a preliminary ruling before the Court of Justice of the European Union, but their request was dismissed.

(iii) *Storage depot for nuclear waste (EIA decision No. 21-9/2011 of the Ministry of Environment and Water)*

37. In 2011, NGOs brought legal action against the EIA decision and the related order for preliminary enforcement concerning the planned construction of a nuclear waste depot. The NGOs alleged that the EIA decision had been based on an incomplete EIA report with regard to environmental and health risks. The Minister had issued the order for preliminary enforcement on the grounds that the proper and timely implementation of national legislation and policy on nuclear waste was of public interest in order to protect human health.

38. The case was reviewed at two instances. At both instances, the courts confirmed that the order for preliminary enforcement was in conformity with article 60 of the Administrative Procedure Code and the protection of the public interest. They held that environmental concerns should not be examined when reviewing the order for preliminary enforcement, but rather during the review of the EIA decision, and in any event, the environmental aspects were not significant given the conclusions of the EIA decision.

(iv) *Highway through "Bulgarka" Nature Park (EIA decision No. 4-2/2012 of the Ministry of Environment and Water)*

39. In 2012, NGOs brought legal action against the EIA decision and the related order for preliminary enforcement concerning the construction of a highway through a national park, financed, among others, by the European Union, on the grounds that the EIA decision had been based on an EIA report that was incomplete as regarded the assessment of the environmental impacts. In addition, the NGOs claimed that the order for preliminary enforcement had failed to properly balance the interests at stake and to take into account the precautionary principle.

40. The court confirmed that the order had been issued in compliance with article 60 of the Administrative Procedure Code because the construction of the highway was of high public interest and that, given the EIA report's conclusions, the applicants' environmental concerns were not justified.

(v) *Wind turbine parks (EIA decisions VA-4/2011, VA-7/2012, VA-8/2012 and VA-13/2012 of the Varna Regional Inspectorates for Environment and Waters)*

41. In 2012, NGOs brought legal action against the EIA decisions and orders for preliminary enforcement concerning the construction of wind turbine parks on Via Pontica, the second largest bird migration route in Europe. The NGOs claimed that the EIA decisions were based on an incomplete EIA report regarding the assessment of the environmental impacts and that the orders for preliminary enforcement had failed to properly balance the interests at stake and to take into account the precautionary principle.

42. At the first instance, the Court followed a slightly different approach to the courts in the cases mentioned above, because it found that the orders should actually be based on the protection of the particular interest of the developer rather than the grounds which had been invoked by the authority to justify it. The Court still did not consider any environmental concerns raised. At the second instance, the case was closed because the EIA decision had been repealed by the Ministry in the meantime; according to the communicant, because of severe violations of environmental law.

43. The communicant submits that, in contrast to the approach taken by the courts when reviewing orders for preliminary enforcement of EIA/SEA decisions, when considering whether to uphold preliminary enforcement of decisions suspending activities the courts correctly take into account the protection of the environment. The communicant refers to cases where the public authorities had issued decisions obligating the cessation of certain illegal environmentally harmful activities, such as construction in a protected area and orders for preliminary enforcement of these suspension orders under article 60 of the Administrative Procedure.¹⁸ When the developers challenged the order for preliminary enforcement, the courts found that the private interests of the developers were subordinate to the public interest in the protection of the environment.¹⁹

44. The Party concerned submits that issuing an order for preliminary enforcement is "not established uniform practice and is allowed rather exceptionally".²⁰ According to the Party concerned, in the period 2009–2013 a total of 93 EIA decisions were issued and only 11 of them included an order for preliminary enforcement. Similarly, in the period of 2011–2013 a total of 53 SEA decisions were issued and only 3 of them included an order for preliminary enforcement.²¹

45. The communicant alleges that neither the law nor judicial practice require authorities to examine whether upholding the order for preliminary enforcement (and thus allowing the activity to be implemented pending the appeal of the EIA/SEA decision) might have an irreversible impact on the environment. According to the communicant, there is a striking difference in this respect between the practice regarding orders for preliminary enforcement of EIA/SEA decisions and orders which ban rather than permit an activity. In the latter, article 60 of the Administrative Procedure Code is interpreted correctly to cover environmental issues as overriding reasons of public interest.

¹⁸ For example, cases 8792/2009, 1396/2010, 241/2010, 12009/2008 and 11796/2006 of the Supreme Administrative Court. See communication, p. 13.

¹⁹ Communication, p. 13.

²⁰ Information provided after the hearing by the Party concerned, 22 August 2013, p. 7.

²¹ Ibid.

46. The communicant contends that the courts interpret article 60 of the Administrative Procedure Code as allowing them to review an order for preliminary enforcement only to check that the reasons given for the order correspond with the grounds listed in article 60, paragraph 1, of the Code; no examination of the actual facts is made and the courts, accordingly, usually find that the criteria of article 60 are met and uphold the order.

47. Finally, the communicant alleges that even if environmental considerations are taken into account, the courts usually rely on the findings of the EIA/SEA decisions despite those decisions themselves being challenged as inaccurate or insufficient. The communicant alleges that, when considering a dispute regarding preliminary enforcement, the courts as a rule follow the position and reasoning of the authorities. This applies both in cases where operators challenge decisions obligating them to stop illegal activities and in cases where NGOs challenge the preliminary execution of EIA/SEA decisions.

48. The Party concerned refutes the communicant's argument that the courts' appraisal is limited to the formal grounds of article 60, paragraph 1, of the Administrative Procedure Code without a thorough appraisal of the facts. It contends that, when considering applications for interim measures, the courts properly carry out their task of balancing the interests involved in the given case and carefully applying the proportionality principle; they assess whether the public interest, including protection of the environment, is at stake in an objective and impartial manner and in compliance with the right of the public concerned to participate in the decision-making process. The Party concerned provided several examples of balancing the interests from case law to substantiate its claim.²²

49. With respect to the courts' reliance on the findings of the EIA/SEA decision, according to the Party concerned, in general the need for preliminary enforcement should be examined solely on the basis of the findings of those decisions because "it is not possible, in any other way and using different criteria, to perform an independent and objective appraisal/examination of whether to admit pre-enforcement, taking into account potential irreversible effects on the environment, because this would mean the competent authority to take a subjective and unlawful decision".²³ Furthermore, the Party concerned contends that it would be unreasonable if environmental authorities would, when taking EIA/SEA decisions and granting orders for preliminary enforcement not comply with "an act of superior authority (e.g. the Council of Ministers), which, based on the policy in a particular sector/area has determined that the project/investment proposal is of national importance".²⁴

50. The Party concerned disagrees with the communicant's allegation that, in granting orders for preliminary enforcement, the authorities are motivated by the developers' interests and that the courts endorse the authorities' reasoning without taking into account the potential irreversible damage to the environment. As evidence to the contrary, it points, among others, to a recent decision of the Supreme Administrative Court that found that the competent authority, the Regional Inspectorate of Environment and Water of Varna, had wrongly issued an order for preliminary enforcement protecting in particular the considerable interests of the developer without providing for a necessary guarantee.²⁵ It claims that, in general, environmental concerns are taken into account both by the authorities and by courts in accordance with the requirements of applicable environmental laws.

²² Information provided after the hearing by the Party concerned, 22 August 2013, p. 4 ff.

²³ Response to the communication from the Party concerned, 28 March 2013, p. 7.

²⁴ Ibid.

²⁵ Ibid., p. 2.

51. Furthermore, the Party concerned underlines that even if the EIA/SEA decision is issued without taking into account all possible negative environmental effects and/or the conditions contained in that decision are insufficient to ensure full protection of the environment, the order for preliminary enforcement cannot lead to irreversible damage to the environment, since the Party's multistage development consent procedure requires a construction permit to be granted before the activity can proceed.

2. Financial guarantees

52. The communicant alleges that the requirement for a financial guarantee in a case where a private interest is claimed to justify preliminary execution of the activity is determined usually at a very low level not commensurate with the value of the project (for example €6,000 in the case of a project worth €200 million) and without any consideration as to the potential environmental damage or costs of recultivation.

53. The Party concerned refutes the communicant's allegation and provides examples of cases where the financial guarantee was fixed at a significantly higher level (e.g., 150,000 Bulgarian leva (approximately €77,000)).²⁶

C. Domestic remedies

54. The communicant submits that all domestic remedies have been exhausted for the proceedings described in paragraphs 32–42 above and that no general remedy exists at the domestic level to challenge the Party concerned's failure to comply with the Convention, as this is of an ongoing systemic nature.

III. Consideration and evaluation by the Committee

55. Bulgaria deposited its instrument of ratification on 17 December 2003. The Convention entered into force for Bulgaria on 16 March 2004.

56. The communication concerns the approach taken by the Party concerned to applying the requirement in article 9, paragraph 4, of the Convention to ensure adequate and effective remedies, including injunctive relief as appropriate, to review procedures regarding orders for the preliminary enforcement of EIA/SEA decisions.

57. As a preliminary point, the Committee notes that it has not been disputed by the parties to this communication that review procedures regarding EIA/SEA decisions are subject to the requirements of article 9, paragraph 4, of the Convention. Bearing this in mind, the Committee does not consider it necessary to examine this point further.

58. In order to determine whether the Party concerned meets the standard required by article 9, paragraph 4, of the Convention, the Committee first examines the legal framework regarding orders for preliminary enforcement of EIA/SEA decisions, in particular in the light of the information provided by the Party concerned in the context of this communication. The Committee then evaluates how the legal framework is being applied in practice. In this regard, while both the communicant and the Party concerned helpfully provided a number of examples from case law, the Committee focuses on the five cases summarized in the original communication (see paras. 32–42 above), since it is only with

²⁶ See for instance, decisions Nos. 255/13.09.2012 and 22/01.02.2013 cited in the information provided after the hearing by the Party concerned, 22 August 2013, p. 5.

respect to these five cases that the Committee has received sufficient evidence, in English, from both the communicant and the Party concerned.

A. Applicable legal framework

59. The Committee commends articles 90, paragraph 1, and 166, paragraph 1, of the Administrative Procedure Code, under which administrative acts may not be enforced prior to the expiry of the time limits to contest them or, where an appeal or a protest has been lodged, until resolution of that dispute by the relevant authority. These provisions, which in themselves operate as a form of automatic temporary injunction and which, according to the communicant, do not require the appellant in the substantive proceeding to first give a bond as security nor open the applicant to risk of damages against it if its substantive appeal is subsequently unsuccessful, may provide a useful legislative model and inspiration for other Parties.

60. The Committee has examined the Party concerned's submission that article 166, paragraph 2, of the Administrative Procedure Code provides an alternative to appealing the order for preliminary enforcement as it permits the applicant, at any stage of an appeal of an EIA/SEA decision, to request the Court to issue an injunction to stop the execution of the EIA/SEA decision if there is a risk of irreparable damage to the applicant. The Committee understands that a risk of irreparable damage to the environment would not be sufficient to satisfy the requirement for the applicant to demonstrate that the applicant is itself at risk of irreparable damage. The Committee therefore finds that the Party concerned cannot rely on article 166, paragraph 2, of the Administrative Procedure Code as an alternative means to meet its requirements to provide for adequate and effective remedies under article 9, paragraph 4, of the Convention.

61. Regarding orders for preliminary enforcement, the Committee considers that the mere existence of the order for preliminary enforcement as a measure to limit the automatic suspensive effect of an appeal cannot per se be considered as reducing the effectiveness of the remedies under article 9 of the Convention. Rather, it is necessary to examine the legal basis and practice under which an order for preliminary enforcement will be granted.

62. The Committee notes that it is not disputed between the parties that review procedures regarding EIA/SEA decisions are subject to the requirements of article 9, paragraph 4, of the Convention (see para. 570 above). As an order for preliminary enforcement of an EIA/SEA decision is a measure for injunctive relief regarding a decision subject to article 9, paragraph 4, it is likewise subject to the requirements set out in article 9, paragraph 4, of the Convention to be, inter alia, fair and equitable. In this regard, the Committee commends article 6, paragraph 1, of the Administrative Procedure Code, which requires administrative authorities to exercise their powers reasonably, in good faith and fairly.

63. The Committee considers that the requirement in article 1 of the Convention for Parties to guarantee the rights of information, participation and justice "in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being", makes it clear that the protection of the environment is to be treated as an important public interest.

64. With respect to article 60, paragraph 1, of the Administrative Procedure Code, the Committee notes that it is common ground between the Party concerned and the communicant that, when deciding whether to grant/uphold orders for preliminary enforcement under that provision, public authorities and the courts, in accordance with the proportionality principle set out in article 6 of the Administrative Procedure Code, should carry out a balancing exercise to ensure that the decision is fair and taking into account all

interests, including the public interest in the protection of the environment. Where the Party concerned and communicant differ, however, is whether this happens in practice.

B. Orders for preliminary enforcement in practice

65. When considering the approach of the Party concerned to applying orders for preliminary enforcement regarding EIA/SEA decisions in practice, the Committee examines below the different roles played by the public authorities competent to issue EIA/SEA decisions and orders for preliminary enforcement and the courts and other review bodies competent to adjudicate on challenges to such decisions and orders.

1. Role of the public authorities

66. With respect to the role of public authorities, the Committee finds the view of the Party concerned that when issuing EIA/SEA decisions the competent authorities should not “question” a project/investment proposal that was designated by a superior authority as being of national importance (see para. 49 above) to be out of step with the Convention. If the role of authorities when issuing EIA/SEA decisions was to merely rubber-stamp the policy decisions taken at a higher level, it would effectively deprive the environmental decision-making of any significance and make public participation in such procedures meaningless. Likewise, making a designation of national importance by a superior authority a decisive factor in deciding to grant an order for preliminary enforcement would neglect the need for a balancing of interests, which should be the key factor in any determination on whether to grant interim relief.

67. The Committee notes the Party concerned’s submission that often no concerns regarding the environmental effects of the proposed activity have been raised by the public during the public participation procedure leading up to the EIA/SEA decision. The Committee understands that this might explain why, when deciding whether to grant the order for preliminary enforcement in those cases, the public authorities determined that other interests were more pressing. If there is no evidence before them to the contrary, public authorities could not be expected to act otherwise. Bearing this in mind, the Committee is not convinced that the current practice of the Bulgarian public authorities with respect to the grant of orders for preliminary enforcement fails to comply with the requirements of article 9, paragraph 4, of the Convention, and therefore the Committee does not conclude that the Party concerned is in non-compliance with the Convention on this specific point.

68. The Committee takes this opportunity to make a more general observation regarding the relationship of the right to participate and the right of access to justice under the Convention, while stressing that what follows is not in any way directed at the communicant of the present communication. The Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention. On the other hand, the Convention recognizes that public participation in decision-making procedures is a fundamental tool for enhancing the quality of environmental decision-making.²⁷ By ensuring that the public has the opportunity to express its concerns and by requiring public authorities to take due account of those concerns, the Convention helps to ensure that environmental considerations are integrated into governmental decision-making. Therefore, the Committee considers that if NGOs were to develop a practice to deliberately opt not to participate during public

²⁷ See, e.g., preambular para. 9.

participation procedures, though having the opportunity to do so, but instead to limit themselves to using administrative or judicial review procedures to challenge the decision once taken, that could undermine the objectives of the Convention.

2. Role of the courts and other review bodies

69. The Committee confirms that, as submitted by the communicant, the requirement in article 9, paragraph 4, of the Convention that injunctive relief and other remedies be “effective” includes, *inter alia*, an implicit requirement that those remedies should prevent irreversible damage to the environment.

70. In this respect, it is important to note that the Party concerned is bound to guarantee access to justice in accordance with the objective set out in article 1 of the Convention, that is, in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being. Therefore, the protection of the environment must, in the language of article 60, paragraph 1, of the Administrative Procedure Code, be treated as a “particularly important public interest” for the purposes of that provision.

71. Furthermore, the Committee considers that, in contrast to its findings regarding the grant of such orders by public authorities (see para. 67 above), in an appeal of an order for preliminary enforcement under articles 60, paragraph 4, of the Administrative Procedure Code, it should be irrelevant whether the public raised any concerns during the earlier public participation procedure. Likewise, the grounds upon which the EIA/SEA decision is challenged in the main proceeding should be irrelevant also. Rather, if a risk of damage to the environment is put forward as a ground for appealing the order for preliminary enforcement, then — in accordance with the requirement in article 9, paragraph 4, of the Convention to ensure adequate and effective remedies to prevent environmental damage — the protection of the environment must be a major factor to be taken into account by the court in deciding the appeal.

72. Given that the EIA/SEA decision is itself challenged in the main proceeding, this will require that the reviewing body, when considering the appeal against an order for preliminary enforcement, undertakes its own assessment as to whether there is any risk of damage to the environment should the activity proceed while the challenge to the EIA/SEA decision is still pending. This assessment must be carried out on the basis of all the facts and arguments before it, and 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.

73. As an aside, the Committee does not find convincing the Party concerned’s submission that, even though an order for preliminary enforcement is upheld by the court, the project may not yet commence for some time, and hence no environmental damage will occur. While, due to various practical circumstances, that may be correct in some cases, as is evident from the cases examined in these findings, it is not necessarily so. For example, the two ski-lift projects (ruling no. 15789/2010 regarding decision No. 31-PR/2010 of the Ministry of Environment and Water)²⁸ resulted in irreversible environmental damage before the decision authorizing the ski lifts was finally found to be illegal (paras. 32–34 above). As that case demonstrates, environmental damage can indeed occur as a result of granting preliminary enforcement of a challenged EIA/SEA decision that is subsequently overturned as a result of that challenge. The key point is that there is nothing that legally prevents the developer from proceeding to apply for and obtain a construction permit as soon as the

²⁸ See communication, annex 6 (in Bulgarian); for English translation see the letter from the communicant dated 21 August 2013 answering questions after the hearing at the Committee’s forty-first meeting, attachment A, annex 6.

order for preliminary enforcement is upheld and before the appeal regarding the validity of the EIA/SEA decision is concluded.

74. Bearing in mind the above considerations, the Committee notes that only in one of the five cases it has examined, namely the ruling in cassation case 14251/2010 regarding decision No. 33-PR/2010 of the Ministry of Environment and Water, did the court appear, when balancing the interests, to make its own assessment of the risk of environmental damage on the basis of all the facts and arguments before it. In the other four cases, the courts, when reviewing the decisions of the competent authorities regarding the preliminary enforcement of challenged EIA/SEA decisions, did not attempt to make their own assessment of the potential effects on the environment, but instead relied solely on the conclusions of the competent authority on that point, i.e., the exact conclusions being challenged in the main proceeding. In one case, the ruling in cassation case No. 8885/2012,²⁹ the courts did not consider environmental concerns at all. Subsequently, the substantive review by the Ministry revealed significant flaws in assessing the environmental impact of the activity and consequently repealed the EIA decision (in that case, decision No. 181/2012³⁰ of the Ministry of Environment and Water repealing the decision VA-7/2012 of Regional Inspectorates for Environment and Waters). The courts in the other three cases clearly refused to take into account any environmental concerns put forward by the applicant, indicating that they would be addressed when adjudicating the case on its merits.

75. That the above is an accurate summary appears further confirmed by the Party concerned's statement that in each of the five cases the courts rejected the appeals against preliminary enforcement "on the grounds of prevailing public and State interest in the implementation of the investment proposals, given the fact that the possible occurrence of any harms for the environment has not been proved".³¹

76. In the view of the Committee, the above facts reveal the existence of a certain trend, condoned by the Party concerned: when considering an appeal of an order for preliminary enforcement of a challenged EIA/SEA decision, instead of reviewing the extent to which the criteria in article 60, paragraph 1, of the Administrative Procedure Code are met in the light of the proportionality principle (APC, art. 6) and the requirement to assess all the facts and arguments significant for the case (APC, art. 7), the courts rely heavily on the conclusions contained in the EIA/SEA decision, despite the fact that the legality of that decision is being challenged in the main proceeding. The Committee considers that the courts' approach is not in accordance with the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies.

77. More precisely, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, the Committee finds that a practice in which the review bodies rely on the conclusions of the contested EIA/SEA decision, rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, 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, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

²⁹ See the letter from the communicant dated 21 August 2013 answering questions after the hearing at the Committee's forty-first meeting, attachment A, annex 32.

³⁰ See *ibid*, annex 33.

³¹ Information provided after the hearing by the Party concerned, 22 August 2013, p. 4.

78. The Committee notes that, in addition to an appeal under article 60, paragraph 4, of the Administrative Procedure Code, an applicant may, pursuant to article 90, paragraph 3, of the Code, request a higher administrative body to stop the execution of a preliminary order for enforcement if not necessitated by the public interest or if execution would cause irreparable damage to the person concerned. Having not examined in detail the practice of higher administrative bodies regarding requests under article 90, paragraph 3, the Committee does not make any findings on this point. However, the Committee stresses that the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies is equally applicable to requests under article 90, paragraph 3, grounded on a risk of environmental damage. Thus, the Committee's reasoning in paragraph 77 is also applicable to such requests.

3. Financial guarantees

79. While the Convention does not preclude the use of financial guarantees per se in judicial procedures covered by the Convention (and indeed guarantees may in appropriate cases play a useful role in helping to protect the environment), they may in practice be applied in a manner counter to article 9, paragraph 4, of the Convention. This could be the case when a financial guarantee imposed as a condition for upholding an order for preliminary enforcement is not set at a level that would be a disincentive to the taking of action that may cause environmental damage or, alternatively, that would provide an adequate remedy for any harm caused.

80. The case law before the Committee appears to show that courts tend to uphold orders for preliminary enforcement if a financial guarantee is imposed, without first considering whether the amount of the guarantee would be adequate to redress any environmental and other harm suffered should the work go ahead, and the appellant then succeeds in the substantive proceeding. If the courts indeed do so, the Party concerned would fail to comply with article 9, paragraph 4, of the Convention. However, on the basis of the limited information in front of it, the Committee does not conclude that it has been established that the Party concerned is in non-compliance with the Convention on this specific point.

IV. Conclusions and recommendations

81. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

82. The Committee finds that, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, a practice in which the courts rely on the conclusions of the contested EIA/SEA decision rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, 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, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

B. Recommendations

83. The Committee, pursuant to paragraph 36 (b) of the annex to decision I/7 of the Meeting of the Parties, and noting the agreement of the Party concerned that the Committee take the measures requested in paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review the approach of its courts to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, and undertake practical and/or legislative measures to ensure that:

(a) Instead of relying on the conclusions of the contested EIA/SEA decision, 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, 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;

(b) The courts in their decisions on such appeals set out their reasoning to clearly show how they have balanced the interests, including the assessment they have undertaken of the risk of environmental damage in the light of all the facts and arguments significant to the case, 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;

(c) Training and guidance is provided for judges and public officials in relation to how to carry out the above-mentioned balancing of interests in environmental cases, including on how to properly reflect that balancing in their reasoning.
