

ANSWERS

TO THE QUESTIONS ASKED BY JONAS EBBESSON FOR THE PURPOSES OF THE AVOSETTA MEETING, STOCKHOLM, 2-3 OCTOBER 2009

By Alexander Kodjabashev, attorney at law, Sofia Bar Association, Bulgaria

Preliminary notes:

In Bulgaria environment protection is carried out via several procedures, regulated in several laws:

EIA (Environment Protection Act)

- The procedure exists since 1991. The authorities have got experience in implementing it. The EIA regulation is in compliance with the Aarhus Convention
- EIA decisions are based on EIA reports, commissioned by investors to independent experts. No mechanism exists for checking the correctness of EIA expert's opinions except penal liability.
- EIA reports are subject to public discussion. Before taking decision the authority is helped by an expert council – a panel of experts most of whom are officials.
- EIA decisions can be appealed before higher authority and/or directly before court. The appeal suspends the effect of the decision, until the final court decision enters into force.
- In court appeals are heard by judges who are lawyers. Technical experts are rarely consulted before courts. Courts usually base their decisions on technical conclusions, taken by the expert councils.

SEA (Environment Protection Act)

- Procedure for assessment of impact of plans and programs on the environment.

Assessment of Compliance of Investment Proposals with Natura 2000 Sites (Biodiversity Act)

- Procedure for checking the compliance of investment proposals with the purposes and requirements of the nature protection directives.
- The procedure can be carried out alone or as part of an EIA or SEA procedures

IPPC procedure (Environment Protection Act)

- A procedure which meets the requirements of the EC IPPC procedure.
- An EIA decision is a prerequisite for issuing an IPPC permit – EIA and IPPC procedures can not be combined.

Procedure for issuing a Water Use Permit (Water Act)

- A Water Use Permit can be issued if regulatory and individual water body requirements (including water plan requirements) are met.

Answers to the questions of the Questionnaire

Question 1.

All three types of tools for environmental law enforcement are available in BG. Few private (civil) law and penal cases have been reported. Most (99 %) of the cases are administrative law disputes.

Question 2

Lack of enforcement is a major deficiency in BG legal system. The answers below are valid for all the situations described in sub-question IV-a/i.

I. Both criminal and administrative sanctions are provided for the following stakeholders in the procedures listed in the Preliminary Note:

- officials who fail to implement the law (either by letting a business to act without permission or by omitting to sanction the business for not meeting the requirements of a permit);

- private persons (companies or managers of companies) who fail to comply with the regulatory or individual standards;

- experts who provide incorrect or misleading expert opinions, on which administrative decisions are based;

- officials or private persons who do not implement a court's decision.

The administrative sanctions (fines) vary between A facility can be closed down in case of non compliance with the regulatory requirements. Permits can be cancelled. No penal actions are reported to have been taken against stakeholders in environmental cases. Court disputes between private persons (business stakeholders) happened in water matters (when the issuance of a water use permit limits or makes impossible the functioning of another business).

NGOs and citizens bring into administrative courts mostly EIA, Natura 2000, waste management and territorial planning cases. Since 2003 in territorial planning legislation amendments were made which limited a lot the right of standing.

II. NGOs and citizens can challenge administrative decisions in court if the law recognizes their right of standing (EIA, SEA, Natura 2000).

Despite a provision in a recently (2007) adopted Administrative Procedure Code, the Supreme Administrative Court does not recognize NGOs and citizens the right to challenge administration's omissions (failures) to act and sanction an illegal polluting activity.

In the last 4-5 years the business faced almost the same problem as citizens because the environmental authorities did not process hundreds of applications for permits. Some companies went to the Administrative Courts and the judiciary repealed the implicit refusal of the authorities to state on the applications.

III. The courts respect those EC law provisions which give citizens right of standing (EIA, SEA).

In BG civil law there is also an opportunity provided for those who are affected by a polluting activity to bring the polluter before court. The court can be asked both to order the polluter to cease the activity and to adjudicate compensation for damages. This opportunity is rarely used. Possible cause – it is difficult to prove an illegal polluting activity, especially when the polluter has a permit, but the activity is in violation of the conditions set out in the permit.

IV. In civil law the competent authority (state or local authority) could be held liable for erroneous acts and omissions, but there is no personal liability for damages provided for those persons who were in position to act.

A lot of acts are based on erroneous (or misleading) decisions (or opinions) taken by other (including consultative) bodies – not by individuals. In many cases this is an obstacle for proving the erroneous behavior in court.

An important issue is the unfair implementation of rules regarding different (often competing) stakeholders. As in environmental law the “technical” component of a decision often prevails over the “legal” component, the courts are not able to sanction this type of incorrect behavior of the administration.

As a whole the national means for environmental law enforcement are inadequate.

For improving the enforcement I would suggest the following steps:

- guaranteed right granted to NGOs and citizens to challenge the administration’s omissions and the non enforcement to court;
- provision of personal liability for officials in cases of erroneous decisions and for experts in cases of wrong or incorrect expert opinions;
- implementation of existing rules for achieving transparency in the administration’s activity;
- setting up a mechanism for solving/clarification of controversial “technical/scientific” issues on which might depend the court’s decision.
- setting up a mechanism for cost adjudication/sharing in cases where the public interest is involved;

Question 3

No other options are provided except the tools commented in the answers to question 2.II and IV.

Question 4

The length of procedures is not so important as obstacle because (for EIA especially, but also for other permits) the **appeal has a suspensive effect**. Costs become an obstacle. Firstly because the since recently the business started “penalizing” the public by asking what could be assessed as excessive costs by BG standards. In some cases courts adjudicated the asked court expenses even if this was in possible conflict with art.9, paragraph 5 of the Aarhus Convention. Secondly – high cost are imminent if the court decides to investigate the “technical” aspects of a case. Other obstacle to effective access to justice is the remaining (from communist times) mentality among administrative judges who still are not enclined to sanction the executive power.

Question 5

In most cases, because of the suspensive effect related to the appeal, NGOs simply do not need an injunctive relief or interim legal remedies.

Question 6

There have not been such cases yet. In the near future we might have such situations because most of the pending procedures before the European Commission are related to private projects carried out in violation with nature protection directives.

Question 7

There have not been such cases yet.

Question 8

For two months there is a new BG government.

It's first steps seem to be in the right direction.

The Government started dealing with about 1000 applications for issuing environmental permits, which have not been processed since 2007-2008.

The Government promised to put in the Internet most of the environmental information (including detailed data about pending administrative procedures – i.e. information which might be of use for the purposes of the public participation).