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Item 7 (b) of the provisional agenda

Procedures and mechanisms facilitating the implementation of the Convention: Compliance mechanism

Report of the Compliance Committee**

Compliance by Bulgaria with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 19 of decision V/9 of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision V/9d on compliance by Bulgaria with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up

2. On 31 December 2014, prior to the submission by the Party concerned of its first progress report due on the same date, the communicant of communication ACCC/C/2011/58 (the communicant) provided comments on the implementation of decision V/9d by the Party concerned.

3. The Party concerned provided its first progress report on the implementation of decision V/9d on 6 January 2015.

4. At the Committee's request, on 6 January 2015 the secretariat forwarded the first progress report of the Party concerned to the communicant, inviting it to provide any comments by 27 January 2015. On 30 January 2015, the communicant sent up updated version of its comments of 31 December 2014, which it indicated had been revised to take into account the first progress report of the Party concerned.

5. By letter of 20 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9d to the Party concerned.

6. On 28 October 2015, the Party concerned provided its second progress report on the implementation of decision V/9d.

7. At the Committee's request, on 6 November 2015 the secretariat forwarded the second progress report of the Party concerned to the communicant, inviting it to provide its comments by 27 November 2015. The communicant provided comments on 27 November 2015.

8. At the Committee's fifty-second meeting (Geneva, 7–11 March 2016), representatives of the Party concerned and the communicant participated by audioconference in an open session reviewing the implementation of decision V/9d.

9. On 28 October 2016, the Party concerned provided its third progress report.

10. At the Committee's request, on 7 November 2016 the secretariat forwarded the second progress report of the Party concerned to the communicant, inviting it to provide comments by 21 November 2017. On 17 November 2016, the communicant provided comments.

11. At its fifty-fifth meeting (Geneva, 6–9 December 2016), the Committee held an open session on the implementation of decision V/9d, in which a representative of the Party concerned participated in person and the communicant participated by audio conference

12. By letter of 3 January 2017, the secretariat sent the Committee's second progress review on the implementation of decision V/9d to the Party concerned. The secretariat's letter drew the attention of the Party concerned to the Committee's conclusions regarding the on-going non-compliance and also informed the Party concerned that all measures necessary to implement decision V/9d had to be completed by, and reported upon, by 31 January 2017 as that would be the final opportunity for the Party concerned to demonstrate to the Committee that it had fully met the requirements of decision V/9d.

13. At the Committee's request, on 23 January 2017 the Executive Secretary of the ECE also wrote to the Minister of Foreign Affairs of the Party concerned, enclosing the second progress review and again drawing the attention of the Party concerned to the Committee's

conclusions regarding the on-going non-compliance and the fact that the Committee may consider to recommend to the Meeting of the Parties that a caution be issued.

14. On 26 January 2017, the Party concerned provided further information on the steps it had taken to implement decision V/9d.

15. At the Committee's request, on 2 February 2017 the secretariat forwarded the further information received from the Party concerned to the communicant of communication ACCC/C/2011/58, inviting it provide any comments by 22 February 2017. On 12 February 2017, the communicant provided comments.

16. At the fifty-sixth meeting of the Committee (Geneva, 28 February – 3 March 2017), representatives of the Party concerned participated by audio conference in an open session to review the implementation of decision V/9d. Though invited, the communicant did not take part in the session.

17. The Committee adopted its report to the sixth session of the Meeting of the Parties on the implementation of decision V/9d at its fifty-seventh meeting (Geneva, 27–30 June 2017), and thereafter requested the secretariat to send it to the Party concerned and the communicant.

III. Considerations and evaluation by the Committee

18. In order to fulfil the requirements of decision V/9d, the Party concerned would need to provide the Committee with evidence that:

(a) Members of the public, including environmental organizations, have access to justice with respect to General Spatial Plans, Detailed Spatial Plans and (either in the scope of review of the spatial plans or separately) also with respect to the relevant strategic environmental assessment statements;¹

(b) Members of the public concerned, including environmental organizations, have access to review procedures to challenge construction and exploitation permits for the activities listed in annex I to the Convention.²

19. The Committee welcomes the three progress reports received from the Party concerned, the second and third of which were submitted on time, as well as the further information provided on 26 April 2016 and 26 January 2017.

20. The Committee also welcomes the comments and information provided by the communicant on 31 December 2014, 30 January and 27 November 2015, 29 April and 17 November 2016 and 12 February 2017.

21. At the outset, the Committee takes note of the information provided by the Party concerned in its third progress report concerning its draft act to amend and supplement the Spatial Planning Act as well as the draft Ordinance amending and supplementing Ordinance No. 8 of 2001 on the scope and content of spatial plans. The Committee welcomes the statement by the Party concerned that these measures will provide greater possibility for members of the public, including environmental organizations, to submit objections and other signals to the authorities to prevent omissions and violations; measures which according to the Party concerned facilitate “administrative control” and help prevent

¹ Decision V/9d, para. 2 (a).

² Ibid., para. 2 (b).

corrupt practices.³ However, since, as the Party concerned itself stated,⁴ these draft acts, once adopted, will not affect the access of members of the public concerned to challenge spatial plans or construction and exploitation permits as required by paragraph 2 (a) and (b) of decision V/9d, the Committee will not examine the draft legislation further in the context of the present report.

Paragraph 2 (a) of decision V/9d: Access to justice regarding General and Detailed Spatial Plans

22. With respect to paragraph 2 (a) of decision V/9d, the Party concerned informed the Committee in its second progress report that it had amended the Environmental Protection Act, specifically by adding article 88, paragraph 3, which further clarifies the right of the public concerned to challenge strategic environmental assessment (SEA) statements/decisions.⁵ The Committee welcomes the adoption of this amendment, which appears to further clarify that the public concerned is able to challenge SEA decisions associated with General and Detailed Spatial Planning Acts, one element required by paragraph 2 (a) of decision V/9d.⁶

23. However, the Committee expresses its serious concern that none of the measures described in the progress reports of the Party concerned appear to give access to justice for members of the public, including environmental non-governmental organizations (NGOs), with respect to General and Detailed Spatial Plans, as explicitly required in the wording of paragraph 2 (a) of decision V/9d. The Committee notes that pursuant to article 215, paragraph 6, of the Spatial Planning Act, General Spatial Plans are still not subject to appeal.⁷ The Committee further notes that pursuant to article 131, paragraphs 1 and 2, of the Spatial Planning Act, Detailed Spatial Plans are still only subject to challenge by persons having a direct and immediate legal interest.

24. Regarding the type of acts and omissions covered by article 9, paragraph 3, of the Convention, the Committee emphasises that this provision requires the Party concerned to ensure that members of the public have access to administrative or judicial procedures to challenge any acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. The Committee points out that, in the context of General and Detailed Spatial Plans, this means that access to justice under article 9, paragraph 3 is not limited to a right to challenge the SEA statement/decision, but also includes a right to challenge the decision approving a General or Detailed Spatial plan as well as the plan itself.⁸

25. With respect to who may challenge acts or omissions under article 9, paragraph 3, that provision gives the Party concerned the right to lay down criteria in its national law as to which members of the public have the right to make such a challenge. However, the Committee reiterates paragraph 65 of its findings on communication ACCC/C/2010/58 where it held that:⁹

While referring to “the criteria, if any, laid down in national law” in article 9, paragraph 3, the Convention neither defines these criteria nor sets out the criteria to

³ Third progress report of the Party concerned, 28 October 2016, p. 1-3, and further information from the Party concerned, 26 January 2017, p. 1.

⁴ Further information from the Party concerned, 26 January 2017, p. 1.

⁵ Second progress report of the Party concerned, 28 October 2015, p. 1.

⁶ See Committee’s second progress review, 3 January 2017, para. 48.

⁷ First progress report of the Party concerned, 6 January 2015, p. 2.

⁸ See Committee’s second progress review, 3 January 2017, para. 51.

⁹ Ibid., para. 52.

be avoided and allows a great deal of flexibility in this respect. On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations from challenging acts or omissions that contravene national law relating to the environment. The phrase “the criteria, if any, laid down in national law” indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception (cf. findings on communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, paras. 34-36).¹⁰

26. While welcoming the adoption of article 88, paragraph 3, of the Environmental Protection Act allowing the public concerned to challenge SEA statements/decisions, the Committee finds that since none of the measures described by the Party concerned in its progress reports give access to justice for members of the public, including environmental NGOs, with respect to General and Detailed Spatial Plans, the Party concerned has not fulfilled paragraph 2 (a) of decision V/9d.

Paragraph 2(b) of decision V/9d: Review of construction and exploitation permits

27. Regarding paragraph 2 (b) of decision V/9d, the Committee expresses its concern that none of the measures described by the Party concerned provide members of the public concerned, including environmental NGOs, with access to review procedures to challenge construction and exploitation permits for the activities listed in annex I to the Convention.

28. The Committee therefore finds that the Party concerned has not fulfilled paragraph 2 (b) of decision V/9d.

Paragraph 5 of decision V/9d: Position of the Party concerned

29. The Committee expresses its serious concern that, notwithstanding paragraph 5 of decision V/9d of the Meeting of the Parties, the Party concerned still appears to maintain the position that fully implementing the recommendations of the Committee is not required for its compliance with article 9, paragraph 2 and 3, of the Convention.

30. The Committee notes that the Party concerned appears to hold the view that the possibility to challenge the EIA and SEA decisions is a sufficient replacement for providing access to justice concerning General and Detailed Spatial Plans and building and exploitation permits.¹¹ In support of its position, it cited decisions of its own administrative courts (which apparently hold similar views to its own).¹² The Committee stresses that the position of the Party concerned is directly in contradiction with paragraphs 2 (a) and (b) of decision V/9d, which expressly requires the Party concerned to take measures to provide access to review procedures for the public concerned with regard to General and Detailed Spatial Development Plans and exploitation and building permits, and the Committee has continuously reiterated this point to the Party concerned through its progress reviews as

¹⁰ Findings of the Committee on communication ACCC/C/2010/58, ECE/MP.PP/C.1/2013/4, para. 65.

¹¹ Second progress report of the Party concerned, 28 October 2015, pp. 2-3, and third progress report of the Party concerned, 28 October 2016, p. 3.

¹² Second progress report of the Party concerned, 28 October 2015, pp. 2-3.

well as during the open sessions on decision V/9d in which the Party concerned participated.¹³

31. The Committee further notes that in both its second and third progress reports, the Party concerned stated that the issue of providing access to justice to challenge General and Detailed Spatial Plans as well as exploitation and building permits cannot be considered only in terms of protecting the environment as it also raises a number of significant socio-economic factors.¹⁴ The Committee points out that the requirements set out in the Convention are legally binding minimum standards. Whatever other considerations, socio-economic or otherwise, may also need to be taken into account, the Convention's legally binding requirements must be ensured as a minimum.

32. In the light of the above, the Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9d. The Committee further expresses its grave concern at the position taken by the Party concerned throughout the intersessional period as set out in paragraph 29 above and, in light of the position of the Party concerned, recommends to the sixth session of the Meeting of the Parties that a caution be issued to the Party concerned.

IV. Conclusions and recommendations

33. The Committee finds that the Party concerned has not yet fulfilled the requirements of decision V/9d. The Committee expresses its serious concern at the position of the Party concerned as set out in paragraph 29 above and, accordingly, recommends to the sixth session of the Meeting of the Parties that a caution be issued to the Party concerned.

34. The Committee recommends to the Meeting of the Parties that it:

(a) Reaffirm decision V/9d and in particular reiterate paragraphs 2 and 5 thereof in their entirety;

(b) Request the Party concerned, as a matter of urgency, to take the necessary legislative, regulatory and administrative measures to ensure that:

(i) Members of the public, including environmental organizations, have access to justice with respect to General Spatial Plans and Detailed Spatial Plans;¹⁵

(ii) Members of the public concerned, including environmental organizations, have access to review procedures to challenge construction and exploitation permits for the activities listed in annex I to the Convention.¹⁶

(c) Call upon all relevant ministries of the Party concerned, including the Ministry of Justice, to work together to ensure the successful fulfilment of the above recommendations.

(d) Request the Party concerned:

(i) To provide detailed progress reports to the Committee by 1 October 2018, 1 October 2019 and 1 October 2020 on the measures taken and the results achieved in the implementation of the above recommendations;

¹³ Committee's first progress review, 20 October 2015, para. 13, and Committee's second progress review, 3 January 2017, paras. 53 and 54.

¹⁴ Second progress report of the Party concerned, 28 October 2015, pp. 3-4, and third progress report of the Party concerned, 28 October 2016, p. 3.

¹⁵ Decision V/9d, para. 2 (a).

¹⁶ Ibid., para. 2 (b).

(ii) To provide such additional information as the Committee may request in between the above reporting dates in order to assist the Committee to review the progress by the Party concerned in implementing the above recommendations;

(iii) To participate (either in person or by audio conference) in the meetings of the Committee at which the progress of the Party concerned in implementing the above recommendations is to be considered.

35. The Committee further recommends that, in the light of the position of the Party concerned that implementing paragraphs 2 (a) and 2 (b) of decision V/9d is not required for its full compliance with article 9, paragraphs 2 and 3, of the Convention, the Meeting of the Parties issue a caution to the Party concerned.

36. The Committee also recommends to the Meeting of the Parties that it decide that the caution will be lifted on 1 October 2019, if the Party concerned has fully met the requirements set out in paragraph 34 (b) of this report and has notified the secretariat of this fact, providing evidence, by the same date.

37. The Committee recommends that the Meeting of the Parties request the Committee to establish the successful fulfilment of paragraph 36 above.
