

Implementation of the Aarhus Convention in Bulgaria: limping towards effectiveness

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Introduction

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters¹ (Aarhus Convention) continues to drive environment-related administrative and legal reform in countries which are members of the UNECE.² It is also a source of empowerment for civil society organisations and for the development of civil society itself, especially in countries which are still in the process of transition from state-socialism. The case of Bulgaria, a country which is preparing to accede to the European Union but still faces significant obstacles, demonstrates the capacity of these transition countries to make full use of the Aarhus Convention, and shows the convention's effectiveness as a driver of reform.

Given that the Aarhus Convention intends to promote transparent and participatory governance, its implementation can be viewed as an indicator of a country's progress in developing democratic institutions and habits. By this measurement, Bulgaria is struggling but not failing. Most of the legal framework for complying with the convention is in place, although additional regulations are still needed in certain areas. Implementation of the convention is, however, patchy; advances and accomplishments are marred by blatant violations of the letter and spirit of the law. To a large degree,

these failures reflect continuing difficulties in the process of transition from state-socialism. In contrast to the generally reluctant stance of government bodies towards greater openness to the public, the civil society sector in Bulgaria has been proactive in developing capacities to promote democracy and participation in environmental matters. This article will examine these issues in detail.³

The legal and institutional framework for compliance

Environmental law is one of the most rapidly developing legal fields in Bulgaria, due largely to the EU accession process. Although Bulgaria formally closed the Environment Chapter of the EU accession process in 2003, work on harmonisation with EU directives continues to be a priority for the Ministry of Environment and Waters and consumes a significant proportion of staff time, which is consistent with the experience of previous east European candidate countries. It is also consistent with previous experience that transposition of environmental law in Bulgaria has at times been haphazard; mistakes have been made along the way, and there are gaps that will need to be filled at a later date. In all likelihood, some of these gaps will not be discovered until the European Commission begins its conformity checking process after accession. The 2002 Bulgarian Environmental Protection Act (EPA)⁴ contains general provisions relating to access to information, participation and justice in environment related matters, although the regulatory substructure (internal legislation) to implement the convention is still lacking in certain areas.

1 The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on 25 June 1998. The text of the convention is available on the UNECE website: www.unece.org/env/pp/welcome.html.

2 For a discussion of the convention's European and global significance, see E Morgera 'An Update on the Aarhus Convention and its Continued Global Relevance' (2005) Review of European Community and International Environmental Law 14(2).

3 Note that only implementation of the convention itself is examined here, not of the Protocol on Pollutant Release and Transfer Registries.

4 Environmental Protection Act (EPA) SG No 96/2002 Promulgated, State Gazette No 91/25.09.2002.

Access to information

Access to information is the foundation upon which other aspects of environmental democracy and governance rest. Like many new democracies in Europe, Bulgaria has incorporated a general provision guaranteeing access to information in its constitution:

Article 41. (1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.

(2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.⁵

These constitutional provisions are further elaborated in Bulgaria's Access to Public Information Act,⁶ which sets out general principles for access to all varieties of public information and determines application procedures and exemption criteria that are, in applicable sections, in line with the Aarhus Convention. In some cases the Bulgarian act exceeds the Aarhus Convention's requirements. For instance, the Access to Public Information Act allows the Minister of Finance to levy fees for granting access to information that 'shall not exceed the actual costs incurred'.⁷ Moreover, authorities must decide whether to grant or deny applications for access to information within 14 days of receiving and registering them,⁸ as opposed to the 30 days allowed by the convention.⁹ The procedures established in the general Access to Public Information Act also apply to environmental information, as stipulated by the Bulgarian EPA.¹⁰

The Access to Public Information Act does specifically exempt administrative agencies from the obligation to provide information that:

Article 13. (2) Access to administrative public information may be restricted, if it:

1. relates to the preparatory work of an act of the bodies, and has no significance in itself (opinions and

recommendations prepared by or for the body, reports and consultations);

2. contains opinions and statements related to on-going or prospective negotiations to be led by the body or on its behalf, as well as any data relating thereto, and was prepared by the respective bodies' administrations.¹¹

These are potentially significant loopholes that could prevent concerned citizens and non-governmental organisations (NGOs) from acquiring relevant information during the preparation phase of a project, in the absence of the right to participate directly in negotiations, meetings and other relevant aspects of the project development process. This provision of the Bulgarian Access to Information Act expands upon Article 4 (4) (a) of the Aarhus Convention, which allows requests for environmental information to be refused if granting them would adversely affect 'The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law'.¹² The question in this case is whether 'preparatory work' and 'on-going or prospective negotiations' in an environment-related activity do not constitute legitimate arenas for transparency and public participation. Further elaboration of the conditions under which such activities should be screened from public view are needed to ensure that Bulgarian authorities do not violate the spirit of the Aarhus Convention, even if the letter of the law is, arguably, being followed.

Chapter II of the EPA, entitled 'Information Relating to the Environment', tailors the general provisions of the Access to Public Information Act to the environmental field. The EPA establishes the general principle that 'Anyone shall have the right of access to available information relating to the environment without having to prove a specific interest'.¹³ Interestingly, the framers of the EPA specifically included the word 'available' in this general provision. Article 18 of the EPA states that:

The information relating to the environment shall be:

1. available primary information;
2. available pre-processed information;
3. expressly processed information.

It is therefore unclear whether 'expressly processed information', which is presumably not 'available' in the sense of existing in an accessible format prior to the request for

5 Constitution of the Republic of Bulgaria State Gazette (SG) N56/13.07.1991; amended SG N18/25.02.2005.

6 Access to Public Information Act, SG N55/7.07.2000.

7 Access to Public Information Act SG N55/07.07.2000 art 20 (2).

8 *ibid* art 28.

9 Aarhus Convention (n 1) art 4 (8).

10 EPA (n 4) art 26.

11 Access to Public Information Act (n 6) art 13 (2) (1 and 2).

12 Aarhus Convention (n 1) art 4 (4) (a).

13 EPA (n 4) art 17.

information, would be available to anyone 'without having to prove a specific interest'.

Much of this chapter has been transposed directly from the Aarhus Convention. For instance, the scope of the term 'information relating to the environment' as elaborated in Article 19 is a near verbatim transposition of the definition of 'environmental information' given in Article 2 (3) of the convention. Similarly, Article 20 of the Bulgarian Act, listing the criteria for refusing access to environmental information, transposes the criteria given in the Aarhus Convention.

Not all provisions relating to access to information in the Aarhus Convention are faithfully addressed, reproduced, or elaborated in the Bulgarian EPA. For instance, the Aarhus Convention provision that call on parties to:

[E]ncourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means.¹⁴

Private entities, in fact, are not mentioned at all in the EPA in relation to access to information. Moreover, the EPA does not clearly establish government obligations with regard to information that should be made progressively 'available in electronic databases, which are easily accessible to the public through public telecommunications networks',¹⁵ in other words, the internet. The Aarhus Convention explicitly states that parties should establish databases that include state of the environment reports, texts of laws, policies, plans, and programmes, and other relevant information. The EPA fails to address the government's obligation to establish comprehensive electronic databases. Instead, it emphasises the dissemination of environmental information through public-service radio and television programming. While such programming is certainly in the public interest, provided it does not camouflage unpleasant environmental realities and conceal government shortcomings, it cannot be a substitute for universal and constant access to unvarnished and complete environmental data and processed information such as can be made available through electronic databases.

Public participation

The Bulgarian Constitution ensures the basic rights of citizens to assemble in associations¹⁶ and to submit 'appeals,

suggestions and petitions to state authorities'.¹⁷ Furthermore, the constitution requires National Assembly sessions to be open to the public, as well as sessions of permanent committees of the National Assembly, and of municipal councils and their subsidiary committees.¹⁸ These general rights form the foundation upon which citizens can organise and communicate with government authorities on matters of interest to them. They do not, however, in themselves guarantee a right to participate directly and meaningfully in decision-making, but rather ensure that the right to voice an opinion is not violated by governmental authorities.

The Aarhus Convention identifies three areas in which the public must have the right to participate in environment related matters: specific activities such as construction projects;¹⁹ plans, programmes and policies;²⁰ and executive rule making and the preparation of legislation by ministries or other executive agencies.²¹ These are quite extensive rights, bringing citizen input into most relevant decision-making processes, including strategic decision-making in the case of the right to participate in programme and policy development.

Bulgarian law addresses the right to participation mainly in the EPA; the Regulation on the Conditions, Procedure and Methods for Environmental Assessment of Plans and Programmes;²² the Ordinance on the Terms and Procedure for Making Environmental Impact Assessment of Investment Proposals for Construction, Activities and Technologies;²³ and the Legal Acts Law.²⁴ The rights to public participation are most explicitly developed in the regulations on EIA, while the public's right to participate in the development of legislation is relatively vague and subject to a significant degree of unwarranted administrative discretion.

In practice, most public participation occurs in EIA processes. After an EIA statement has been submitted, and

18 *ibid* art 82. Although these provisions are adopted quite vaguely they presume a possibility for public participation through visiting the open session of the legislative authorities of the Republic of Bulgaria (Access Initiative n d).

19 *ibid* art 6.

20 *ibid* art 7.

21 *ibid* art 8.

22 Adopted with Letter of the Council of Ministers No 139 of 24.06.2004, promulgated in SG, N57/2.07.2004, enforced as of 1.07.2004.

23 The ordinance was issued without a reference number or code, and is available on the Ministry of Environment and Waters and Water's website [http://www.moew.government.bg/recent_doc/legislation/horizontal/en/EIA%20Ordinance%20\(English%20translation\).doc](http://www.moew.government.bg/recent_doc/legislation/horizontal/en/EIA%20Ordinance%20(English%20translation).doc). The Regulation on the Conditions, Procedure and Methods for Environmental Assessment of Plans and Programs was adopted with a letter of the Council of Ministers No 139 on 24.06.2004, promulgated in the SG N57/2.07.2004 and enforced as of 1.07.2004.

24 Legal Acts Law, SG N27/03.04.1973. Last amended SG N55/17.06.2003.

14 Aarhus Convention (n 1) art 5 (6).

15 *ibid* art 5 (3).

16 Bulgarian Constitution (n 5) art 44.

17 *ibid* art 45.

the competent authority has issued a favourable evaluation of it with regard to it having met procedural and substantive criteria, 'public discussions' must be held.²⁵ The project developer must inform the public as to the time and place of the discussion no less than 30 days before the event.²⁶ Members of the public are then required to 'submit their opinions in writing' at, or within seven days of, the public discussion meeting.²⁷ The developer is responsible for submitting 'the results of said discussion' to the competent authority,²⁸ which will make its final decision 'taking into account' the results as submitted.²⁹ The competent authority must justify the reasoning of its final decision, 'including the manner in which the opinion of the general public has been taken into account'.³⁰

The executor of the plan or project is obliged to organise public consultations, in which citizens participate as part of the environmental assessment procedure. These consultations should provide access to information about the project, as well as an opportunity for citizens to express their opinion. The consultation results should be included in the environmental assessment report, so that they are taken into account in the final evaluation given by the minister or head of the relevant agency.

Public participation in EIAs for development projects, as regards submission of statements, is anticipated at quite a late stage in decision making. Non-governmental organisations argue that previous EIA legislation obliged the competent authorities to organise public hearings at a much earlier stage (*preliminary* EIA report), thus providing opportunities for public statements to be taken into account at a stage of the process when more changes to projects were possible.

The Legal Acts Law prescribes that: 'The people for whom new duties and restrictions can occur due to the adoption of new legal act, are informed before its adoption.'³¹ Information regarding pending legislation is to be sent to 'representative organisations' of the affected public. Comments from such organisations should in principle be accepted and considered by the authorities in the development of the draft legislation. The law does not specify how representative organisations are to be identified, creating the opportunity for a biased selection process. Moreover, the restriction of prior notification and opportunities to comment on acts that impose 'new duties and restrictions' might well exclude most environmental legislation, in principle or in fact.

25 EPA art 97 (1).

26 *ibid* art 97 (3).

27 *ibid* art 97 (5).

28 *ibid* art 99 (1).

29 *ibid* art 99 (2).

30 *ibid* art 101 (6).

31 Legal Acts Law art 2 (a).

Bulgarian law explicitly exempts all 'development proposals related to national defence and security' from EIA requirements.³² It is not yet clear how important this exemption will be in terms of environmental quality and the rights of affected persons. Moreover, no provision in Bulgarian law recognises the status of specifically environmental NGOs in environmental decision-making. Consequently, the authorities are within their legal rights to favour labour unions and other pro-development actors from civil society in their environmental decision-making processes.

Access to justice

The Bulgarian judiciary has made substantial progress towards becoming independent of the government, although it lags behind the EU's new east European Member States.³³ The constitution provides for an independent judiciary, authorises the courts to supervise the legality of administrative actions, and empowers all citizens to challenge administrative actions that affect them.³⁴ Article 15 of the EPA further guarantees the right to access to justice in matters relating to access to environmental information, stating that refusals of access to information can be appealed administratively or through the court system. This right is further elaborated with specific appeals procedures in the Access to Public Information Act,³⁵ which also establishes penalties for civil servants who fail to respond to requests for public information.

Although in theory NGOs constitute legal persons entitled to challenge administrative decisions that affect them, Bulgarian law, unlike the law of other new democracies such as Hungary, does not specifically provide environmental NGOs with legal standing in environmental matters. Standing must therefore be decided on a case-by-case basis. Bulgarian courts are not obliged to act expeditiously, and often do not. Moreover, court costs can range up to roughly €400 and attorney's fees are additional to this. It seems doubtful whether Bulgaria, where per capita GDP is less than €8000,³⁶ complies with the Aarhus Convention's mandate to provide inexpensive remedies.

Bulgaria has no regularised alternative dispute resolution options. An office of ombudsman was created in 2003, but its

32 EPA arts 81 (5) and 85 (3).

33 <http://www.freedomhouse.hu/nit.html>. Freedom House *Nations in Transit* (Budapest 2005).

34 Constitution of Bulgaria (n 5) art 120.

35 Access to Public Information Act (n 6) arts 40, 41, 42, 43, and 44.

36 Estimates of per capita GDP for Bulgaria differ. This one is taken from the United States Central Intelligence Agency's estimates, available at: www.cia.gov/via/publications/factbook/rankorder/2004rank.html. According to the CIA's ranking system, Bulgaria stands at 89 in the world, behind countries such as Botswana, Trinidad and Tobago, and the Turks and Caicos Islands.

mandate currently extends only to violations of human rights. Whether or not the ombudsman would consider violations of environmental rights – which fall under so-called ‘third generation’ human rights – is not clear, as no cases have been brought. In other east European countries, such as Hungary, the office of ombudsman has become important in the pursuit of justice in environmental matters. In spite, and perhaps largely because of, the fact that ombudsmen have no legal authority to impose their decisions on government, their high status as incorruptible and independent has endowed them with a rare degree of moral authority. The development of this institution in Bulgaria could prove, over time, to be an effective means of pursuing justice in environmental matters.

Implementation of the Aarhus Convention in Bulgaria

Bulgaria submitted an implementation report to the secretariat of the Aarhus Convention in 2005, at the meeting of the parties in Almaty, Kazakhstan.³⁷ Unfortunately, we do not consider the report’s generally positive self-assessment to be convincing. Rather, Bulgaria suffers from significant impediments to successful implementation of the convention, even while technical legal compliance is adequate in most respects, as discussed above.

Access to information

Access to environmental information is the most strongly developed pillar of the Aarhus Convention in Bulgaria, both in terms of the law and administrative capacity. The country has given priority to developing administrative capacity further in the area of access to environmental information in important strategic documents, including the National Plan for Administrative Capacity Building as well as the National Program for Twinning with the EU. While this may reflect a genuine commitment on the part of high officials, actual implementation of the access to information pillar is often problematic, requiring significant changes at local and regional levels and among civil servants generally, especially in ministries other than the Ministry of Environment and Waters. The Environment and Waters Ministry itself should be given credit for developing new services through which citizens can access environmental information, although, as we will discuss, additional steps are still necessary to implement fully the first pillar of Aarhus.

37 United Nations Economic Commission for Europe 9 May 2005. Ministry of Environment and Waters (MEW) Aarhus Implementation Report: Bulgaria ECE/MP PP/2005/18/Add 5. <http://www.unece.org/env/pp/documents/mop2%20informal/Report%20Bulgaria%20nat.lang.pdf>.

As is also the case in other new democracies in central Europe,³⁸ Bulgarian law does not clearly and unambiguously define the concept of a commercial or industrial secret, thereby giving state authorities opportunities to make *ad hoc* decisions and arbitrarily deny access to information. Even well-meaning civil servants may be uncertain about their responsibilities and choose to deny requests for information, rather than risk facing the legal consequences of divulging commercial or industrial secrets. The NGO Za Zemiata has conducted a systematic test of the effectiveness of access to information procedures across the government by requesting documents related to projects financed by EU pre-accession funds. Za Zemiata requested access to identical documents and related information from several ministries and executive agencies³⁹ involved in these projects. In some cases, the request for information was granted, and in others it was denied.⁴⁰ In the absence of government-wide guidelines for dealing with requests for environmental information, ministries and agencies are likely to continue to exercise a degree of discretion that produces seemingly arbitrary and contradictory results. The experience of Za Zemiata in testing how authorities are implementing the access to information provisions of the Aarhus Convention has led the organisation to conclude that: ‘The principle that if a document or information is of public interest it should be available even if it contains a commercial secret is consistently neglected in Bulgaria. The authorities simply prefer not to provide any information at all.’⁴¹

One factor accounting for the discrepancies between the responses to requests for information from various ministries is that the process of transition from insulated authority under state socialism to transparent accountability under the new democratic regime has been uneven throughout the government. Some ministries, such as the Ministry of Transport, continue to display an organisational culture that favours secrecy over transparency⁴² and consistently deny access to information through what Bulgarian attorneys have called ‘mute denial’,⁴³ whereby authorities do not respond to requests for information at all, thereby effectively denying access. Although mute denial violates the Act on Access to

38 A Antypas ‘A New Age for Environmental Democracy: The Aarhus Convention in Hungary’ [2003] 11 Env Liability (6).

39 These included the Ministries of Environment and Waters, Finance, Transport and Communication, Regional Development and Public Affairs, and the Executive Road Agency.

40 Hlebarov, Ivaylo of Za Zemiata (2005) personal communication.

41 *ibid.*

42 MEW, Aarhus Convention Implementation Strategy. http://www.moew.government.bg/recent_doc/aarhus/Aarhus_Convention_Strategy15May_bg.doc.

43 Hlebarov (n 40).

Public Information, it is a common practice in ministries and agencies, and can be an effective means of restricting access to information as it puts the burden of challenging the government through the courts on financially constrained NGOs or individuals. To the extent that the courts themselves may be unreliable, the right to access to information can be consistently subverted by determined authorities.

The performance of the Ministry of Environment and Waters is more encouraging, although it too demonstrates significant shortcomings in its commitment to instituting a more democratic form of environmental governance through the provisions of the Aarhus Convention. For the sake of efficiency, the ministry has established a so-called 'one desk' service staffed by a clerical employee for receiving and delivering requests for information from the public. However, neither this desk nor any other office of the ministry disseminates aggregate statistics on the number of requests for environmental information made within a given period, or on what percentage of such requests are granted or denied.

The ministry has also established an information centre that aims to provide quick access to environmental information free of charge. However, the information centre does not hold environmental impact assessments, which are of considerable and consistent interest to the NGO community. Non-governmental organisations report that in fact the information provided through the centre is largely useless to them, being limited to annual and monthly reports, official bulletins and information awareness leaflets. Additionally, the office of the official responsible in the ministry for implementing the Aarhus Convention is located near but not in the centre. Non-governmental organisations report that this official is averse to meeting NGO staff, and often takes an adversarial position vis-à-vis NGO requests and feedback. This observation was confirmed during the course of conducting research for this article.⁴⁴ Moreover, inexplicably, the 'one desk service' for requests for information is not incorporated in the information centre, but located in a different building 20 minutes away by public transport. The information centre itself is open for only two hours each day.

The ministry's electronic information services are improving, especially in terms of information about air and water quality, but still fall short of European standards. While national level information is regularly updated by the ministry as well as the Environmental Executive Agency, regional and local environmental information is altogether absent. The technological infrastructure has not been put in place at a

regional and local level, nor have state environmental authorities established regular procedures for delivering local data to central government. Consequently, there is no central database where local and regional environmental information is stored, making access to this information virtually impossible. This extends to the collection of information on environmental impact assessments done at the level of regional inspectorates. As the ministry does not maintain a register of regional-level EIAs, NGOs or members of the public would have to be in regular contact with all regional inspectorates in order to keep track of EIA processes and decisions that fall within the range of their interests. Moreover, an exceptionally low percentage of the Bulgarian population regularly uses the internet,⁴⁵ which indicates that the ministry should disseminate more information by non-electronic means.

Consistent with the state-socialist administrative culture of maintaining an unbridgeable distance between government personnel and the public, the Ministry of Environment and Waters does not publish names or contact information of staff on its web page. It is consequently very difficult even for professionals to discover who in the ministry is responsible for what, much less to open a line of direct communication with staff. In this context, the 'one desk service' for receiving and disseminating environmental information appears to serve as a gatekeeper between ministerial officials and the public rather than simply as an efficient administrative device to facilitate the movement of information.

As mentioned above, the ministry has established a web page devoted to the Aarhus Convention. At the time of writing, this page contains nine documents related to the convention. Curiously, this website was not a part of nor even linked to the ministry's official website for several months during 2005. In the course of conducting research for this article, it was discovered that those environmental NGOs in Bulgaria working most actively on Aarhus Convention issues had not been informed that the Aarhus Convention website had been established, and were not aware of its existence.

Taken together, the measures employed by the Ministry of Environment and Waters to implement the Aarhus Convention are encouraging but require additional efforts. The ministry has not instituted a dialogue with the environmental NGO community about how to implement the access to information provisions of the convention, in spite of the fact that environmental NGOs are the main constituency in Bulgaria for environmental information. Such a dialogue, and procedures for improving access to information

44 The first author was consistently denied a request for a meeting throughout 2005, finally and reluctantly being granted a 15-minute interview in January 2006.

45 In 2002, only 8.9 per cent of the adult population used the internet. For details, see http://www.online.bg/vr/surveyeng/eread/#_Toc14839647.

in cooperation with the NGO community and interested members of the public should be, but are not currently, an essential part of the implementation structure of the Aarhus Convention in Bulgaria. Other ministries and levels of government are lagging behind the Environment Ministry in terms of both compliance and implementation.

Public participation

Implementation of the right to public participation in environmental decision-making is considerably poorer than implementation of the right to access to environmental information. Bulgarian law does not elaborate clear procedures for public participation in environmental decision-making beyond the EIA process, although this is partly due to the regrettable vagueness of the Aarhus Convention itself. While public participation in drafting executive regulations and legislation is allowed to a limited degree, there is no compelling evidence as yet that public and NGO inputs are seriously considered in these processes.

The experiences of NGOs in attempting to influence the decisions of authorities through public hearings have been discouraging. The public hearing process in Bulgaria has regular and consistent shortcomings, including poorly advertised hearings, exclusionary tactics used by authorities to limit participation by the interested public, and poor and limited incorporation of public statements into official documents and decisions. Mechanisms have not been established to involve the public and the environmental community in monitoring projects, plans or programmes that have been approved and are being implemented, in spite of the government's distinctly limited capacity to monitor activities itself, and the willingness of the NGOs to take up such a role in cooperation with government.

The following cases will serve as not untypical examples to illustrate the obstacles to effective public participation in environmental decisions. The Struma Motorway is a project to build a highway through an area of high biological diversity, including a future NATURA 2000 site. The NGOs For the Earth, Centre for Environmental Information and Education, and Balkani Wildlife have taken the lead in challenging the project as it has been proposed, and have encouraged local people to become involved in the decision-making process. The Ministry of Environment and Waters organised public hearings, but advertised them badly, using vague language and failing to explain either the purpose and importance of the meetings, or the rights of the public to participate. The turnout for the public hearing was 50 people. The NGOs subsequently organised their own alternative public hearings, making sure that they reached all the affected communities through letter writing and leaflet distribution, local radio and television announcements, and announcements in local

newspapers. Subsequently, 300 people took part in the NGO-sponsored alternative hearing on the project,⁴⁶ demonstrating that the public did take an active interest in the issue and also demonstrating that the authorities did not take sufficient measures to promote participation. This case also shows that if the government were willing to develop partnerships with the NGO community to promote public participation, it could significantly improve its performance in this area. Such partnerships would compensate for the government's low capacity to generate interest and input from affected communities. The ministry also failed to translate a number of major documents related to this project, which receives funds from the EU's pre-accession funds, from English into Bulgarian, thus denying local people access to information directly relevant to them. The NGOs took it upon themselves to translate these documents into Bulgarian.

On one occasion, the Ministry of Environment and Waters scheduled public consultations on two major projects – the National Centre for Hazardous Waste Treatment facility and the proposed Maritza Iztok 2 thermal power plant – on the same day, a move interpreted by the environmental NGOs as a tactic to dilute their participation in the hearings. In the case of the Hazardous Waste Treatment Centre, only two copies of the EIA were provided to the 20,000 persons living in the localities that would be most affected. The practice of supplying municipalities affected by projects with only one or two copies of EIAs is common in Bulgaria. It serves to limit public participation as well as dissemination of information, although technically the requirements of the Aarhus Convention are being met. Another common practice is to schedule public hearings in regional centres rather than in smaller towns where the environmental impacts will be greatest. Due to the low mobility of rural people in Bulgaria, this practice also serves as an impediment to meaningful local input and participation in decision-making, whether or not it is intended to do so.

Environmental NGOs strongly suspect that investors, who are responsible for receiving and submitting public statements to the authorities in cases of privately funded development projects, regularly and deliberately fail to include negative statements, passing on only statements in support of their projects. The NGOs do not have the financial or staffing capacity at present to establish a monitoring programme to test their suppositions. However, their claims are supported by the one case in which an investigation was launched into an EIA that was approved seemingly without reference to public comments. In the case of the proposed

⁴⁶ Anelia Stefanova (staff, CEE Bankwatch) (2006) personal communication.

Bansko ski resort, the National Botanical Institute discovered that detailed and accurate comments pointing out significant gaps in the information included in the draft EIA were systematically excluded from consideration and incorporation into official documents, allowing the authorities to approve the EIA without amendment.⁴⁷

Meaningful public participation with regard to specific activities has not yet become an accepted part of the administrative or business culture in Bulgaria, although the EIA procedure does give NGOs a mechanism through which to attempt to influence decisions. Even less can be said about public participation in plans, programmes and policies related to the environment as specified in Article 7 of the Aarhus Convention, or in the preparation of executive regulations and/or generally applicable legally binding normative instruments as specified in Article 8.

Although the regulation governing participation in plans, programmes and policies was issued in late 2004, no regular and effective practices have been developed in this area. While the authorities can accurately claim that they involve NGOs in these activities, actual experience indicates that this involvement is not intended to be meaningful or to constitute an opportunity to affect changes to existing governmental intentions. Typically, the authorities will choose one environmental NGO to participate in meetings related to plans, programmes or policies, to the exclusion of all other environmental NGOs. The excluded NGOs claim that the standard practice is for the authorities to choose an environmental NGO to which they have close ties and from which they do not expect to receive criticism or challenging suggestions. The authorities are more liberal in inviting labour unions and other pro-development actors to participate in relevant activities, thereby biasing the process against the environmental quality outcomes towards which independent environmental NGOs would work. For instance, the Ministry of Environment and Waters established the so-called Working Group 22, responsible for preparing and approving projects and positions for negotiations with the EU and harmonisation with the environmental *acquis communautaire*. Working Group 22 includes participants from labour unions, professional organisations and pro-development organisations, but no environmental groups or activists.

Although experience is still limited and improvements may be expected, the authorities do not yet have a procedure for incorporating the input they do receive on plans, programmes and policies. To give an example, the Ministry of Environment and Waters posted a draft of its Aarhus Convention Implementation Report – subsequently

presented at the Meeting of the Parties in May 2005 – on the internet, requesting comments and suggestions from interested members of the public. Environmental NGOs claim to have provided input, but the ministry later reported that although it had requested comments, none were forthcoming. This claim is supported by the fact that one of the authors of this article provided comments and suggestions on the report that were unacknowledged, and presumably covered by the ministry's denial of having received feedback. The ministry also used an internet platform to solicit comments on draft legislation. It is unclear how, or whether, comments are considered and incorporated in drafting processes. Given the absence of unambiguous and transparent procedures, the solicitation of comments through the internet cannot be regarded as a reliable and meaningful avenue through which the public can affect executive rulemaking and legislative drafting.

To summarise, current practices for public participation in environmental matters in Bulgaria are discouraging and leave much room for improvement. It cannot be said that the relevant authorities are making a real effort to implement the Aarhus Convention effectively, although they do seem to be taking steps that allow them to claim that they are in technical compliance with Articles 6 and 7 of the convention. If and when regular procedures for acknowledging and incorporating public comments on plans, programmes, and policies are in place and a right to participate in executive rulemaking and drafting legislation established, significant achievements will have been made. These achievements alone, however, will not be enough to demonstrate that public authorities have changed their organisational cultures to reflect the spirit of environmental democracy that the Aarhus Convention is intended to foster.

Access to justice

Access to justice in environmental matters suffers from problems that affect the judicial and administrative systems as a whole. Judges are not trained in and often do not understand environmental law, courts are slow, decisions are inconsistent and sometimes appear arbitrary. The courts seem reluctant to find in favour of plaintiffs asserting violations of procedural rights and standards in environmental matters. While in principle civil servants can be held accountable for their decisions through the legal system by any person affected by those decisions, in practice this is quite difficult. For instance, in spite of the fact that the Access to Public Information Act specifies fines for civil servants for not responding to requests for information (mute denial), a practice that NGOs report is common, research conducted for this article could not turn up a single instance in which a civil servant had indeed received a fine in such a case.

⁴⁷ Handbook for Implementation of the Aarhus Convention.

The Bulgarian courts have not played a very important role in the environmental arena to date, although their importance will certainly grow as the NGO community in particular acquires the expertise and financial means to bring more cases. The cases that have been brought so far do not give much cause for optimism, although there are exceptions. In one high profile case, NGOs challenged the legality in the Supreme Administrative Court of the EIA procedure for a proposed ski resort near the town of Bansko, adjacent to the Pirin Mountain National Park. The Ministry of Environment and Waters had approved a plan to extend the ski resort into the park itself, which would involve clearing 60 hectares of forest and impact endangered species. The NGOs asserted that the EIA was incomplete and had not been prepared with any public participation. The court found in favour of the ministry, stating that the environmental impacts were acceptable under the law. Importantly, the court did not address the procedural issues regarding the EIA. While it was evident that the Ministry of Environment and Waters did not invite the public to participate in the environmental assessment procedures as it was required to under the law, the court did not deem this omission sufficiently important to consider in its decision. This case, in which the courts refused to enforce procedural rules related to public participation in EIA processes, is not unique.⁴⁸

The civil society sector is currently well in advance of the government or the courts themselves in promoting unimpeded access to justice in environmental and other matters in Bulgaria. Two organisations have special expertise in the field of environmental law and access to information and justice. The Access to Information Programme monitors the development of law and practice in the areas of access to information and justice generally, publishing annual reports and training environmental and other NGOs in how to request access to information and pursue justice through the legal system. As a result of this training, NGOs report greater success in accessing information and greater competence in accessing justice.

In 2002 the Centre for Environmental Law was established in Sofia. It has since brought a number of environmental cases to the courts. The centre's experience indicates that, while the courts are relatively willing to enforce the right of citizens to obtain public information, they do consistently fail to enforce proper procedures in the preparation of EIAs.⁴⁹ Moreover, EIA cases can take up to two years to settle, during which time activities on projects

usually continue, in spite of the fact that this violates the law.⁵⁰ Gradual improvements in the functioning of the legal system can be expected, as the centre and other NGOs continue to develop their abilities in bringing cases against government authorities, and when recourse to Community remedies become available after accession to the EU.

Conclusions

While Bulgaria largely complies with the Aarhus Convention, its actual implementation of the convention is weak and in need of significant improvement. Its performance cannot be considered acceptable for a country soon to enter the European Union. To summarise, while the right to access to public information is legally ensured, in practice this right is often subverted by administrative non-compliance, abuse of the commercial secrets exception, poorly developed and integrated electronic databases, and ineffective courts. The right to public participation in environmental decision-making is undermined by selective exclusion of critical NGOs from decision-making processes, the deliberate although not openly stated refusal of state bodies to take account of public input, poorly advertised public meetings, and the unwillingness of courts to enforce the public's right to participation as demonstrated by the Bansko case. Poorly trained and performing judges and slow courts reduce access to justice to a theoretical right only, and make it difficult for the public and environmental NGOs to hold public agencies and ministries accountable for violations of the first and second pillars of the Aarhus Convention.

Progress in improving Bulgaria's implementation of the Aarhus Convention will undoubtedly be slow and difficult. The most important question is which forces can most effectively serve as drivers of reform. It hardly makes any sense, for instance, to recommend that the Ministry of Environment and Waters allows all interested environmental NGOs to participate meaningfully in decision-making processes when the ministry has every intention of not doing so, and the courts cannot and will not oblige it to do so. In the short to medium term, environmental NGOs are most likely to induce incremental improvements in Bulgaria's implementation of the Aarhus Convention. Specifically, environmental organisations should be encouraged to begin systematically documenting issues associated with implementation and developing additional strategies, including:

48 S Stec *Handbook on Access to Justice under the Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe Szentendre Hungary 2000) pp 105–11.

49 A Kodjabashev 'Access to Justice in Environmental Matters in Bulgaria' (2003) Participate 16. Available at www.participate.org

50 Alexander Kodjabashev (attorney Centre for Environmental Law) (2005) personal communication.

- keeping and aggregating (across organisations) records of requests for environmental information and the final outcomes of those requests
- documenting and aggregating case studies of the process and outcomes of public participation in environment related activities, plans, policies, etc
- attempting to assert the right to participate in the development of executive regulations and legislation prepared by ministries and agencies, and documenting the outcomes of those attempts
- regularly publishing reports on implementation of the Aarhus Convention on the internet, using the aggregated data just mentioned and communicating the findings to the Compliance Committee of the Convention⁵¹ and to appropriate staff at the Enlargement and Environment Directorates General of the European Commission
- asserting a willingness to form partnerships with the government to promote public participation, as in the Struma Motorway case discussed above
- training attorneys in the use of European Community remedies, appeals processes, etc in preparation for accession
- continuing to challenge unfavourable government decisions and poor practices through legal appeals processes, and maintaining good and aggregated records of these processes and their outcomes
- filing complaints with the ombudsman's office.

As Bulgaria approaches accession to the EU, the importance of the Aarhus Convention as an instrument to push forward the development of open and accountable public institutions and a democratic political culture will increase. As was the case in the democratic revolution of 1989, the civil sector is well in advance of the government in seeing the need for change. Indeed, transition from state-socialism has proven to be a process of 'continuous reform'⁵² in policy, law and institutions. Far from being complete, this process will continue for years into the future.

51 The right of members of the public to submit communications to the Compliance Committee of the convention is under-utilised. At the time of writing, only 15 communications from the public have been received, all but one from former socialist countries, but none from Bulgaria.

52 A Cherp and A Antypas, 'Dealing with Continuous Reform: Towards Adaptive EA Policy Systems in Countries in Transition' (2003) *Journal of Environmental Assessment Policy and Management* 5(4).