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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

38th meeting
Strasbourg, 27-30 November 2018

Possible file

**Follow-up of Recommendation No. 98 (2002)
on the project to build a motorway
through the Kresna Gorge
(Bulgaria)**

- REPORT BY THE GOVERNMENT -

*Document prepared by
the Ministry of Environment and Water, Bulgaria*

- 2 November 2018 –

Complaint No. 2001/4 and Recommendation No. 98 (2002) on the project to build a motorway through the Kresna Gorge (Bulgaria) (Struma Motorway Lot 3.2)

(Additional Government Report - Progress since 23 October 2018)

The present report introduces the latest development of Struma Motorway Lot 3.2. project after the submission of the government report dated 23 October 2018 (“**the Government Report**”). For the sake of completeness, it should be read together with the Government Report. All definitions and abbreviations quoted herein have the meaning ascribed to them in the Government Report.

The information herein refers to the complaint against the Judgement by virtue of which the legitimacy of the EIA Decision 2017 was fully upheld by the Supreme Court. As mentioned in the Government Report (Section IV thereof), a complaint against the Judgement was filed by an NGO and 1 (one) individual to an extended panel of the Supreme Court. Contrary to national law, the complainants alleged that the Judgment is subject to a cassation appeal and requested its annulment. The complainants further claimed infringement of the Constitution of the Republic of Bulgaria and requested a referral to the Constitutional Court.

By a ruling of 31 October 2018 of the Supreme Court¹ (“the Court Ruling”) the complaint against the Judgement was dismissed and the litigation was terminated. The court established that the complaint is inadmissible and should not be considered. Pursuant to Bulgarian law, first-instance judgements on appeals against EIA decisions of the Minister of Environment and Water on investment proposals for sites of national importance declared as such by an act of the Council of Ministers and sites of strategic importance are final (Art. 99, para 7 of the Environment Protection Act („EPA“)).

The existence of all pre-conditions under the said provision of the EPA was confirmed by the Supreme Court, namely:

- 1) The EIA Decision 2017 has been issued by the Minister of Environment and Water;
- 2) The investment proposal is declared a site of national importance by an act of the Council of Ministers²; and
- 3) The investment proposal is a site of strategic importance³.

On this ground, the Supreme Court ruled that the Judgement is final and cannot be appealed.

The Supreme Court also rejected the complainants’ request for referral to the Constitutional Court. According to the complainants, art. 99, para. 7 of the EPA contradicts the constitutional principles that all administrative acts may be challenged, and the Supreme Court performs high judicial supervision in administrative justice. The court considered these allegations unfounded, since the EIA Decision 2017 has already been subject to judicial control by the competent national court – the Supreme Court – and the latter has exercised its high-supervision powers. In view of the above, the court upheld that the constitutional principles have been strictly observed as all stakeholders had a legal possibility to challenge the EIA Decision 2017 before the Supreme Court, and the high-supervision function of the Supreme Court was duly performed in the course of the proceedings.

The Court Ruling cannot be appealed.

¹ Ruling No 13201/ 31 October 2018 under administrative case No 12483/2018 of the Supreme Court.

² Decision No 250/25 April 2013 of the Council of Ministers.

³ The project is included in the Integrated Transport Strategy for the period until 2030 approved by Decision No 336/23 June 2017 of the Council of Ministers.

At present, there is no pending legal proceeding concerning the EIA Decision 2017. By the Court Ruling, the NGO's allegations for illegality of the Judgement, respectively of the EIA Decision 2017, were once again considered by the court and fully rejected.

As mentioned in the Government Report, regardless of the complaint against the Judgement which was rejected by the Court Ruling, the EIA Decision 2017 has come into legal force and constitutes a final administrative act. As such, it is legally binding and can be immediately implemented.

In view of the above, we ask again the honorable Standing Committee to remove the present file from the list of possible files.

Appendix:

1. Ruling No 13201/ 31 October 2018 under administrative case No 12483/2018 of the Supreme Court.

Appendix

10/31/2018

Ruling No.13201

RULING

No.13201

Sofia, 31 October 2018

The Supreme Administrative Court of the Republic of Bulgaria – Panel of Five Judges – II bench, in a closed session in the following panel:

CHAIPERSON: VANYA ANCHEVA
MEMBERS TANYA VACHEVA
SONYA YANKULOVA
PAVLINA NAYDENOVA
MIROSLAVA GEORGIEVA

with the court clerk
prosecutor

GEORGIEVA under administrative case No.12483/2018.

and with the participation of the public
heard the report of judge MIROSLAVA

The proceeding is under article 208 et seq. of the Administrative Procedure Code (APC).

It is initiated on the grounds of a cassation appeal of the “For the Earth – Access to Justice” Association and D. Vasilev against judgment No.6834/23 May 2018 of the Supreme Administrative Court under administrative case No.13132/2017 whereby the court rejected the appeal of D. Dimitrov, personal ID No.[personal ID No.], and the appeal of “For the Earth – Access to Justice” Association, uniform identification code 177012094, and D. Vasilev, personal ID No.[personal ID No.], against Resolution No.3-3/2017 of 19 October 2017 on an Environmental Impact Assessment (EIA) of the Minister of Environment and Water, whereby the implementation of an investment proposal for the “Improvement of the route of Lot 3.2 of Motor Highway “Struma” along the Eastern Variant Г 10.50” is approved. They allege that the court has not addressed the issue concerning the appealability of the rendered judgment of the court of first instance, except for the non-motivated operative part. They dispute the applicability of article 99, paragraph 7 of the Environmental Protection Act (ZOOS), according to which the judgments of the court of first instance are final when issued on appeals against resolutions of the Minister of Environment and Water on investment proposals, their expansions or changes, which are determined as sites of national importance by an act of the Council of Ministers and are sites of strategic importance. They allege that the substantive prerequisites for the applicability of this hypothesis are not present. Under the conditions of eventuality, they make a request to suspend the proceeding under the present case and refer to the Constitutional Court (CC) for the establishment of unconstitutionality of the provision of article 99, paragraph 7 of the Environmental Protection Act. Relying on judgment No.21 of 26 October 1995 of the Constitutional Court of the Republic of Bulgaria under constitutional case No.18/1995, they allege that the ruling out the appealability of a category of administrative act by an act of the legislative branch should not be on account of fundamental constitutional rights, such as the right of healthy and favourable environment guaranteed by article 55 of the Constitution. They allege that there is contradiction of the provision of article 99, paragraph 7 of the Environmental Protection Act to article 56, article 120, paragraph 2 and article 125, paragraph 1 of the Constitution of the Republic of Bulgaria. Arguments are also adduced about irregularity of the appealed court judgment on all grounds referred to in article 209, subparagraph 3 of the Administrative Procedure Code.

A request-opinion is also received under the case from D. Dimitrov, in which the latter states arguments for admissibility and justifiability of the cassation appeal. He joins the request for suspension of the proceeding under the case.

An answer to the cassation appeal is received from the Minister of Environment and Water. He states detailed reasons for inadmissibility of the cassation appeal in the presence of the substantive prerequisites of article 99, paragraph 7 of the Environmental Protection Act for non-appealability of the first-instance court judgment. He alleges that the request for suspension of the proceeding under the case is unjustified due to inadmissibility of the request to refer to the Constitutional Court due to absence of a pending legal suit. He alleges that in this case the parties concerned have access to the court, which is implemented at one court instance and for this reason denies any violation of article 120, paragraph 2 of the Constitution of the Republic of Bulgaria. In essence, he states considerations that the appealed court judgment is correct.

An answer to the cassation appeal is also received from the Road Infrastructure Agency through the chairperson of the Management Board. It disputes the conclusion of the cassation appellants as regards the absence of the prerequisites referred to in article 99, paragraph 7 of the Environmental Protection Act. It states arguments about inadmissibility of the request to refer to the Constitutional Court due to the absence of a pending proceeding. It denies any contradiction of the provision of article 99, paragraph 7 of the Environmental Protection Act to article 120, paragraph 2 of the Constitution of the Republic of Bulgaria in view of the absence of a prohibition for court review of the lawfulness of the administrative act disputed before the court of first instance.

After making an ex-officio check of the admissibility of the cassation appeal, the panel of judges has found it to be inadmissible on the grounds of article 215, subparagraph 4 of the Administrative Procedure Code (APC) given the following conclusions in terms of law:

The proceeding under administrative case No.13132/2017 in the docket of the Supreme Administrative Court is initiated on the grounds of an appeal of D. Dimitrov, to which the appeal of “For the Earth – Access to Justice” Association and D. Vasilev, against resolution No.3-3/2017 of 19 October 2017 on an Environmental Impact Assessment (EIA) of the Minister of Environment and Water, whereby the implementation of an investment proposal for the “Improvement of the route of Lot 3.2 of Motor Highway “Struma” along the Eastern Variant Г 10.50”, with principal Road Infrastructure Agency (RIA) is approved, has also been joined for joint consideration.

By judgment No.6834/23 May 2018 under the case number, the panel of judges rejected the appeals as unjustified finding that the disputed act is lawful on all grounds referred to in the Administrative Procedure Code.

The court has explicitly stated in the operative part of the judgment that it is final.

The dispute between the parties about the admissibility of the cassation appeal concerns the application of article 99, paragraph 7 of the Environmental Protection Act, according to which: the judgments of the court of first instance are final when issued on appeals against resolutions of the Minister of Environment and Water on investment proposals, their expansions or changes, which are determined as sites of national importance by an act of the Council of Ministers and are sites of strategic importance. The cassation appellants allege that the substantive prerequisites for applicability of the provision are absent.

The objection is unjustified:

By resolution No.3-3/2017 of 19 October 2017 under Environmental Impact Assessment (EIA) of the Minister of Environment and Water the implementation of an investment proposal for the “Improvement of the route of Lot 3.2 of Motor Highway “Struma” along the Eastern Variant Г 10.50”, with principal the Road Infrastructure Agency (RIA), is approved.

The application of the rule of article 99, paragraph 7 of the Environmental Protection Act requires the cumulative presence of three prerequisites:

1. The environmental impact assessment (EIA) resolution, which approves the implementation of the investment proposal (its expansion or change), must be of the Minister of Environment and Water.

2. The investment proposal (its expansion or change) must be determined as a site of national importance by an act of the Council of Ministers.
3. The site referred to in item 2 must have a strategic importance.

By resolution No.3-3/2017 of 19 October 2017 on an environmental impact assessment (EIA) of the Minister of Environment and Water, the implementation of an investment proposal for the “Improvement of the route of Lot 3.2 of Motor Highway “Struma” along the Eastern Variant Г 10.50”, with principal the Road Infrastructure Agency (RIA), is approved.

By resolution No.250/25 April 2013 the Council of Ministers declares as sites of national importance the national roads, as letter c) explicitly points out road: A-3 “Pernik – Dupnitsa – Sandanski – border with Greece”. Considering the subject of the investment proposal: “the route of Lot 3.2 of Motor Highway “Struma””, it is a part of national road A-3 “Pernik – Dupnitsa – Sandanski – border with Greece”, included in Resolution No.250/25 April 2013 of the Council of Ministers as a site of national importance, determined as such by an act of the Council of Ministers.

Paragraph 1, subparagraph 76 of the Additional Provisions of the Environmental Protection Act provides a legal definition of a site of strategic importance and this is any site included in the Energy Strategy of the Republic of Bulgaria till 2020 for reliable, efficient and cleaner energy or in the Integrated Transport Strategy for the period until 2030. This strategy has been approved by resolution No.336/23 June 2017 of the Council of Ministers on the design and construction under Operational Programme “Transport and Transport Infrastructure” 2014 – 2020 and the project is laid down in the Strategy for the Development of the Road Infrastructure in Bulgaria 2016 – 2020. As long as lot 3 is included in the list of projects within the Integrated Transport Strategy for the period until 2030 approved by the said Resolution No.336/23 June 2017 of the Council of Ministers, this site has the nature of a site of strategic importance within the meaning of paragraph 1, subparagraph 76 of the Additional Provisions of the Environmental Protection Act.

The above substantiates a conclusion about the cumulative presence of the three prerequisites from the set of facts of article 99, paragraph 7 of the Environmental Protection Act, and the appealed judgment of a panel of three judges of the Supreme Administrative Court as a final one is therefore not subject to cassation appealing. In this respect, and on the grounds of article 215, subparagraph 4 of the Administrative Procedure Code the cassation appeal is inadmissible as being lodged against a court act that is not subject to cassation appealing.

As regards the request for suspending the proceeding under the case and referring to the Constitutional Court:

Pursuant to article 229, paragraph 1, subparagraph 6 of the Code of Civil Procedure, which is applicable on the grounds of article 144 of the Administrative Procedure Code, the court must suspend the proceeding when the Constitutional Court has admitted the consideration on the merits of a request disputing the constitutionality of a law applicable to the case.

Pursuant to the provision of article 150, paragraph 2 of the Constitution of the Republic of Bulgaria, when the Supreme Court of Cassation or the Supreme Administrative Court finds any discrepancy between the law and the Constitution, they must suspend the proceeding under the case and submit the issue to the Constitutional Court.

According to the cassation instance, the request for suspension of the case proceeding made by the cassation appellants for the purpose of referring to the Constitutional Court of the Republic of Bulgaria in this particular hypothesis is unjustified:

First, the case is not about a law applicable to the case in view of the correct resolution of the dispute on the merits:

For the cassation instance to make an evaluation whether the cassation ground referred to in article 209, subparagraph 3 of the Administrative Procedure Code is present and to make a cassation check under article 208 et seq. of the Administrative Procedure Code of the disputed judgment, the cassation appeal must be admissible. In this case there is an obstacle under article 215, subparagraph 4 of the Administrative Procedure Code to the consideration on the merits of the cassation appeal, as

long as the latter is inadmissible as being lodged against a judgment that is not subject to cassation appealing. As the court has mentioned above, the provision of article 99, paragraph 7 of the Environmental Protection Act provides for that the judgment of the administrative court with above mentioned subject is final and may not be appealed against. On the basis of the above, the cassation appeal should be left without consideration, and the case proceeding should be terminated.

In view of these considerations, the ground referred to in article 150, paragraph 2 of the Constitution of the Republic of Bulgaria for suspending the present case and referring to the Constitutional Court of the Republic of Bulgaria the issue whether the provision of article 99, paragraph 7 of the Environmental Protection Act contradicts to article 120, paragraph 2, article 125, paragraph 1 and article 56 of the Constitution of the Republic of Bulgaria is not present. The cassation appellants' request to suspend the case proceeding on the specified ground is found by the present cassation panel of judges unjustified in view of what has been found about the inadmissibility of the cassation appeal.

As long as the provision, the interpretation of which is requested, concerns the admissibility of the cassation appeal:

The provision of article 120, paragraph 2 of the Constitution of the Republic of Bulgaria provides for general appealability before the courts of all administrative acts. The mandatory interpretation of the specific rule made by the Constitutional Court by judgment No.21 of 26 October 1995 under constitutional case No.18 of 1995 (promulgated in State Gazette, No.99 of 1995) clarified the cited text in a sense that citizens and legal entities may appeal before the courts all administrative acts, including internal ones, when they violate or threaten their rights or legal interests and their court review is not explicitly excluded by a law. In this particular hypothesis such right of appealing has been exercised before a panel of three judges of the Supreme Administrative Court. The providing for by a legal instrument having the rank of a law that the proceeding shall be a single-instance one does not obstruct the parties' right of access to court, nor does it violate their right of defence under article 56 of the Constitution. It is exercised and the case proceeding before a panel of three judges of the Supreme Administrative Court has ended up with an act on the merits of the dispute.

The present panel of judges finds the objection concerning the contradiction of article 99, paragraph 7 of the Environmental Protection Act to the provision of article 125, paragraph 1 of the Constitution of Republic of Bulgaria unjustified, under the conditions of incorrect quoting of the judgment under constitutional case No.13/2017. In fact, this judgment of the Constitutional Court points out that "the supreme supervisory function of the Supreme Administrative Court referred to in paragraph 1 of article 125 of the Constitution is a sign of rule of law (article 4, paragraph 1) because it is a guarantee of the protection of the rights and freedoms of citizens and legal entities against the acts issued by the bodies of the executive branch. It is also an expression of the principle of separation of powers (article 8) and a guarantee of the lawfulness of the state governance. The court protection is the most secure legal guarantee both for the protection of rights and legal interests of citizens and legal entities, as well as a guarantee for the lawfulness of the administrative acts issued by the executive branch (see Judgment No.5 of 18 April 2003 under constitutional case No.5/2003)." However, the text explicitly points out how the specific constitutional power of the Supreme Administrative Court is implemented and it takes place through the judicial activity of the Supreme Administrative Court as a court of first instance under certain categories of legal disputes, as a cassation instance with respect to these same disputes, as well as with respect to the disputes resolved by administrative courts as a court of first instance, for which cassation control is provided for. Ruling out by a legal act having the rank of a law of the cassation control over a part of the first-instance court judgments under administrative cases is not at variance with the supreme supervisory function of the Supreme Administrative Court.

Considering the above, unjustified is also the request to suspend the proceeding under the present case and to refer to the Constitutional Court for the establishment of a contradiction of the provision of article 99, paragraph 7 of the Environmental Protection Act to article 56, article 120, paragraph 2 and article 125, paragraph 1 of the Constitution of the Republic of Bulgaria.

On the basis of these motives and also on the grounds of article 215, subparagraph 4 of the Administrative Procedure Code, the Supreme Administrative Court

RULED:

IT HEREBY REJECTS the request of “For the Earth – Access to Justice” Association and D. Vasilev to suspend the proceeding under administrative case No.12483/2018 in the docket of the Supreme Administrative Court and to refer to the Constitutional Court for the establishment of a contradiction of the provision of article 99, paragraph 7 of the Environmental Protection Act to article 56, article 120, paragraph 2 and article 125, paragraph 1 of the Constitution of the Republic of Bulgaria.

IT HEREBY LEAVES WITHOUT CONSIDERATION the cassation appeal of “For the Earth – Access to Justice” Association and D. Vasilev against judgment No.6834/23 May 2018 of the Supreme Administrative Court under administrative case No.13132/2017.

IT HEREBY TERMINATES the proceeding under administrative case No.12483 in the docket of the Supreme Administrative Court for 2018.

The Ruling may not be appealed against.

- October 2018 –



REPUBLIC OF BULGARIA

MINISTRY OF ENVIRONMENT AND WATER

**COMPLAINT NO. 2001/4 AND RECOMMENDATION NO. 98 (2002) ON THE
PROJECT TO BUILD A MOTORWAY THROUGH THE KRESNA GORGE (BULGARIA)
(STRUMA MOTORWAY LOT 3.2)**

Progress since December 2017

23 October 2018

I. INTRODUCTION

The Struma Motorway project has been monitored by the Bureau and the Standing Committee of the Bern Convention for years and, as part of this process, Recommendation No. 98 (2002) has been issued. Following a complaint from local NGOs, the progress of the project has been reported at the 35th, 36th and 37th meetings of the Standing Committee and reviewed at the meetings of the Bureau in 2015, 2016, 2017 and 2018.

This report summarizes the progress of the environmental procedures and project preparation since December 2017. At its 37th meeting, the Standing Committee decided to leave the file as a possible file in the light of the pending national court appeal of the environmental impact assessment (“EIA”)/appropriate assessment (“AA”) and the pending submission of an application package to the European Commission for the funding of the Lot 3.2 construction of Struma Motorway.

In this regard, and given the upcoming 38th Standing Committee meeting, we provide up-to-date information about the progress of this case.

This report includes the information requested by the Bureau and summarizes the progress of the environmental procedures and project preparation since December 2017.

Information about the project development until December 2017 is included in the previously submitted government reports.

II. PROJECT SUMMARY

Struma Motorway is an important road link connecting the capital of Bulgaria, Sofia, and Greece. The largest part of the motorway has been constructed⁴ but the most difficult section through the environmentally sensitive Kresna Gorge remains unconstructed. It is called Lot 3.2 of Struma Motorway and is the main priority of Operational Programme Transport and Transport Infrastructure 2014-2020.

There is an existing two-way road (E-79) in the direction of Struma Motorway that passes Kresna Gorge for about 16 km. The gorge hosts two Natura 2000 sites, as well as a number of national protected areas. Due to the difficult terrain (narrow and without any separation in the middle road) and the high volume of heavy trucks transporting goods on the existing road (E-79), there is a very high rate of traffic accidents in the gorge area. This heavy traffic, in addition to accidents, causes

⁴ The physical progress of Lot 3.1 is about 30% and of Lot 3.3 - about 87%.

environmental pollution, noise and vibrations and is a source of environmental degradation. The road also passes through Kresna town, thus increasing the exposure of the population to accidents, noise and pollution. The accidents in Kresna town are also a serious issue demanding immediate solution.

Construction of the entire length of Struma Motorway has been approved pursuant to EIA Decision No 1-1/2008 (“**EIA Decision 2008**”) of the Minister of Environment and Water (“**MEW**”), whereas for the section in Kresna Gorge (Lot 3.2) the decision envisaged the construction of a long tunnel in the mountain on the one side of the gorge. The decision included also a number of recommendations for improvement of the route during the next stages of research and design. One of the conditions laid down for the design phase (pt. 3.2 of the Decision) required, alongside the development of the tunnel option, additional ways for its improvement and achievement of the best possible - environmentally-friendly, technically and economically feasible option, to be sought.

Due to the challenges identified by the assignor in the design of the long tunnel and following the directions of the Ministry of Regional Development, additional options for the route were developed and a new EIA and AA procedure was launched in 2015. In the EIA and AA reports (respectively “**EIA report**” and “**AA report**”), in accordance with the EU Environmental Impact Assessment Directive⁵, 5 alternatives were considered and evaluated equally:

- Long Tunnel Alternative (double pipe tunnel), 2015 – conforming to EIA Decision 2008;
- Option G20 – Blue, 2014 – duplicating the existing road in Kresna Gorge;
- Option G20 – Red, 2015 – duplicating the existing road in Kresna Gorge;
- Eastern Alternative G10.50, 2016 – left carriageway (Kulata-Sofia direction) on a new route outside the gorge and right carriageway (Sofia-Kulata direction) on the existing first-class international road E79 in the gorge, bypassing the town of Kresna;
- Eastern Alternative G20, 2016 – both carriageways outside of the Kresna Gorge.

These five alternatives were proposed by the Road Infrastructure Agency (“**RIA**”), taking into account: the EIA Decision 2008, the Recommendation No. 98 (2002) of the Standing Committee of the Bern Convention, the written instructions given by the competent authority for the environment, the results of the monitoring of the existing route, the analysis and the assessment of the mortality of the animal species in the section E-79 (I-1) for the period 2012 - 2016, the results of the consultations on the EIA scope, as well as the comments received from the European Commission, DG Environment, during the regular consultations.

Implementing the EU legislation, based on the provisions of the EIA Directive, the 5 alternatives have been thoroughly assessed. As a result of the AA report and its conclusions, it is estimated that G20 – Blue, G20 - Red and Eastern G20 alternatives are incompatible with the SCI Kresna – Ilindentsi (BG0000366) conservation objectives, and the Eastern Alternative G20 is also incompatible with the subject and objectives of SPA Kresna (BG0002003). As a result of the assessment, the other two alternatives (Long Tunnel Alternative and Eastern Alternative G10.50) were found to be compatible with the conservation objectives of both protected areas⁶.

EIA demonstrated that, compared to the Long Tunnel Alternative, the Eastern Alternative G10.50 has clear advantage over 8 (eight) environmental components and factors of human health - atmospheric air, surface and groundwater, soil, waste, noise, cultural heritage and health-hygienic aspects - 5 of which are significantly advantageous for the Eastern Alternative G10.50 option.

For both compatible options (Long Tunnel Alternative and Eastern Alternative G10.50) mitigation measures have been addressed in the AA report, aiming at minimizing or even eliminating negative impacts during or after the realization of each one of these alternatives.

⁵ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014.

⁶ Pursuant to Bulgarian, the definition “protected area/site” comprises SCI and SAC within the meaning of Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora, as well as SPA within the meaning of Directive 2009/147/EC on the conservation of wild birds.

As a result of the thorough analysis and, as stated in the conclusions in the EIA and AA reports regarding the impact on environment and human health, the Eastern Alternative G10.50 was clearly preferable to the Long Tunnel Alternative.

As a result of the EIA report and its annexes, incl. the AA report, the Minister of Environment and Water issued EIA Decision No 3-3/2017 approving the implementation of the investment proposal "Improvement of the route of Lot 3.2 of Struma Motorway" under the Eastern Alternative G10.50 ("EIA Decision 2017"). The decision envisages mandatory conditions and measures for implementation at all stages of the realization of the investment proposal.

III. DEVELOPMENTS

A. EIA Decision 2017

The EIA Decision 2017 was appealed at the court by 2 (two) individuals and 1 (one) non-governmental organization (NGO)⁷.

Pursuant to decision of 23 May 2018⁸ of the Supreme Administrative Court ("Supreme Court") the appeals were dismissed after detailed examination of all the supporting arguments of both sides. The judgment was delivered in a one-instance court procedure and has entered in force as of the date of its issuance, i.e. the judgement is final and cannot be appealed. As the subject of the case file is in the agenda of the 38th Standing Committee Meeting and, in order to refute the assertions of the NGOs, detailed information on the case is included below in Section IV of this report.

Further Steps

The present project includes planning and construction activities for the following sections from Lot 3.2:

- Section I, Lot 3.2.1, section "Krupnik - Kresna" - left carriageway from km 375+860 ≡ 376+000 from Struma MW, Lot 3.1 to km 389+100, including road connections;
- Section II, Lot 3.2.2, section "Krupnik - Kresna" - left carriageway from km 389+100 to km 399+500, bypass of Kresna town – part of right carriageway from km 396+137 to km 401+691.90 ≡ 397+000 from Struma MW, Lot 3.3, including road connections;
- Section III – Right carriageway: Rehabilitation of the existing Road I – 1 (E79) from km 376+000 (Lot 3.1) = km 378+300 (Road I-1 (E79) to km 396+137(Road I-1 (E79).

The public procurement procedures for design and construction works for Section I and Section II were announced and the announcements were published on:

- For Struma Motorway Lot 3.2.1 – 31 August 2018;
- For Struma Motorway Lot 3.2.2 – 30 August 2018.

The deadlines for receipt of tenders are respectively:

- For Struma Motorway Lot 3.2.1 – 22 November 2018;
- For Struma Motorway Lot 3.2.2 – 29 November 2018.

B. Application Form ("AF"):

The procedure for selection of a contractor for "Preparation of Application Form for Financing the Struma Motorway Project, Lot 3.2" is finished. On 5 April 2018, the contract with the selected consultant was signed (Consultant).

On 12 September 2018 the draft AF was submitted by the Consultant to RIA. On 1 October 2018 the RIA's comments were submitted to the Consultant. Simultaneously, RIA is working with Jaspers on the AF. It is expected the AF to be submitted for approval to the European Commission by the end of this year.

⁷ „For Earth – Access to Justice“ Association.

⁸ Decision No 6834/23 May 2018 under administrative case No 13132/2017 of the Supreme Administrative Court.

IV. COURT CASE REGARDING THE EIA DECISION 2017

The EIA Decision 2017 was issued by the Minister of Environment and Water. The decision allowed its preliminary implementation. Preliminary implementation has been allowed since the implementation of the approved by the EIA Decision 2017 alternative (besides ensuring the protection of environment and biodiversity) will also secure the life and health of the citizens and will protect particularly important state and public interests by accelerating the overall completion of the construction of Struma Motorway⁹.

The EIA Decision 2017 was appealed before the competent national court (the Supreme Court). An appeal has also been lodged against the preliminary implementation order.

The complainants' argument is that the preliminary implementation affects the right to a clean and healthy environment and threatens irreversible damage to the habitats of protected species, and that the Aarhus Convention does not permit preliminary implementation.

By a court ruling of 29 November 2017, the appeal against the order for preliminary implementation was dismissed. The court accepts that the motifs given by the Minister for allowing preliminary implementation are in place, as the timely implementation of Struma Motorway will contribute, in addition to the correct implementation of Bulgaria's commitment to the EU, to the reduction of road traffic accidents in Kresna Gorge (respectively limiting the number of victims and injured). The court also held that the applicants defended a private interest and did not prove their assertions that preliminary implementation would cause damage to the population to a greater extent than the protected state interest. Therefore, the protection of public interest as well as the protection of the environment in the gorge demand the dismissal of the appeal to the order for preliminary implementation.

Appeals were also brought against the EIA Decision 2017 on the merits. The appeals generally set out allegations of material law violation and non-compliance with the purpose of the law, as well as procedural violations. There was also a request to suspend the project realization until the approval of another alternative option. These appeals were also dismissed.

Since the complainants' allegations in the case are similar to the claims of the NGOs in their reports to the institutions of the Bern Convention, we consider it necessary to provide more detailed information on the content of the appeals and the court's conclusion. The information is included in Appendix 1 to this report.

The lawfulness of the EIA Decision 2017 was fully upheld and the complaints against it were rejected pursuant to a court decision of 23 May 2018 of the Supreme Court (“**Judgment**”)¹⁰. The Judgment was submitted to the Bureau of the Bern Convention on 31 August 2018.

Under national law, the Judgment is final and cannot be appealed. Therefore, the EIA Decision 2017 has come into legal force and constitutes a stable administrative act which is legally binding act that can be immediately implemented.

Some of the complainants¹¹ have filed a complaint against the Judgment to an extended panel of the Supreme Court. Contrary to national law, they claim that the Judgment is subject to a cassation appeal and request its annulment.

By the Judgment, the litigation is finally resolved and not subject to review.

⁹ Art. 60, para 1 of the Administrative Procedure Code: “*The administrative act shall include an order for its preliminary execution where necessary in order to ensure the life or health of the citizens, to protect particularly important state or public interests, in case of danger that the execution of the act may be thwarted or seriously hampered, or if the delay in its implementation may result in material or difficult to repair damage, or at the request of one of the parties – to protect particularly important interest of such party. In the latter case, the administrative authority shall require the relevant guarantee.*”

¹⁰ Decision No 6834/23 May 2018 under administrative case No 13132/2017 of the Supreme Administrative Court.

¹¹ 1 (one) individual and the NGO.

According to the national legislation "*Final are the decisions of the first-instance court on appeals against decisions of the Minister of Environment and Water on investment proposals, their extensions or amendments, which are defined as sites of national importance by an act of the Council of Ministers and are sites of strategic importance.*" (Art. 99, para 7 of the Environmental Protection Act).

The existence of the preconditions under the above provision, has been confirmed by the court and the complainants have not objected to their lack.

According to the national law, this type of case is reviewed by a single court instance and the complainants are not entitled to such an appeal. MEW has submitted an opinion in this respect to the Supreme Court. The decision of court is expected.

V. GOVERNMENT POSITION ON THE ISSUE FOR EXTERNAL REVIEW OF EIA AND ITS RECOMMENDATIONS

The Bureau, at its meeting on 10-11 September 2018, discussed the issue of an external review of the EIA and decided to address this issue at the forthcoming 38th Standing Committee Meeting. Bulgaria considers that the assignment of such a review is not legally founded, inappropriate and pointless, and contradicts EU law.

The Republic of Bulgaria, member state of the EU, is a rule of law state. Basic principles therein are the rule of law and the independence of the judiciary. The control of the legality of the acts and actions of the administrative bodies is exercised by the courts. The Supreme Court exercises supreme judicial supervision for the correct and uniform application of the laws in the administrative procedure and decides on disputes concerning the legality of acts issued by ministers (as is the case).

The legality of the EIA Decision 2017 and the EIA procedure, on the basis of which the decision was issued, has been fully confirmed by the competent national court (the Supreme Court) with a final court decision. The judgment is legally binding and the parties are obliged to implement it.

A new inspection of the EIA procedure and the EIA Decision 2017, regardless of the scrutiny by the Supreme Court of legality, would violate basic legal principles such as the rule of law, stability of administrative acts and legal certainty. In addition, it would breach the EU law.

The national court, following the "*juge de droit commun du droit communautaire*" principle, has the universal competence to decide on the application of EU Law. In this case, the Supreme Court has already applied the EIA and Habitats Directives and undoubtedly ruled that the EIA and AA procedures have been carried out in full compliance with the Directives.

To make a revision of the EIA and AA is manifestly against EU law. Under EU it is inconceivable to challenge EU processes *ex post* under procedures that EU law does not foresee. Moreover, the combination of the EIA and AA processes ensure a protection at least equivalent to the Bern Convention standards, and also takes into consideration the case law of the Court of Justice of EU.

The assignment of an external review would lead to numerous questions without clear answers, e.g. on the body competent to perform an external review, the applicable criteria, the procedure to be followed in the reviewing process, etc. and, finally, what would be the legal effect of such a review.

Given the background of the case, it cannot be excluded that NGOs will continue to appeal against/complain about the "external" EIA decision, if they are not content with its conclusions, and this may have no end. The NGOs have had the chance to participate in the public consultations of the combined EIA/AA process and to make their points (as a statutory step of the EIA procedure). This procedural requirement has been fulfilled and all reasonable comments of the NGOs have been reflected.

Besides, the EIA Decision 2017 prescribes mandatory conditions and measures to be implemented at all stages of realization of the investment proposal, which are definitely targeting protection of the environment and the biological diversity. Their effectiveness has been scrutinized not only by prominent international experts but, above all, by the competent national authority and the Supreme Court.

VI. CONCLUSION

Bulgaria strictly complies with and implements international, European and national legislation on species and habitats protection, respecting completely the Bern Convention. Also, all considerations of Recommendation 98 (2002) of the Standing Committee of the Bern Convention have been taken into account during the project development¹².

Therefore, the allegations of NGOs set out in their report of 4 September 2018, are not true, not founded and all the facts presented by the NGOs are either misinterpreted or inaccurate.

The supremacy of law is a leading principle in Bulgaria and the state submits to the conclusions of the performed judicial control on administrative acts. Pronouncing the EIA Decision 2017 legitimate by the court makes the state authorities obligated to implement the decision.

Democracy is realised if the legally adopted decisions, which are also controlled by justice, are implemented without further delays, thus undermining the sustainable functioning of any state.

The issue of external review of EIA and its recommendations is rather excessive and counter-productive, as it would raise a conflict between an administrative act confirmed by the court as EU- and national law-compliant, and the outcome of the external EIA review.

Therefore, we request the Bureau of the Bern Convention to reconsider the issue of assigning an external review of the EIA.

In view of the above, we ask the honorable Standing Committee to remove this file from the list of possible files.

¹² Detailed information on the implementation of the individual considerations of Recommendation 98 (2002) is contained in paragraph 12 of the Government Report of 30 October 2017.

APPENDICES:

1. POSITION ON THE ALLEGATIONS OF NGOS.

Appendix 1

POSITION ON THE ALLEGATIONS OF NGOS

In the court case regarding the EIA Decision 2017¹³ and in their reports to the Bureau of the Convention, NGOs set out complaints about infringement of the procedure for its issuance and claim lack of justification for the approval of the implementation of Lot 3.2 of the Struma Motorway under the Eastern Alternative G10.50.

Bulgaria maintains that the EIA Decision 2017 is legitimate, which is also confirmed by a final judicial act.

Given the significant inconsistency between Bulgaria's and NGO's views on the EIA Decision 2017, we consider it necessary to provide a summary of the main assertions of NGOs (outlined in the case before Supreme Court and the NGO report to the Bureau of the Bern Convention of 4 September 2018) and our arguments against them.

- A. *The ongoing deterioration of the conservation status of the gorge as a result of increased traffic and the ongoing construction of the other sections on both sides of the gorge. The increased traffic has already led to severe negative impacts on population abundance, such as the decrease in the population of protected bats by 92%, in protected tortoises and snakes by 60% and in all vertebrates by 84%.***

Concerning the status of the populations of vertebrates in the region near the section of the international road E-79 in the Kresna Gorge, the reliable scientific information from the period before 2012 is rather scarce. Very little information is published in referenced literature sources and there were no regular monitoring activities performed in the field before the start of the “Monitoring, analysis and evaluation of animal mortality in the section E-79”, ordered by the National Company “Strategic Infrastructure Projects” (“NCSIP”) and RIA for the period 2012 - 2016.

Additionally, a report was issued by international team of independent scientist, providing information about the status of the herpetofauna populations in Natura 2000 sites impacted by the project for realization of Lot 3.2, which was an inseparable annex to the EIA Report in the EIA procedure 2017.

The reports of the monitoring of the mortality and the report on the herpetofauna are the only published sources of information concerning the status of the vertebrate populations in the region and the impact of the traffic on them.

The information contained in these documents contradicts completely to the percent reduction in populations cited in the “Report by the NGO” of 4 September 2018 submitted to the Bureau of the Bern Convention. The authors of the complaint do not specify the scientific approach adopted and used, although this is standard requirement for every reliable and scientifically acceptable estimation. Therefore, we can only guess how they had calculated the cited numbers and what datasets and methods they had used to perform the analyzes and to draw the conclusions.

In all cases the data are highly manipulative, imprecise, speculative and have no scientific base. In the local scientific community limited information is available concerning some kind of monitoring on the populations of the vertebrates inhabiting the Kresna Gorge, which was performed in the beginning of the present century. No information concerning the methods and results of these activities was ever published. During the sessions of the Monitoring Committee of the Struma Motorway, members belonging to the NGO community had repeatedly mentioned that all of the information was lost because of hardware issues. No direct comparison is possible between the data

¹³ All definitions and abbreviations quoted herein have the meaning stipulated in the report which the present appendix is attached to.

collected during the last several years (due to the efforts of competent authorities) and the old (apparently lost) data. There is an enormous time gap between the surveys and there are also crucial differences between the methodic that had been used for field surveys.

The authors of the complaint had not followed the standard scientific practices for obtaining reliable information and interpretation of scientific results. Their approach is not professional and all conclusions and numbers cited are either speculative or wrong. The authors do not take account of important differences between the activities performed fifteen years ago and the current field surveys. Additionally, they do not take account of ecological effects of the roads related to minimization of the wildlife-vehicle collisions such as “noise avoidance”, “road avoidance”, “use of the road vicinity as habitat” of the species, etc.

Presently, no “severe negative impacts on population abundance” can be defined. The data from the so-called “Monitoring of NGOs in 2003-2004” cannot be taken as a reference because they are not published and scientifically reviewed, the methodology for their collection is unclear and the data are not available to the scientific community. This is the base for the start of a long-term monitoring program planned by RIA for obtaining reliable data concerning the impact of the realization and operation of the existing road. Only a long-term and systematic monitoring by a single methodology may provide answer to important questions concerning the mortality on the road, the connectivity of the populations, the effectiveness of possible mitigation measures and the protection of the vulnerable species in the Kresna Gorge.

B. *Eastern Alternative G10.50 provides for straightening and widening of the existing road and its conversion into a high-speed road:*

The Eastern Alternative G10.50 project documentation assessed in the EIA and the AA reports does not provide for straightening and widening of the existing E-79 road passing through the Kresna Gorge, nor its conversion into a high-speed road or motorway. The projected speed is 80 km/h.

The AA report¹⁴ provides for rehabilitation measures that will be implemented only within the scope of the existing road which even currently has a gauge larger than 10.5 m in particular sections.

C. *Eastern Alternative G10.50 leaves the town of Kresna without a local road:*

The existing E-79 road has never been a local road used for agricultural or tourist activity. The E-79 is a first-class international route and there is no legal possibility to be decommissioned. The traffic on it cannot be limited to the local community and the road cannot be turned into a pedestrian or cycling corridor. The E-79 is an important part of an international transport corridor and essential for national security.

By implementation of the Eastern Alternative G10.50 the traffic on the existing road passing through Kresna Gorge will be reduced by half.

D. *The EIA Decision 2008 foresaw that Struma Motorway should be built entirely outside the Kresna Gorge through 1) full (western) tunnel, or 2) by the Eastern bypass via viaducts and tunnels. The EIA Decision 2008 also provided for the two possible conceptual alternatives to be further designed to improve them.*

The EIA Decision 2008 approves a single alternative to building Lot 3.2 of the Struma Motorway - a full (western) tunnel.

The EIA Decision 2008 was made on the basis of very limited environmental information and in the absence of technical design data and geological surveys. Therefore, the decision includes numerous recommendations for improving the route in the next stages of study and design. One of the conditions for the design phase of the Kresna Gorge is “... *alongside the development of a purple (tunnel) variant, to look for ways to improve it and reach the best possible - environmentally friendly, technically and economically feasible option*” (paragraph 3.2 of the Decision). The EIA Decision 2008 approves only one alternative and provides for its improvement.

¹⁴ Appendix No 8 to the AA report.

Upon the launch of the new EIA and AA procedure in 2015, a conceptual design for a “Long Tunnel Alternative” was presented that has been upgraded to the one approved by the EIA Decision 2008. Thus, the condition under pt. 3.2 of the EIA Decision 2008, which requires seeking to “improve” the approved option has been fulfilled.

E. The EIA Decision 2017 provides for mitigation measures that have been assessed as ineffective in the EIA Decision 2008

Eastern Alternative G10.50 provides for keeping the existing road and mitigation measures that will be fully implemented within its scope. In the course of the procedure, NGOs alleged that the proposed mitigation measures for the Eastern Alternative G10.50 (defragmenting and fence facilities) would not be effective.

This conclusion is based on an improper assumption that the approach to the appropriate defragmenting facility (passageway) must necessarily be perpendicular to the road body; hence the necessity, according to the authors of this opinion, for a 4 m “free” strip around the road body, which can be provided in the gorge only in a limited number of places. It is clear from the AA report¹⁵ that another solution is possible - the approaches to be parallel to the road body.

As a result of the analysis, assessments and conclusions carried out, a recommendation for the implementation of specific mitigation measures was made in the AA report of 2017. An independent team of road engineers, in close collaboration with the experts performing the AA report, designed both defragmenting and protective facilities that are practically realizable and meet the requirements for such kind of facilities.

On the right lane of Eastern Alternative G10.50, from km 381 + 100 to km 396 + 137, 172 facilities were designed, 50 of which are 50 cm in diameter, and the rest are over 80 cm. If the lengths of the tunnels and bridges (two tunnels, four large and one small bridge with a total length of 964 m) are not considered, the other passage facilities (excluding those with a diameter of 50 cm) have an average density of 82 m (one facility at each 82 m). It is precisely in the cited sections with steep slopes or a concrete wall that the approaches are parallel to the road body, with a small slope.

The measures are in line with the optimal habitats of amphibians and reptiles subject to conservation in SCI BG0000366 “Kresna-I lindentsi”, with the locations where their highest concentration is registered, with the results of the observed mortality rates from the existing traffic, as well as with the technical capabilities of the terrain. The facilities envisaged are unique and designed for the respective locations along the existing road path and ensure the achievement of the respective objectives.

Their effectiveness has been further assessed by independent international herpetologist experts. Their report is publicly available and no objections are raised against it. The evaluation results show that the most successful scenario for improving the current situation would be the Eastern Alternative G10.50 with application of mitigation measures.

In the long term, the impact on habitats of the affected species of reptiles on the right carriageway of Eastern Alternative G10.50 is expected to be minimized in terms of habitat fragmentation and mortality compared to the current situation. The conclusions confirm that the positive impact of the measures is closely related to the proper implementation and regular maintenance of the fencing/defragmentation facilities and requires monitoring of their use. Against the backdrop of all the expert work involved in the design process, declarative statements that measures are ineffective appear to be totally unreasonable.

As an additional measure, the AA report envisages the monitoring of the populations of 4 of the potentially most affected species in order to verify the effectiveness of the mitigation measures in a real environment.

The conclusions of the AA report of 2007 that it is not possible to apply effective mitigation measures are not relevant at present because they concern route options in Kresna Gorge with a highway gauge.

¹⁵ Appendix No 8 to the AA report.

The AA report of 2007 examines options in Kresna Gorge only with a highway gauge, while the approved Eastern Alternative G10.50, right carriageway, does not provide a highway gauge, but maintains the existing width of the road (without straightening or widening). Only rehabilitation is envisaged in the context of the recommended mitigation measures.

The data from the so-called “2003 and 2004 monitoring” cannot be taken as reference since they are not published and scientifically reviewed, the collection methodology is unclear and the data are not available to the scientific community.

NGOs’ data on drastically reducing the population of several groups of animals are grossly manipulative and not supported by any evidence, especially about population numbers.

In the course of the public consultations, the official opinion of the Bulgarian Academy of Sciences, which examines aspects related to biodiversity and human health, was presented, and was positive with regard to the selected Eastern Alternative G10.50.

F. In the EIA Decision 2017 and the EIA report prepared thereon, no reference is made to the EIA Decision 2008 and the EIA report of 2007

The EIA Decision 2008 and the EIA report of 2007 were taken into account in the procedure for issuance of the EIA Decision 2017. They were used as literature and were accordingly referred to as a source of information in the procedure for issuance of the EIA Decision 2017.

G. The EIA Decision 2008 is valid and contains mandatory mitigation measures. The EIA procedure started in 2015 should be considered as fulfilling the condition under I.3.2. of the EIA Decision 2008

The EIA Decision 2008 and the EIA Decision 2017 have a different subject. The EIA Decision 2008 approved the construction of the entire Struma Motorway. In the section of the Kresna Gorge (Lot 3.2), the EIA Decision 2008 approves the so-called “tunnel option”. The EIA Decision 2017 refers to “Improving the route of Lot 3.2 of Struma Motorway”.

The EIA decisions do not oblige the contracting authority to execute an investment proposal in a particular way. On the contrary, the EIA decision empowers the investment proposal to be implemented in a certain way from the perspective of environmental law.

If the contracting authority amends its investment proposal for whatever reasons (including for implementing instructions from an EIA decision), it must notify the competent environmental authority in order the environmental impact, incl. Natura 2000, of the new investment proposal to be assessed. This is performed through a new EIA and AA procedure (as is the case).

H. The EIA Decision 2017 “reviews” a lawful and enacted administrative act (the EIA Decision 2008)

The EIA Decision 2008 and the EIA Decision 2017 have a different subject, namely:

- EIA Decision 2008: Construction of Struma Motorway (Dolna Dikanya - Kulata).
- EIA Decision 2017: Improving the route of Lot 3.2 of the Struma Motorway.

In the case at hand, there is an amendment to the investment proposal and not a resumption of the procedure for issuance of the EIA Decision 2008.

Bulgarian law explicitly allows for the possibility of amendment and extension of investment proposals approved by an EIA decision¹⁶. As stated above, the existence of an EIA decision does not create any legal or other obstacle to further development and amendment to an investment proposal for any reason whatsoever (including environmental, e.g. related to geology and hydrogeology, or related to safety and protection of human health). Upon such an amendment to the investment proposal, a new EIA and AA procedure is being carried out.

¹⁶ Point 38 of Appendix 1 to the Environment Protection Act: “Any amendment or extension of an investment proposal included in the Annex where such amendment or extension itself meets the criteria, if any, set out in the Annex.”

The statutory possibility of amending and extending the investment proposal provides a guarantee of freedom in the development of investment proposals, however in compliance with environmental law. A possible ban on amending/extending an already approved investment proposal would be in clear contradiction with the provisions and purpose of the Bulgarian Environment Protection Act, respectively with the EIA Directive. Such a view not only does not find a legal basis, but is also devoid of logic.

In this case, the Judgment also confirms the fact that there is no revision of the EIA Decision 2008, but an amendment to the investment proposal “...given the serious challenges that complicate the implementation of the project and the exploitation of the site in the future.”.

I. There is no equivalent and full assessment of all alternatives in the new EIA and thus an alternative is adopted which would damage the site conditions of the Kresna Gorge and the Natura 2000 site “Kresna – Ilindentsi”

In the EIA and AA reports, the 5 alternatives have been evaluated equally. The evaluation of the investment proposal has been carried out for the phases of its realization - construction and operation, as well as in emergency situations, taking into account the degree of development/detail of the project designs, fully equivalent to each of the proposed project options.

In the selection of the project implementation option, in the EIA and AA reports an in-depth assessment of all alternatives has been carried out in consideration and full compliance with mandatory provisions for the protection of fauna, flora and habitats at national and European level. In the course of the EIA procedure, including in the public discussions, the considerations presented by the affected local communities have also been taken into account.

The EIA report contains detailed analysis and assessment of environmental components and factors for each of the options, objectively showing benefits, in certain components, of options which are not finally recommended by the report. For example, under the soil component, the long tunnel option has priority over all other options.

As a result of the AA report, it is concluded that only 2 of the 5 alternatives are compatible with the conservation subject and objectives of the two concerned Natura 2000 protected sites, as follows:

Compatibility with the conservation subject and objectives in the protected areas	G20 – blue	G20- red	Eastern alternative G20	Eastern Alternative G10.50	Long Tunnel Alternative
Kresna-Ilindentsi (BG0000366)	No	No	No	Yes	Yes
Kresna (BG0002003)	Yes	Yes	No	Yes	Yes

The equal assessment of the options made in the EIA and AA reports gives full transparency and clarity for which reasons the most preferred option in view of its environmental, human health and protected sites impact is chosen.

J. A large number of NGO statements to the public discussions of the new EIA report and rejected by the Bulgarian Government were submitted to the court case as evidence in support of NGO allegations. In these opinions it was revealed that the government had chosen the Eastern Alternative G10.50 in advance (by the end of 2016 - before the EIA report was prepared) entirely by means of technical and economic criteria.

In the litigation concerning the EIA Decision 2017, claims were made that Eastern Alternative G10.50 was “approved in advance”, as, before the decision was issued, a public procurement procedure was carried out with a subject: “Elaboration of an expanded conceptual design project with plot plan for Struma Motorway, Lot 3.2, Krupnik - Kresna section - left carriageway with an

approximate length of 23.8 km and a bypass of Kresna - part of the right carriageway with an approximate length of 5.45 km”.

The subject of the procedure is design and urban planning activities, which in no way hinders the parallel implementation of the EIA procedure. The latter is performed on individual criteria that have been strictly observed. The simultaneous conduct of procedures of a different nature does not affect the impartiality of the competent environmental authority in the decision-taking process for approval of a certain alternative.

K. Expert report on herpetofauna developed by private company ENVECO S.A. has never been a part of the official EIA procedure – EIA report and official consultations and public discussions on EIA

The report is part of the documentation to the EIA Decision 2017 (one of the appendices to the EIA report along with the Non-technical resume and AA report) and, at each stage of the EIA procedure, it has been accessible to the eligible persons (during the consultations with the public and stakeholders, public hearings, EIA documentation review by the Supreme Environmental Expert Council etc.). No objections have been raised against it.

The conclusions of the report show that the most successful scenario for improving the current situation would be Eastern Alternative G10.50 with applying mitigation measures.

In their report to the Bureau, NGOs state that the company that produced the report - Enveco - has also produced a report “*on the same topic*” (impact of Struma Motorway on the herpetofauna in Kresna Gorge) on assignment by the Bulgarian Construction Chamber (BCC). Therefore, NGOs consider that there is a conflict of interest. This statement, like the rest of NGOs’ allegations, is untrue and manipulative.

BCC has assigned Enveco to explore the issue of the effects of the long tunnel and the G20-blue alternative of 2014, given the many speculations in the public domain. As a result of the analysis, Enveco points out that the 2014 version of G20-blue alternative has an edge over the long tunnel, but should be improved. The Enveco report was presented to the NCSIP, and in this respect the G20-red version was developed in 2015.

L. The Eastern Tunnel alternative, proposed in the public consultation on the EIA scope, was not evaluated or even discussed in the new EIA report and the EIA Decision 2017

MEW has forwarded the project proposal to RIA with a view, *inter alia*, analysis of the technical feasibility of its implementation and the admissibility of the project proposal (given the presence in the region of protected territories - wildlife sanctuary and a protected area - and protected areas of the Natura 2000 network).

The proposal has been considered and taken into consideration in the course of the procedure for approval of the investment proposal. Nevertheless, with regard to the options for combination of the route of Lot 3.2 with the existing railway line, we would like to pay attention to the following:

- For the modernization of the railway line in the region of Kresna Gorge there is an effective EIA Decision No 4-4/2016 of the Minister of Environment and Water, which approved the “Modernization of Radomir - Kulata railway line” under Option F (combined), for a section from km 182 to km 190 of Division 4 under Option 2 (light blue) of the National Railway Infrastructure Company (“NRIC”). The chosen alternative does not envisage a change in the existing route passing through Kresna Gorge.
- New options for passing of a railway line in this section can only be initiated by NRIC, as it is the contracting authority for such investment proposals. RIA does not have the competence to investigate variants and alternatives for railway lines and has no right to scrutinize proposals from the competence of another institution.
- It can be inferred from the hard copy mapping material that is available only for review that, for the realization of the project, it will be necessary to excavate tunnels with a large ground clearance which will be connected with securing of many suitable places for disposal of the excavations. The proposed project is related to the realization of huge-scale construction works in

the region of Kresna Gorge and even in the bed of Struma river, crossing it several times. This is associated with an increased risk of pollution of the river and deterioration of the ecological situation. Negative impacts on environmental components are similar to those which the long tunnel is rejected with.

M. Lack of assessment of the cumulative impacts resulting from the construction of the whole motorway

The assessment of cumulative impacts is a mandatory step in the EIA and AA procedure. Therefore, the control for legality of the EIA decisions also includes analysis whether an assessment of cumulative impacts has been performed. In this case, the Judgment confirms that the cumulative effect was assessed in the EIA Decision 2017.

The assessment of cumulative impacts has been carried out in the EIA report thoroughly. Accumulation effects and overlay effects have been studied. It has been attested that, in the case of accumulation effect, there is no accumulation of various impacts on surface water, groundwater, geological base, soils, wastes, hazardous substances, landscape and cultural heritage. In the overlay effect it was found that there is no overlap of the same effects leading to a new significant impact on the environment components/factors listed in the previous sentence. It is concluded that no cumulative impacts are expected from the construction and operation of the road and the exploitation of existing engineering networks in the vicinity of the track - gas pipelines, electricity transmission networks, water supply and sewerage telecommunications, etc., as well as from the presence of a railway line near the track with respect to the components and environmental factors besides minor ones. It is generally concluded that no cumulative effect is expected on the components as described above.

The AA report evaluation of the expected cumulative impact for all types of natural habitats and habitats of species, including birds, subject to conservation in the two protected sites concerned were made on the basis of the analysis of the acts of conciliation issued under the environmental legislation and their prescription. 109 investment proposals, plans, programs or projects were considered in detail in the AA report, thereof 29 are considered to have a negligible cumulative impact together with the present investment proposal on SCI BG0000366 "Kresna – Ilindentsi", and 22 on SPA BG0002003 "Kresna".

N. All other parts of the Struma Motorway have been constructed in accordance with the EIA Decision 2008

Up to now, modifications and corrections have been carried out on the route of Struma Motorway also in other lots, for each of which a new EIA procedure has been carried out. As an example, we point out a shifting of the Struma Motorway route, which was also subject to judicial control (see next paragraph).

With the entry in force of Decision No 1386 of 10 February 2016, under administrative case No 1974/2015 of the Supreme Court, has been rejected the contestation of the decision No 1-PR/15.01.2015 of the Minister of Environment and Water, which stated that no environmental impact assessment is needed for investment proposal "Struma Motorway - Lot 2 "Dupnitsa - Blagoevgrad" from km 322 + 000 to km 359 + 483.52 - displacement of the route in the section from km 330 + 000 to km 332 + 960".

Amendments have also been made in connection with the construction of line networks of other institutions, overpasses for bears and new road detours in the municipality of Sandanski.

O. The following alternatives are possible outside the Kresna Gorge:

➤ *"Eastern Alternative G20"*

According to the project materials, the easement (the area that will be destroyed during the construction and will be permanently occupied by route elements – excavations, embankments, etc.) of the Eastern Alternative G20 on a new terrain is about three times higher compared to the Eastern Alternative G10.50, where only the left carriageway and the bypass of Kresna are on a new terrain. This is due to the following specifics of the Eastern Alternative G20:

- The route passes through heavy terrain with steep slopes and it is necessary to place the two carriageways apart from each other, in some cases at different levels. Placing both carriageways side by side is possible in smooth terrains with little transverse inclines;
- For two carriageways, it is necessary to execute complete road junctions, providing non-conflicting infusion and casting, which requires many larger areas for alienation and areas to be built;
- When performing large road facilities - two-lane high viaducts - it is necessary to distribute the two lanes in order to ensure independent operation of each lane;
- When performing two lanes in tunneling solutions, it is necessary to distribute the two tunnels in order to ensure the stability of the soil. Also, large gateways are required before the entry in the tunnel to ensure the transition from an open road to a tunnel, and vice versa;
- Two-lane construction also requires a much greater number of service roads compared to one-lane construction;
- The construction of two lanes requires the implementation of a slow-moving car belt on each lane, which requires additional areas for alienation and construction;
- The existence of two lanes affects much more steep slopes, requiring measures to ensure the stability of the same. This is related to the provision of smooth project slopes and berms, which sometimes increase several times the necessary area for alienation and construction.

Concerning the assessment of mitigation measures for the Eastern Alternative G20:

- While Eastern Alternative G10.50 affects 5 polygons with a 91E0* habitat with a total area of 10,231 decares, Eastern Alternative G20 affects 7 polygons of this habitat with a nearly 3 times larger area (29,348 decares). Even if there is some technical possibility to reduce the scope of Eastern Alternative G20 with more than 25 decares to reduce the impact on the 91E0* habitat, it still has significant impacts on the habitat 6220* - affected 29 polygons with a total area of 199,417 decares and 91AA* - affected 26 polygons with a total area of 468.077 decares.
- Areas of species habitats subject to conservation in both protected sites are also affected considerably. In order to reduce these area impacts, the scope of the Eastern Alternative G20 should be reduced to approximately the area of the Eastern Alternative G10.50, but then a motorway with a G20 gauge (20 m width only on the road body) will be impossible. This is the reason why the only effective mitigation measure - to reduce the scope of the track - is not assessed.

➤ *“Alternative to full tunnel”*

This alternative is part of the 5 alternatives which are analyzed in the EIA Decision 2017. All alternatives have been assessed equally and the conclusions for them are set out in the EIA Decision 2017 and the documentation thereto.

➤ *“Eastern Bypass”*

This option was developed by NGOs in 2002 as “the Votan Project” and was assessed in the EIA procedure in 2007 but rejected as unacceptable, which is reflected in the EIA Decision 2008. The arguments have been set out in the AA report of 2007 and are related to the fact that for some species, subject to conservation in SCI BG0000366 “Kresna-Ilindentsi”, considerable negative impacts remain despite the possible mitigation measures and compensatory measures within the meaning of Art. 6(4) of the Habitats Directive¹⁷. At the same time, it is concluded that there is no need to apply Art. 6 (4) of the Habitats Directive as far as feasible alternatives are available allowing the avoidance of significant impacts on protected sites as a result of mitigation measures.

➤ *“Eastern Tunnel Alternative”*

The alternative has been analyzed above in paragraphs 51 and 52.

¹⁷ Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora.

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Translation from Bulgarian

DECISION

No. 6834

Sofia, 23 May 2018

The Supreme Administrative Court of the Republic of Bulgaria – Sixth division, at a hearing on the twenty third of April two thousand and eighteen

CHAIRPERSON: RUMYANA PAPAZOVA

MEMBERS: NIKOLAY GUNCHEV

SIBILA SIMEONOVA

Before court clerk, Penka Kotanidis
Prosecutor, Iskrenna Velichkova
Judge, NIKOLAY GUNCHEV

and with the participation of the
heard the reporting of

under Administrative Case No. 13132/2017.

The proceedings under the case are pursuant to Art. 145 and set out from the Administrative Procedural Code (APC) in conjunction with Art. 99, subparagraph 6 of the Environmental Protection Act (EPA). The case has been initiated on the grounds of a claim submitted by D.G.D., which is examined jointly with the claim of [Legal Entity] D.V.V., against Decision no. 3-3/2017 of 19 October 2017 under an environmental impact assessment (EIA) of the Minister of Environment and Water with which an investment proposal was approved for 'Improvement of the route of Lot 3.2 of the Struma Motorway under the East G 10.50 variant' with Contracting Authority – the Road Infrastructure Agency (RIA).

The claimant, D.G.D., requests from the court to annul the contested decision under the EIA. He states that: that there is an error of 13 kilometers in the mileage of the investment proposal for Lot 3.2 of the Struma Motorway from Krupnik to Kresna; the road will have the characteristics of a second class one, but only the long tunnel variant meets the parameters of the motorway; variant 'East G 10.50' does not comply with the new Road Construction Ordinance, it is unsustainable in transport, environmental and financial terms and is not compatible with the motorway options such as 'Long tunnel variant', 'East G20 variant' or the variants of [company]; the improvement of Lot 3.2 of the Struma Motorway is not awarded to anyone and it is not clear in what the improvement of the route consists of; a request was made about the issue of an order regarding the drafting of a detailed development plan – plot plan (DDP-PP) before the EIA; a dissenting opinion was submitted to the Supreme Environmental Expert Council (SEEC) on part of a representative of the NGOs and a member of the council – engineer D.I., which was not taken into account; the failure to develop conceptual projects for all options is also a violation; another problem is related to the award of the pre-investment study as well.




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On grounds of illegality that are relevant to all of the basis under Art. 146 of the APC – lack of competence, leading to nullity, essential breach of the administrative and procedural rules, lack of conformity with the established form, contradiction to the material legal provisions and non-compliance with the purpose of the law, the claimants [Legal Entity] and D.V.V., acting via their proxy – lawyer A.K., request for the nullity to be disclosed and their contested decision under the EIA to be respectively annulled. They state that: there is a need for the re-examination of a sustainable administrative act that can only happen on the grounds and under the terms of Art. 99 of the APC and this has not been abided to; the provisions of the EPA are not a special act in regard to Art. 99 of the APC; the chosen option in 2008, the so called ‘long tunnel’ is obligatory; there is a lack of motives for the re-examination of the adopted variant in 2008; there is no improvement of the project and the motives for this; the requirement regarding the clarification of facts and significant circumstances for the case has been violated; the cumulative effects have not been taken into account, as well as the discussions of the Supervising Committee.

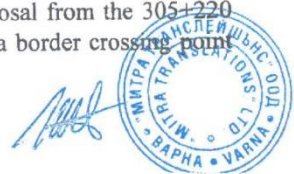
The defendant – the Minister of Environment and Waters, acting via the procedural representatives - lawyer A.P., lawyer P.P and M.K., employee with legal education, contests the submitted claims as unfounded and argues that the decision which is contested by them to be lawful under the EIA, due to which he wants for their claims to be rejected.

The interested party - the Road Infrastructure Agency, acting via the procedural representatives – lawyer V.V., states that the claims are unfounded and request for them to be rejected as such.

The representative of the Supreme Prosecutor’s Office of Administration concludes that the requests are admissible and founded and proposes for the administrative act that is contested by them to be declared as null and to be rejected as unlawful.

The Supreme Administrative Court (SAC), sitting with three members, sixth division, after examining the arguments of the parties and examined the evidence provided under the case under Art. 171 of the APC, established for the following under the factual background:

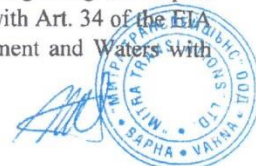
The Contracting authority (up to the moment of the lodging – the National Company Strategic Infrastructure Projects (NCSIP) and later on their legal successor – the Road Infrastructure Agency (RIA)) submitted two notices at the Ministry of the Environment and Waters (MEW) that were enclosed to a letter with your reference No. 1795/28.04.2015 (last folder to the I-st blue binder that is enclosed under the case) for an investment proposal (IP), in accordance with Art. 4, subparagraph 1 of the Terms and Procedure for Carrying Out the Environmental Impact Assessment Ordinance (EIA Ordinance), adopted by Decree of the Council of Ministers No. 59/2003, SG 25/2003, last amended and supplemented with SG 12/12.02.2016) and Art. 10 of the Terms and Procedure for Carrying Out an Assessment of the Plans, Programs, Projects and Investment Proposals Compatibility with the Subject and the Purposes of the Environmental Protection Ordinance (EP Ordinance), adopted by Decree of the Council of Ministers No. 201/31.08.2007, SG 73/11.09.2007, amended and supplemented with SG 94/30.11.2012), following which the Minister of the Environment and Waters, in his capacity as a competent authority, delivered an opinion via a letter with your reference No. OBOC-85/13.05.2015 of the Ministry of Environment and Waters (page 185 under the case and Annex No.1 to the additionally updated assignment for the scope and content of the EIA of the IP for the ‘Improvement of the Lot 3.2. Route of the Struma Motorway’). According to the same one, a procedure under the EIA was conducted for Lot 3 as part of the ‘Construction of the Struma Motorway (Dolna Dikanya - Kulata)’ Investment Proposal from the 305+220 km. at the village of Dolna Dikanya to the 439+000 km at the Kulata border crossing point.



and the road junctions and on the grounds of Art. 31, subparagraph 4 of the Biodiversity Act (BA), a compatibility assessment was carried out regarding the environmental protection subject and purposes by the Natura 2000 network. The procedure was concluded with a Decision under EIA No. 1-1/2008 of 15.12.2008 of the Minister of Environment and Waters (pages 49-63 under administrative case No. 13136/2017 as per the dockets of the Supreme Administrative Court, joined with Order No. 14430 of 28.11.2017 to this case) with which the implementation of the investment proposal was approved. The option for the construction at Lot 3.2. that was agreed with the Decision under the EIA from 2008 was with a long tunnel for which the degree of impact on the subject and the objectives of the affected protected areas is with a minimum impact assessment.

With a letter of the Minister of Environment and Waters, it is accepted that the IP can be regarded as the performance of a condition under p. 3.2 of the Decision under EIA No. 1-1/2008 of 15.12.2008 which provides for the Krupnik – Kresna part (Kresna Gorge region): p.1: 'along with the development of a purple (tunnel) option, possibilities should be looked for its improvement and in order to have the best possible environmentally friendly, technically and economically feasible option' (page 54 of the abovementioned joint administrative case No. 13136/2017 as per the dockets of the Supreme Administrative Court). In the abovementioned letter of the Minister of Environment and Water, a new alternative route had been discussed, which was not a subject of the evaluation within the Decision of 2008 and the two suggested alternatives are between the Krupnik road junction (RJ) from the 376+000 km. to the 397+000 km. from the Kresna road junction from the conceptual project and they are the following: 1) A long tunnel option – the tunnel option of the route starts at the Krupnik road junction with a motorway section with a D29 gauge and 1.5 km. length and it crosses the Struma River with a bridge installation, after which the route goes through a 15.4 km. long tunnel which is designed with two tubes. At the end of the tunnel, the route again crosses the Struma River with a bridge installation and, immediately after that, the construction of the Krupnik road junction is planned; 2) D20 gauge option – the route starts south from the Krupnik road junction with a road section with a G20 gauge and a length of 0.6 km. and it crosses the Struma River with a bridge installation and at the Kresna Gorge, one of the lanes follows the existing E-79 road and the other goes through tunnels and installations at the western part of the gorge and after it leaves the Kresna Gorge, it goes east from the town of Kresna and ends at the Kresna road junction. At the same time, it is pointed out that the expressed intention to improve the Lot 3.2 route of the Struma Motorway at the section which affects the borders of the Kresna Gorge conservation area is allowed by abiding to the terms of the conservation area, thus both of the options are admissible regarding the BG0002003 'Kresna' Regime for the conservation of the wild birds which is determined by the order for its proclamation.

On the grounds of Art. 39, subparagraph 2 and Art. 16 of the EP Ordinance, an assessment for the likely scale of a negative impact was conducted according to which the Investment Proposal for the 'Improvement of the Lot 3.3 route of the Struma Motorway BG0002003 'Kresna'' bears the possibility have a significant negative impact on the natural habitats, populations and habitats of the species, including the birds, that are subject to the conservation in the abovementioned protected areas. It is given that on the ground of Art. 39. Subparagraph 5 of the EP Ordinance for the Investment Proposal for the 'Improvement of the Lot 3.3 route of the Struma Motorway', a report has to be drafted regarding the impact assessment (IAR), as an annex to the report of the EIA, in accordance with Art. 34 of the EIA Ordinance. On the grounds of a letter of the Minister of the Environment and Waters with



your reference No. OBOC-85/13.05.2015 and in accordance with Art. 10, subparagraph 1 and subparagraph 3 of the EIA Ordinance and Art. 95, subparagraph 2 of the Environmental Protection Act, an initial variant was drafted regarding the Scope and Content Assignment of the EIA of the 'Improvement of the Lot 3.2 of the Struma Motorway' Investment Proposal with No. OBOC-85/24.02.2016 (black binder). Pursuant to the execution of this guidance, an additional assignment of December 2016 was prepared by [company], [town/city], awarded to the RIA, to which an opinion was given via letter with your reference No. OBOC-85/13.01.2017, that all options for the construction of the routes under the Investment Proposal fall within the borders of the protected areas within the meaning of the Biodiversity Act BG0002003 'Kresna' for the conservation of the wild birds, environment and waters and BG0000366 'Kresna – Ilindentsi' for the conservation of natural habitats and the wild flora and fauna and the construction of each one of them is not contrary to the implemented with Order No. ПД-748/24.10.2008 (promulgated, SG 97/2008) BG0002003 'Kresna' regime for a protected area for the conservation of wild birds of the Minister of Environment and Waters and due to the circumstance, that at the Procedure Assignment stage under Chapter Six of the EPA, new construction options were proposed, then it follows for such to be assessed in the EIA and IRA reports. The assessment has to be adapted to the requirements under Art. 23, subparagraph 2 of the EP Ordinance and those that are included in the letter with your reference No. OBOC-85/13.05.2015 of the Minister of the Environment and Waters with which an opinion was given regarding the need for an IRA report and in it, it is explained that the final version of the assignment has to include the notes that are given within the Minister of the Environment and Waters' letter, as well as to provide the results from the carried out consultations in accordance with the obligations under Art. 95, subparagraph 3 of the EPA.

Subsequently, an Amended Scope and Content Assignment of the EIA of the 'Improvement of the Lot 3.2 Route of the Struma Motorway' Investment Proposal of June 2017 was drafted by [company], [town/city] under the award procedure of the Road Infrastructure Agency (Consultations – page 128, annex No. 9 and No. 10 – references for the carried-out consultations with the interested responsible offices, organizations and the affected society from the implementation of the Investment Proposal).

In implementing the requirements set out in the letter with your reference No. OBOC-85/13.01.2017 of the Minister of Environment and Waters, a report regarding the environmental impact assessment was drafted from July 2017 connected to the 'Improvement of the Lot 3.2 Route of the Struma Motorway' Investment Proposal by a team of experts and this report meets competently the requirements under Art. 31, subparagraph 2¹ of the Biodiversity Act and Art. 9, subparagraph 1 of the EP Ordinance and it takes into account the conservation subject of the protected areas and the specifications of the Investment Proposal. The report was drafted on the ground of Art. 31, subparagraphs 1 and 4 of the Biodiversity Act and in accordance with Art. 2, subparagraph 1, p. 1 and Art. 39, subparagraph 5 of the EP Ordinance (second and third blue binders that are enclosed under the case).

In implementing the requirements set out in the letter with your reference No. OBOC-85/13.05.2015 of the Minister of Environment and Waters (Annex No. 1), a report regarding the environmental impact assessment was drafted from July 2017 connected to the 'Improvement of the Lot 3.2 Route of the Struma Motorway' Investment Proposal by a team of independent experts that meets the requirements under Art. 83, subparagraphs 1 and 2 of the EPA. The report was drafted on the grounds of Art. 96, subparagraph 1 of the EPA and Art. 12, subparagraph 1 of the EIA Ordinance.



With a letter with your reference No. OBOC-85/05.07.2017, the competent authority – the Minister of Environment and Waters, accepted that the report regarding the environmental impact assessment connected to the ‘Improvement of the Lot 3.2 Route of the Struma Motorway’ Investment Proposal has been drafted in accordance with the requirements under Art. 96, subparagraph 1 of the EPA and Art. 12, subparagraph 1 of the EIA Ordinance. On the grounds of Art. 14, subparagraph 3, p. 2 of the EIA Ordinance, the quality assessment of the environmental impact assessment report is positive, with shortcomings that are of no significant importance and should be reflected in the final version of the report. On the basis of Art. 24, subparagraph 4 of the EP Ordinance, a negative quality assessment was given to the report regarding the ‘Improvement of the Lot 3.2 Route of the Struma Motorway’ Investment Proposal and on the grounds of Art. 24, subparagraph 6 of the EP Ordinance and Art. 14, subparagraph 10 of the EIA Ordinance, the report was returned to be amended and supplemented with an indication to remedy all shortcomings. In the final version of the report, all shortcomings were remedied and the notes were reflected in accordance with the assessment conducted by the Ministry of the Environment and Waters regarding the report. The amended environmental impact assessment report with the remedied shortcomings regarding the ‘Improvement of the Lot 3.2 Route of the Struma Motorway’ Investment Proposal is enclosed as a separate annex to the final report.

With a letter with our reference No. OBOC-85 of 12.07.2017 as per the dockets of the Ministry of Environment and Waters, engineer D., member of the Board of the RIA, submitted a request for the issue of a decision under the EIA of the IP and the supplemented environmental impact assessment report, the non-technical summary of the environmental impact assessment report, the divisional record (list of the experts and the head of the team that drafted the environmental impact assessment report), a written declaration of the experts for the fact that the report was amended and supplemented to meet the requirements under Art. 83 of the EPA and an electronic means carrying the abovementioned documents were enclosed to it.

In a letter with your reference No. OBOC-85 of 21.07.2017 as per the dockets of the Ministry of Environment and Waters regarding the environmental impact assessment report, it is given that the content of the same one meets the requirements under Art. 96, subparagraph 1 of the EPA and in accordance with Art. 14, subparagraph 3, p. 2 of the EIA Ordinance, the quality assessment of the environmental impact assessment report is positive with shortcomings that are of no significant importance, when it comes to taking a decision under the ERA and the quality of the documentation is evaluated in accordance with the criteria under Art. 14, subparagraph 1 and taking into account Art. 14, subparagraph 2 of the EIA Ordinance. Regarding the environmental impact assessment report, it was established that the same one is structured in accordance with the requirements under Art. 23, subparagraph 2 of the EP Ordinance and on the grounds of Art. 24, subparagraph 5, p. 2 of the EP Ordinance, the quality assessment of the environmental impact assessment report regarding the protected areas BG 0002003 ‘Kresna’ and BG 0000366 ‘Kresna-Ilindentsi’ is positive. The obligations of the IP Contracting Authority are given in the implementing of the requirements under Art. 16, subparagraph 1 of the EIA Ordinance – to organize a joint public discussion of the environmental impact assessment report along with all of the annexes to it, including an environmental impact assessment report regarding the affected parties: the Municipalities of Simitli and Kresna and the city halls of the villages of Zheleznitsa, Krupnik, Gradevo, Polet, Dolna Gradeshnitsa, Cherniche, Brezhani, Rakitina, Mechkul, Slivnitsa, Stara Kresna, Oshtava, Vlahi, Gorna Breznitsa, as well as to present at the Blagoevgrad Regional



Inspectorate for Environment and Waters a copy of the environmental impact assessment report, along with all annexes to it, in which the abovementioned recommendations are reflected, and provide public access to the documentation under the EIA for a period that is not shorter than 30 calendar days before the beginning of the public discussion. It is stated that in accordance with Art. 17, subparagraph 1, p. 3 of the EIA Ordinance, the affected population should be informed in an appropriate way about the upcoming public discussion, including by placing a notice at the location of the Municipality/ City Hall building, for which a protocol is drafted and a copy of it needs to be provided to the Ministry of Environment and Waters. Public discussions were organized in accordance with the requirements under Art. 97, subparagraph 1 and subparagraph 5 of the EPA and Art. 17, subparagraph 1, p. 2 and subparagraph 2 of the EIA Ordinance and in accordance with the abovementioned letter of the Ministry of the Environment and Waters at the Kresna Municipality on 11.09.2017 at 14 o'clock at the municipality building, at the Simitli Municipality during the same date and protocols were enclosed to the administrative record in accordance with Art. Subparagraph 1, p. 3 of the EIA Ordinance with which it is certified that at the information board at the municipalities, notices were placed regarding the conduct of a public discussion in accordance with Annex No. 1 of the EIA Ordinance.

Subsequently to the conducted procedure, the contested decision with No. 3-3/2017 of 19.10.2017 under the EIA of the Minister of Environment and Waters was issued with which the implementation of the 'Improvement of the Lot 3.2 Route of the Struma Motorway under the East G 10.50 variant' Investment Proposal was approved.

Under this factual background, the Supreme Administrative Court sitting with three members, sixth division draws the following legal conclusions:

The claims were submitted within the period under Art. 99, subparagraph 6 of the EPA by individuals that were affected by the stipulated act. In accordance with Art. 99, subparagraph 6 of the EPA, the interested parties have a right to appeal the decision under the EIA and the individuals in such cases are the contracting authorities, as well as those that fall within the meaning of 'affected community' within the meaning of § 1, p.25 in conjunction with p.24 of the additional provisions of the EPA, namely the affected community (one or more individuals or entities and their unions, organizations or groups that were created in accordance with the national legislation) or there is a high likelihood of them being affected or those who have legal interests regarding procedures for the approvals of plans, programs, investment proposals and when taking a decision in regard of the issuing or updating of licenses under the EPA or the license conditions, including the environmental NGOs, created in accordance with the national legislation. The quoted provisions are fully in accordance with the provisions under Art. 2, p. 4 and 5 of the Aarhus Convention. In view of this, there is also a direct interest regarding the contest by [Legal Entity], because as an association – NGO, registered in accordance with the national legislation, whose business is the environmental protection, this claimant, no doubt, fall within the scope of the 'affected community' within the meaning of § 1, p.25 of the provisions of the EPA. Another thing, which also falls in this regard is the provision under Art. 9, § 5, p. 'a' of the Convention on the access to information, public participation in decision-making and access to justice in environmental matters, ratified by a legal act which was accepted by the XXXIX National Assembly on 2 October 2003 (SG 91/2003, in force from 16 March 2004). D.V. also has an interest to contest the decision, first of all, as a resident of one of the affected residential places in order to initiate a judicial scrutiny about the legality of the act that is beneficial to the contract party – its addressee. In this way, V. is protecting their right to a healthy and favorable environment as a resident of

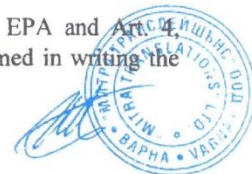


the given place, particularly when it comes to the negative impact on the latter one from factors that are given in Art. 5 of the EPA as pollutants or harmful substances. The other individual – architect, D.D. – as a user of the republican road network, even if they have a different residence, they also fall within the scope of the affected community within the meaning of § 1, p.25 in conjunction with p. 24 of the additional provisions of the EPA, because the investment proposal affects the environmental protection issues. Pursuant to the national legislation and the Aarhus Convention that was ratified by the National Assembly of the Republic of Bulgaria, the presence a direct and indirect interest should also be accepted for this individual under the case, which is connected to the protection of the environment. That is why the current formation deems that the three claimants have a legal interest to contest the administrative procedural act.

Thoroughly examined, the claims are unfounded.

The contested decision under the EIA was taken by the competent authority in accordance with Art. 94, subparagraph 1, p. 5 of the EPA. In accordance with the quoted text, the Minister of Environment and Waters is the competent body to take a decision under the EIA regarding investment proposals that are defined as objects of national importance with a decree of the Council of Ministers. In this case, in accordance with Decision No. 250/25.04.2013 of the Council of Ministers, the Struma Motorway is an object of national importance in accordance with § 5, p. 62 of the additional provisions of the Spatial Development Act. Lot 3.2 of the motorway is part of the Trans-European North-South Motorway and part of the Fourth Trans-European transport corridor and has significant importance for the integration of the national transport infrastructure within the European transport system and with the construction of this lot, the stage of the construction of the whole motorway is concluded and Bulgaria has undertaken the obligation before the European Commission to do this until the end of 2023. At the same time, this is one of the busiest roads that goes through Bulgaria from North to South and the Kresna Gorge section is the part where there are many traffic accidents and injured moto vehicle drivers and with the division of the traffic in separate lanes, the road safety will rise and the number of traffic accidents will be reduced. Due to this, the current formation deems that the Minister of Environment and Waters is the competent body to approve of the implementation of the abovementioned investment proposal. The scrutinized ministry decision was issued in accordance with the format requirements – the act is in written form and contains the requisites that are set out in the provision under Art. 99, subparagraph 3 of the EPA, including motives that represent the founded conclusion of the administrative body regarding the impact on the environment and protected areas that the construction of the approved variant will have, as well as the evaluation under the mandatory reports regarding environmental risk assessment and the evaluation of the environmental impact assessment. In this sense, the administrative act is duly reasoned. Both the decision under the EIA and the written evidences that are enclosed to the administrative record represent factual grounds for the issue of the administrative act and in them, there is the description of the investment proposal, the actions that were carried out for the approval of the procedure and the statements and reports that were result of all of this. The motives presented in the decision give the opportunity to carry out judicial supervision of the legality of the administrative act on the grounds of Art, 146 of the APC, as well as to protect the rights and the legal interests of the affected individuals and organizations.

In accordance with the requirements of Art. 95, subparagraph 1 of the EPA and Art. 4, subparagraph 1 of the EIA Ordinance, the contracting authority has informed in writing the



competent body for their investment intentions and they have provided the relevant documents to the Blagoevgrad Regional Inspectorate for Environment and Waters and within a short period of time afterwards, at the earliest stage of the preparation for the implementation of the investment proposal, they have informed in writing the mayors of the Municipalities of Simitli and Kresna and the city halls of the villages of Zheleznitsa, Krupnik, Gradevo, Poletto, Dolna Gradeshnitsa, Cherniche, Brezhani, Rakitina, Mechkul, Slivnitsa, Stara Kresna, Oshtava, Vlahi, Gorna Breznitsa under Art. 4, subparagraph 2 of the EIA Ordinance. In regard to the investment proposal characteristics and in accordance with Art. 95, subparagraph 3 of the EPA and Art. 9, subparagraph 1 of the EIA Ordinance, the contracting authority chooses the specialized responsible offices and the representatives of the affected community with whom they conduct consultations in regard to the ways set out in Art. 9, subparagraph 3 of the Ordinance. After the evaluation that the investment proposal falls within Annex No. 1, p. 7.2 – construction of motorways and I class roads – to the EPA and a discussion of the provided documentation and performance of the procedure under Chapter Six of the EPA and on the grounds of Art. 31 of the Biodiversity Act, it is deemed that an assessment shall be conducted regarding the compatibility of the investment proposal with the subject and purposes of the environmentally protected areas, as well as an environmental risk assessment.

In suspending the procedural decision under the ERA, no violations of the material provisions were made. The contested decision of the Minister of Environment and Waters is made on the grounds of the submitted documentation for the investment proposal, the provided statements from the competent authorities during the course of the procedure in accordance with the criteria and regulations under Art. 93, subparagraph 4 of the EPA regarding the need to conduct an EIA. The competent body has assessed the need to conduct an EIA and EP by determining the level of importance of the environmental impact on the grounds of the information provided by the competent authority, the criteria under Art. 93, subparagraph 4 of the EPA and the submitted statements of the assistant bodies under Art. 7 of the EIA Ordinance.

The decision of the Minister of the Environment and Waters has also taken into account the purpose of the law which is to protect the components of the environment, human health and the subject and goals of the conservation of the protected areas under the Natura 2000 network. The leading criteria regarding the assessment and the choice of the preferred option was the level of the possible impact on the human health. In this connection, the report on the environmental impact assessment contains a thorough analysis both on the dangers that arise from radiation, as well as on the dangers that arise from seismic activity. The chosen option has the advantage under eight environmental components and factors among which human health is the most important one.

The claimants' objections regarding shortcomings and gaps within the analysis of the documentation and fact that are of importance to the case that lead to the unlawfulness of the decision taken by the Minister of Environment and Waters are unfounded. The decision of the administrative body is grounded on the results from the required opinions of the specialized authorities that thoroughly examine the possible impact of the investment proposal on the different environmental components: soils, air, waters, human health, flora, fauna, etc. and which provides for specific and comprehensive measures in connection to the prevention, reduction and limitation of a possible harmful impact.

The procedure for the issue of the administrative act has also been abided to. The procedure has been set out in Chapter Two of the EIA Ordinance. The joint procedure under the EIA and



the compatibility assessment was conducted by completely abiding to the stages and requirements that are governed by the EP Ordinance and during the preparation of the administrative act the whole documentation and the criteria for determining the level of impact on the environment, including the criteria under Art. 22 of the Compatibility Assessment for the Determination of the Environmental Impact on Protected Areas under Natura 2000 Ordinance were taken into account, as well. The contracting authority has informed in writing the competent authorities – the Ministry of Environment and Waters and the Regional Inspectorate for Environment and Waters about their investment proposal at the earliest possible stage by submitting the IP. Along with notifying the competent authorities, the contracting authority has informed in writing the mayors of the respective city halls and the affected community, as well, by publishing the IP on their website and placing it on the notice boards of the municipalities. The information contains data about the contracting authority, summary of the circumstances, information regarding other existing and approved development or other types of plans within the scope of the subject of the IP, etc. On the grounds of Art. 4a of the EIA Ordinance, the notice was also sent to the Head of the respective Basin Directorate for an opinion under Art. 155, subparagraph 1, p. 23 of the Waters Act regarding the admissibility of the investment proposal in connection to the regimes that are set out in the established plans for the management of the river basins and the flood risk-management plans. The competent authority has informed in writing the contracting authority for the necessary actions that have to be taken under Chapter Six of the EPA.

The statements of the claimant, architect, D.D., for the fact that there is a shortcoming in the mileage of the investment proposal are also unfounded. It should be noted, that given the linear nature of the roads, different mileages can be a result from the different design stages when specifying one or another road element (radius, parameter, tangent length, etc.). In view of this, very often the concept of the identity of the kilometric positions is introduced during the project development, which is identified with a sign (Pages 2, 4, 5, 10, 11, 16 and others of Decision No. 3-3/2017). It is also evident from the report under the EIA that is enclosed to the administrative record that such an “adjustment” of the kilometers is explicitly mentioned. The mileage of the ‘East G 10.50 variant’ is the following: 1) right lane from 373+300 project km. (this is the project mileage under the Lot 3.1 Struma Motorway Project) to 400+371.81 km. (under the ‘East G 10.50 variant’ mileage) = 397+000 (under the Lot 3.3 Struma Motorway Project); 2) left lane from 373+300 project km. (this is the project mileage under the Lot 3.1 Struma Motorway Project) to 400+371.81 km. (under the ‘East G 10.50 variant’ mileage) = 397+000 (under the Lot 3.3 Struma Motorway Project). Detailed information regarding the mileage of the ‘East G 10.50 variant’, including in relation to the location of all facilities along the route, is contained, apart from p. III of the Decision under the environmental risk assessment No. 3-3/2017, in the report under the EIA that is enclosed to the administrative record under this case. An integral part of the same one are road maps for each of the options that are examined under the EIA report.

The statement of architect, D., can also not be left out, that the road has the characteristics of a second class one, as the East G 10.50 variant’ provides for a division of the traffic into two separated by a long distance lane such as: 1) The right lane for the conduct of one-way movement from Sofia to Kulata uses entirely an existing 1-1 first class road. Restoration and strengthening will be provided for road 1-1 and immediately before the town of Kresna.



eastern bypass is planned going through a new terrain; 2) The left lane is for the conduct of one-way movement from Kulata to Sofia and will be developed on an entirely new terrain and it is situated east of the existing 1-1 first class road, outside of the Kresna Gorge. The two lanes of the existing 1-1 first class road (E79) shall be used for one-way movement from Sofia to Kulata and they shall constitute one of the lanes of the Lot 3.2 Struma Motorway. Due to the heavy terrain conditions and according to the prepared pre-investment study, the gauge on the left lane of the Lot 3.2 Struma Motor is determined to be D10.50 with the design speed = 80 km / h. The movement will be one-way, with the two lanes providing the passing of the motor vehicles in the direction from Kulata to Sofia. Namely, in accordance with the provisions for the designing of roads to increase the throughput and speed of passenger cars in the sections with a long longitudinal slope, the construction of an additional road lane is provided. With the construction of the additional third lane, the road safe is increase as all slow moving motor vehicles will be moving along it. The claimant did not take into account the fact that the D 10.50 gauge is for the lane going into one of the directions and not the total gauge of the road. In this sense, the opinion of architect, D., that a second class road is being built in this case is unfounded.

His statement that the 'East G 10. 50 variant' is unsustainable in transport, ecologic and financial terms is also unfounded, as the same one is not supported by specific evidence, despite the court's explicit guidance that were defined during the course of the case of 29.11.2017, that the claimants bear the burden of proof regarding the facts and circumstances, stated by them.

D. also unfoundedly states that there is no award procedure regarding the improvement of Lot 3.2 of the Struma Motorway due to the circumstance that the procedure for the issuing of a decision under the EIA is clearly set out in Chapter VI, Section III of the EPA. In this connection, in accordance with the act, the contracting authority of the investment proposal is the Road Infrastructure Agency and this circumstance was not contested under the case and it is absolutely explained and the RIA is the lawful successor of the NCSIP.

Regarding the objection in connection to the possible issue of an order for the approval of the drafting of a detailed development plan – plot plan (DDP-PP) before a decision under the ERA, it has to be noted, that on the grounds of Art. 124a, subparagraph 4 of the Spatial Development Act, an order for a license for the drafting of a detailed development plan – plot plan for republican roads and national objects is issued by the Ministry of Regional Development and Public Works. And both the license request and order itself are not provisionally bound under a previous rule under the EPA. Despite the abovementioned, the competent authority to issue the license - the Ministry of Regional Development and Public Works can reject tissue the requested license, if it deems that are prerequisites for this. The request for conducting a procedure under a detailed development plan cannot be related to the lawfulness of a procedure under the EPA, that is allowed under Art. 91, subparagraph 2 of the



EPA, that represent to separate and independent administrative proceedings and one of them is concluded with an administrative act (order for the approval of a DDP-PP), that is subject to a separate appeal and issued by another administrative body – the Minister of Development and Public Works.

Regarding the submitted dissented opinion of engineer, D.I., member of the Supreme Environmental Expert Council, it has to be noted that the functions of the SEEC are set out in the Functions, Obligations and Formation of the Supreme Environmental Expert Council Regulations (Regulations) to the Minister of Environment and Waters, promulgated by SG 19/13.03.2015. The SEEC Regulations were amended with Order No. ПД-650/10.10.2017 of the Minister of Environment and Waters. Not taking into account the dissent opinion of a member of the SEEC clearly cannot represent a violation of the procedure for the approval of decision No. 3-3/2017 under an EIA of the Minister of Environment and Waters.

The statement regarding a violation due to the fact that no conceptual project has been developed for all options is also unfounded, as the design stage of each of the options is evident from the consented decision, in which it is noted that during the examination of the relevant option (p. I-V), the design stage is also noted as well as the year of the project/study. There is no regulatory requirement for the design stage to which the option, that is examined in the decision under the EIA, belongs. In Art. 4, subparagraph 1 of the EIA Ordinance it is set out that the contracting authority is obliged to inform in writing the competent authorities at the earliest stage of the IP. The requirements to the content of the information that is provided on the grounds of it are under Art. 4, subparagraph 3 of the EIA Ordinance, namely, the data that has to be contained regarding each option and that are used for its evaluation due to which the design stage of the relevant option is deemed to be irrelevant.

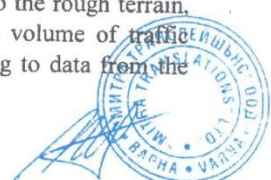
The statements in relation to the award of the pre-investment study are also unfounded, as this procedure is not part under this of the EIA, but part of the development procedures. The obligation of the contracting authority in accordance with Art. 4, subparagraph 1 of the EIA Ordinance is to inform in writing the competent authorities – the Ministry of Environment and Waters/ Regional Inspectorate for Environment and Waters at the earliest possible stage for their investment proposal. The requirement to the information content that the contracting authority has to provide to the competent body, in this case – the Ministry of Environment and Waters, is also provided under Art. 4, subparagraph 3 of the EIA and such one was submitted in accordance with these requirements.

Regarding the appeal by the [Legal Entity] and D.V. the present court panel believes that it also appears to be unfounded. The Process administrative act is legitimate. It was developed by a competent authority pursuant to Art. 94, para. 1, item 5 from the Environmental Protection Act (EPA) for it concerns investment proposal, classified as a site of national and strategic importance under § 1, item 76 from the additional provisions of EPA. The Struma Motorway, Lot 3, is included in the initial list of projects in the document “Integrated Transport System in the period until 2030”, approved with Decision No. 336/23.06.2017 by



the Council of Ministers, for the design and construction under Operative Programme Transport and Transport Infrastructure 2014-2020, as the project implementation would contribute to the fulfillment of objectives, defined in the Strategy. Although the regulatory requirements under Art. 94, para. 1, item 5 from EPA are thereby depleted, in this case there are a number of other arguments which determine the strategic importance of the site. Through the territory of the Republic of Bulgaria pass five of Pan-European transport corridors – IV, VII, VIII, IX and X from the Trans-European Transport Network, which aims at improving the economic and social convergence of the countries in Europe. Lot 3.2. of Struma Motorway is part of the Trans-European motorway North-South and part of IV Orient/East-Med Trans-European transport corridor. By implementing the project Improving the route of Lot 3.2 of Struma Motorway, the entire building of Struma Motorway shall be executed, which will be the next important step in the integration of the National transport infrastructure in the European transport system. The motorway will introduce a significant improvement into the road network of South-East Europe and will provide conditions for a stronger cooperation between the countries in the southern part of the Balkans. It offers the shortest route between the waterway of the Danube river and the Aegean Sea, and plays an important role for connecting the countries from the Visegrad Four group, Romania and Bulgaria, respectively the Baltic Sea, the Black Sea and the Aegean Sea. This international route is the busiest route crossing Bulgaria in the direction North-South. The route is part of the priority project 7 of the EU for developing the Trans-European transport network, including Motorway axis Igoumenitsa/Patras-Athens-Sofia-Budapest. The route section also connects six of the biggest cities in the Western part of our country – Vidin, Montana, Vratsa, Sofia, Pernik and Blagoevgrad.

Struma Motorway is divided to four lots: Lot 1, from Dolna Dikanya to Dupnitsa; Lot 2, from Dupnitsa to Blagoevgrad; Lot 3, from Blagoevgrad to Sandanski; Lot 4, from Sandanski to Greek border at Kulata. Lots 1, 2 and 4 of Struma Motorway were developed under Operative Programme Transport 2007-2013. These were launched in the period 2013-2015. Most of the motorway is ready, however the most challenging section – Lot 3 is yet to be built. The route of Lot 3 is located in the ecologically sensitive part of the region. In most of the route the branch runs along the banks of the Struma river and the plot line which includes the current E79 road and the railroad Sofia-Kulata. The project is further complicated by the complex physical-geographic features of the region (landslides, collapses, narrow gorge), major fracture zone and high seismic risk. Lot 3.2, between Krupnik and Kresna, is a section with an approximate length of 24 km and is subject to the procedures within the Environmental risk assessment (ERA) and the Compatibility assessment is from km 373+300 to km 397+000. In the course of searching for the most suitable and appropriate solution for Lot 3.2 both from ecological and technical point of view, various alternatives were developed: eastern alternative G10.50 and eastern alternative G20 which affect a section of approximately three kilometers at the end of the Struma river, Lot 3.1 (from km 373+300 to km 376+000). The implementation of the project for the Struma Motorway, Lot 3.2 has an important state and public significance. The main ground for the entire building of the Struma Motorway was derived from the necessity to modernize and align the road infrastructure with the requirements of the European regulations for the relevant grade of roads. It is expected that building a new route would reduce the number of traffic accidents. Due to the rough terrain, intense traffic and the significant number of trucks using the road, the volume of traffic accidents is extremely high in the region of the Kresna Gorge. According to data from the



Traffic Police, on the 62 km section from Blagoevgrad to Sandanski, there were almost 900 accidents with 300 injured and over 50 dead for the period of 2012-2016. For the same period, only for the sub-section of the Kresna Gorge there were 270 accidents with 25 victims and 119 injured. This indicates an average of 5 dead people per year only for the Kresna Gorge. Another major issue is that the existing road passes through the city of Kresna, which increases the chance for traffic accidents, the risk for the local population, and the exposure to noise and air pollution. Lot 3 of the Struma Motorway is the main road priority of Operative Programme Transport and Transport Infrastructure 2014-2020. The statement that the process decision is insignificant due to unlawful resuming and reviewing of a decision entered into force in 2008 under ERA, is also ungrounded, and is based on a legal-technical blending of two radically different legal institutes, the institute of resuming the proceedings under Art. 99 from the Administrative Procedural Code (APC) (which the petitioner trustee considers), and the legal institute of modifying the investment proposal under Art. 8 from Appendix No. 1 of EPA (as per the revision applicable in the case). The legislation on the environmental protection does not prohibit the contractor of the IP to change the IP due to the serious challenges which complicate the project implementation and exploitation of the site in the future, incl. the extremely high and energy consuming expenses for exploitation and maintenance which were not investigated in a decision under EPA 1-1/2008. The Environmental Protection Act is unique in this respect regarding the general rules of the APC and explicitly envisages the possibility for modifying and enhancing a certain investment proposal. Apart from the fact that EPA doesn't contain a ban on changing approved and decisions on investment proposals enforced under the environmental risk assessment, it even implies the obligation for a timely informing the competent environmental authorities of a change in the parameters of a given approved investment proposal. This is made for the purpose of assessing the manner for handling the relevant amendment. In this regard, we cannot share the reference to the fact that for the same investment proposal there has already been an approved report for the environmental risk assessment with a decision under EIA No. 1-1/2008 by the Minister of Environment and Water; as the same contains multiple recommendations for improvement of the route during the next project stages of exploration and design. One of the conditions set for the design phase (section 3.2 from the decision) requires that along with the development of a variant for the tunnel alternative, other ways should be sought for its improvement and to accomplish the best possible ecologically eligible, technically realizable and economically suitable alternative. The procedure which started under Chapter six, Section three from EPA with filing of notice for IP for "Improvement of the route of Lot 3.2 of the Struma Motorway", in particular execution of the condition under section 3.2 from the decision under EIA from 2008, as with the notice there was presented a variant for a project of "Long Tunnel Alternative" which was approved in comparison to the one approved with the decision under EIA from 2008. Upon reaching and enforcing the decision under EIA No. 1-1/2008, the development of the project for "Long Tunnel Alternative" has been initiated. Along with other executed activities, there were also geological expert opinions by [Legal Entity] (LE), Bulgarian seismologists and international experts. These papers show serious doubts towards the building a too long tunnel in the gorge, as great construction challenges are expected and exploitation risks as well, including significant seismic and general geological risk. Large areas of land are required for landfilling the earth and rock masses – the expected volume of excavated rock material will be of huge amounts. Experts identified the need for a minimum of three access points for boring the tunnel in order to dig the tunnel within the programme duration, which would create even



heavier traffic problems related to the safe driving of heavy duty machine equipment on the existing E79 road (101), passing through the Kresna Gorge. The opinion from January 2015 of Assoc. Prof. N.D., department [name], [name] institution of the [LE], expressed on the occasion of an inquiry by the National company Strategic Infrastructure Projects regarding geological conditions in the region of the Kresna Gorge (provided by the Ministry of Environment and Water with a request dated 15.02.2018, section 11), states that building a tunnel of 15 km in length will lead to numerous problems in terms of construction and exploitation due to the fact the tunnel crosses many fracture zones. The tunnel crossing these zone is associated with risks of destruction of rock blocks, mud streams, creation of water streams with a high flow rate, increase of the concentrations of Radon in the tunnel. According to the opinion, these fracture-related phenomenon may endanger life and health of people and cause irreversible damages to the facility. The case of Oranovo mine from 2013 was brought as an example; then, damaged rock masses and mud streams were of great volume, which practically did not allow for their pick up. The rock massive has very bad indicators for a high level of risk from sudden tearing off of unstable rock blocks during construction and exploitation. Breakdowns, caused by collapsing, mud streams, seismic phenomenon would be quite probable in a long tunnel like this, due to the intersection of many more risky sections. During sudden tearing off, shifting by seismic activities and mud streams in a long tunnel, rescue operations and repairs would be hard and hazardous, and the chance of large number of victims is quite high.

The expert opinion from December 2014 regarding the seismic activity based on seismic-tectonic characteristics for Lot 3.2, the branch Krupnik – Kresna, Struma Motorway, prepared by the request of the National company Strategic Infrastructure Projects by Prof. S. Sh., chairman of [LE] and a former head of Department [name] of [name] institution at the [LE] (provided by the Ministry of Environment and Water with a request from 15.02.2018, section 5), indicated that motorway route Lot 3.2 is located in one of the regions with the highest seismic activity on the Balkan peninsular. Data from existing active fractures were analyzed, and these fractures affect directly and indirectly the future facilities on the motorway. With active fractures there is a cycle energy discharge related to earthquakes with a magnitude above 5.5. There could be tearing offs which could reach the earth surface and affect directly the motorway structure. Both horizontal and vertical shifts of the earth blocks, which in the long-run might cause deformation of the facilities in the points of their intersections caused by active fractures (section 2.2 from the expert opinion). The route alternatives (as of December 2014 these include a long tunnel alternative and an alternative with dimensions of G20 – blue) are entirely within the seismic zone of the Kresna Gorge and intersect main active structures which have in the past generated strong earthquakes. Impact of active fractures on the facilities will appear as direct deformations or dynamic effects – seismic accelerations (section 4) from the expert opinion. The analysis shows that the area is under the influence of tectonic extension with a main direction North-South while active fractures structures of disjoint appearance intersect almost orthogonally from the motorway route. In addition, another hazardous factor was analyzed in section 5 from the expert opinion – emission from the radioactive element Radon from the active fractures and their segments. Radon emission is another negative factor against the safe exploitation with the tunnel alternative of the motorway. The concentration of Radon in closed spaces may reach dangerous levels for human health. Evidences from measures conducted in the middle of the seismic station at the village of Krupnik were presented. The conclusion of section 7 from the expert opinion is as



stated that more favorable would be any alternative which will avoid building long underground tunnels for the motorway section of Lot 3.2 Krupnik-Kresna.

The report Analysis and assessment of natural radioactive materials on the terrain of Struma Motorway, Lot 3.2 from September 2015, prepared by Assoc. Prof. K. A. and Engineer L. B. [company name] under the assignment of [LE] (provided by the Ministry of Environment and Water with a request dated 15.02.2018, section 6), it is indicated that there is a bed of Uranium and increased concentration of radio nucleotides in the region of the Kresna Gorge. In section 6 from the analysis, a conclusion says that in case of boring a long tunnel in the section of Struma Motorway, Lot 3.2, underground diggings around the two tubes would pass through zones with increased levels of Uranium and Radium. The volume of the dug rock masses from the two tubes would be more than 6,000,000 m³, while natural nucleotides would bring serious hazards during the construction of a long tunnel with two tubes. The rock masses dug need to be picked up and brought to special drained depots, and the water from them need to be purified because of the radio nucleotides. The depots will have to be covered with natural or artificial anti-filtrating barriers, which will significantly increase the expenses for building a long tunnel. In conclusion, building a long tunnel with two tubes is definitely not recommended.

In the opinion from September 2015 to the National Company Strategic Infrastructure Projects (NCSIP) by Prof. Dr. A. B., head of department [name], [name] institute of [LE] (provided by the Ministry of Environment and Water with a request dated 15.02.2018, section 7), it was stated that Kresna tunnel is characterized by a relatively high water abundance, respectively with an expected significant water stream, distributed irregularly along the length of the tunnel. When reaching the water abundant zone, it may also contain an extremely large water stream. The risk will be increased if the fracture is linked to a river valley on the surface. Then, the fracture zone will turn into an easy and fast way for the water to run from the surface towards the structure. Any other alternatives for the long tunnel will significantly reduce the risks of larger water streams.

In response to the opinion prepared by Assoc. prof. I. B. (provided by the Ministry of Environment and Water with a request dated 15.02.2018, section 8), it is stated that a future large-scale tunnel construction will encounter and cause a series of hazards in terms of natural radiation as a result of Uranium accumulations and gas manifestations of Radon, especially at the point of contact with the fracture zones and tectonic dislocations.

The administrative procedural rules were adhered to during the procedure for issuing the appealed administrative act. The cumulative effect from the railway construction and the realization of Lot 3.1 and Lot 3.3 was considered and indicated in the EIA (page 772+828) and ERA (pages 62-70 and 486-526), attached to the administrative file. The procedure under chapter five from the Ordinance for EIA on the organization of a public discussion of the report for EIA was followed. Each alternative was discussed, and as a result of the conducted consultations with specialized institutional bodies and the public, the construction assignment is realized/enhanced – apart from alternatives Long Tunnel Alternative, G20-blue and G-20 – red; they were included to the construction assignment both Eastern Alternative G 10.5, and Eastern Alternative G20, as these five alternatives were proposed by the contractor, taking into account: Decision No. 1-1/2018 by the Ministry of Environment and Water, recommendation No. 98 (2002) by the Standing Committee of the Bern Convention, the



provided instructions by the competent environmental authority, the results from the conducted Monitoring, analysis and assessment of the death of animal species in the section of the E-79 road (1-), passing through protected areas "Kresna" and "Kresna-Ilindentsi" from the period 2012-2016 (assigned by NCSIP – being the contractor at the time), the results from the conducted consultations on the assignment for scope and content of EIA, within which it was proposed that there must be reviewed an alternative outside the Kresna Gorge, as well as the commentaries received by the General Directorate Environment during the regular consultations. As a result of the analyses and the conclusions in the report for EIA and the report regarding the environmental and health impact assessment "Eastern Alternative G10.50" is preferred rather than a Long Tunnel Alternative since it provides a balance between ecological eligibility, economic effectiveness and technical implementation. With a Decision under EIA No. 3-3/2017 by the Minister of Environment and Water approving IP realization, sets forth the compulsory obligations (terms and conditions, and measures) for ARI to abide to at all stages of the project realization – design, construction and exploitation. Pursuant to Art. 22, para. 3 from the Ordinance for EIA the control for execution of the terms and conditions and measures in the abovementioned decision under EIA is given to the Directors of Regional Inspectorate of Environment and Water – Blagoevgrad and Basin Directorate [name of region].

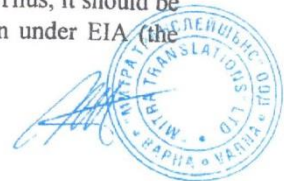
In the procedure during 2017 the alternative of a NGO was also explored; it was prepared by [company name] in 2002 and was assessed in the procedure under EIA in 2017, however it was rejected as being unacceptable, which was stated in the issued Decision 1-1/2018 by the Ministry of Environment and Water. The arguments are set out in the report regarding the environmental assessment from 2007 and are related to the fact that this alternative did not meet the requirements of Art. 6(4) from Directive 92/43/EEC because for some species, subject to preservation in the protected habitats area BG0000366 Kresna-Ilindentsi, there would be significant negative impacts regardless of the possible measures for mitigation; therefore, applying compensatory measures would be required under Art. 6, para. 4 from the Directive. Meanwhile, a conclusion was drawn that adherence to Art. 33 from the Biological Diversity Act, respectively to Art. 6.4 from the Directive 92/43/EEC, was not required as far as there would be no executable alternatives allowing to avoid significant impacts on the protected areas while adhering to the compulsory measures for reducing these impacts.

Within the procedure, all alternatives were equally reviewed, and the cumulative effect was assessed. During public discussion legislation requirements were followed by ensuring access to the required documentation and materials. At the discussion of the report regarding the assessment of the environmental impact, the contractor and a team of independent experts under EIA and the Compatibility assessment gave their complete and substantiated responses to all questions by the public, and a written reference to all opinion were presented which also contains complete and substantiated response to each question and opinion, including as regards the newly proposed route alternative, for which the contractor expressed and supported a negative opinion based also on deliberate consultation with [company name]. In this context, the statements that the process act constitutes an approved alternative in comparison to other alternatives for example the long tunnel one, has proofed more harmful impact, are unsubstantiated. Moreover, taking into account the detailed justification in the administrative act for lack of significant harmful effect from the realization of the approved investment proposal and the lack of significant negative impact.



Some of the main objections by the appellants were connected to the scope of rehabilitation of the right road lane of Eastern Alternative G10.50 and the scope of the route Eastern Alternative G20. As for the statement that the proposed mitigation measures for the right road lane of Eastern Alternative G 10.50 would not be defective, we should state that on the grounds of the mitigation measures proposed by the experts who prepared the report for the environmental impact assessment, certified engineers have developed projects for technically executable facilities which aim at reducing/eliminating the negative impacts from the exploitation of Lot 3.2 of the Struma Motorway (as per the project Eastern Alternative G10.50, pre-investment research, 2016) for the sections which coincide with the existing E-79 road. These impacts are identified in the report for EIA and the report on the environmental impact assessment, as being significant regarding types of reptiles subject to protection in endangered areas BG0000366 Kresna-Illindentsi – Common tortoise (*Testudo graeca*), Hermann's Tortoise (*Testudo hermanni*), Four-lined snake (*Elaphe quatuorlineata*) and European ratsnake (*Elaphe situla*), as well as amphibians and reptiles with a higher natural protection status (included in Addendum 3 of the Biological Diversity Act and/or the Bulgarian Red Data Book) which are not subject to protection in the endangered areas (*Pelobates syriacus*, *Bufo*, *Bufo viridis*, *Telescopus*, etc.). Identified are the following impacts: higher death rate during the exploitation of the right road lane from Eastern Alternative G10.50 due to over run on the road and the barrier effect.

The combination of these two impacts may lead to functional fragmentation of the populations for the abovementioned species, which in turn would cause negative impact on the indicators for the formed two sub-populations (to the west and to the east from the route) of the species which are restricted in their habitat to the lowest parts of the gorge. Prevention/reduction of these impacts may be executed by the realization of two types of measures: fence facilities, restricting the entrance of animals on the road, respectively reducing death of animals from these species; and passage facilities, allowing for the animals to pass under the road construction body. The assessment on the effectiveness of these mitigating measures in the report for environmental impact assessment shows that the combination of guarding and passage facilities would eliminate the death hazard and reduce the barrier effect for the species Common tortoise (*Testudo graeca*), Hermann's Tortoise (*Testudo hermanni*), Four-lined snake (*Elaphe quatuorlineata*) and European ratsnake (*Elaphe situla*), as well as amphibians, reptiles and small mammals, including those subject to preservation in the protected area BG0000366 Kresna-Illindentsi. In addition, in 2017 the contractor asked a Greek consultation company to prepare additional assessment and come up with measures for reducing the negative impact on reptiles and amphibians in the Kresna Gorge. The results from the assessment within the prepared document Assessment and deducing of the negative impact on the reptiles and amphibians in the Kresna Gorge for the alternatives of the Struma Motorway (Lot 3.2) show that the most successful scenario for improving the current situation would be Eastern Alternative G10.50 by applying mitigating measures; as in the long-run it is expected that the negative impact on affected reptile species around the right road lane of Eastern Alternative G10.50 would be minimized in terms of habitat fragmentation and death in comparison to the present situation. The conclusions confirm that the positive impact from the measures is closely connected to the proper implementation and regular maintenance of the network of facilities for fence restrictions/defragmentation and it requires monitoring of their exploitation. Thus, it should be pointed out that this report has been an integral part of the documentation under EIA (the



report on environmental impact assessment with all addendums), and has been publicly available on the web page of ARI and is now part of the documentation provided for public discussion and reaching a decision under ERA.

In the decision under EIA No. 3-3/2017 by the Ministry of Environment and Water the following compulsory condition was included: in order to assess the actual effectiveness of the planned defragmentation and fence restricting measures on the right road lane, during all phases there should be monitoring of the populations of the two terrestrial types of tortoises and the two types of snakes subject to protection in the area, around the right road lane (the existing road). Monitoring should start in the Spring of 2018 and shall continue for at least 5 years upon commissioning the road lane. The monitoring should allow tracking the population trends of the targeted species and the isolation rate (or the lack of such isolation) of the sub-populations, to the west and to the east from the right road lane, and provide opportunities for assessing the real effectiveness of the planned defragmentation and restricting fence facilities. The effectiveness of the applied measures shall be assessed annually (within the monitoring period) after the second year from commissioning the right road lane. In case of proven effectiveness the road agency shall undertake corrective measures or alternatives.

The appellants' statement that the experts who prepared the report on the environmental impact assessment, do not meet the requirements provided in Art. 83, from the Environmental Protection Act, and the lack of conflict of interest, is also unsubstantiated because the requirements under Art. 11, para. 4 from the Ordinance for ERA, based on the reference in Art. 83, para. 4, item 2 from EPA were followed. In accordance with the provisions of Art. 11, para. 4 from the Ordinance, the report on EIA shall be prepared by a team of experts with a team leader, and each of the team members shall present individual declaration. In para. 5 of the same article it is indicated which cases meet the condition under item 3, namely that the relevant expert is not personally interested by the investment proposal realization by certifying with a signed in its own writing declaration, such as those attached to the documentation on the case in accordance to the requirements of Art. 83, para 4., from EPA and Art. 11 from the Ordinance on ERA.

Given the above, the court accepts that the appealed decision of the Minister of Environment and Water was issued by the competent authority, in the appropriate manner, while adhering to the administrative-procedural rules and the legal provisions, in accordance with the purpose of the legislation; thus there are no grounds for this decision to be revoked.

Substantiated on these grounds and pursuant to Art. 172, para. 2, last proposal by the APC, the Supreme Administrative Court, six panel,

DECIDED:

to REVOKE the appeal of D. G. D., Personal No. [Personal No.], and the appeal of the [Legal Entity], UIC [UIC], and D. V. D., Personal No. [Personal No.] against Decision No. 3-3/2017 from 19.10.2017 regarding the environmental impact assessment by the Minister of Environment and Water, which approved the implementation of an investment proposal for



Improving the route of Lot 3.2 of the Struma Motorway, as per the Eastern Alternative G10.50.

The decision is final and is not subject to appeal.

I, the undersigned Plamena Ivanova Krasteva do hereby certify that this is a true and correct translation I have made from Bulgarian into English of the document attached hereto. The translation includes 19 /nineteen/ pages.

Translator: Plamena Ivanova Krasteva,



- March 2018 -



REPUBLIC OF BULGARIA

MINISTRY OF ENVIRONMENT AND WATER

**COMPLAINT NO. 2001/4 AND RECOMMENDATION NO. 98 (2002) ON THE
PROJECT TO BUILD A MOTORWAY THROUGH THE KRESNA GORGE (BULGARIA)
(STRUMA MOTORWAY LOT 3.2)**

PROGRESS SINCE DECEMBER 2017

26 February 2018

1. Introduction

The Struma Motorway project has been monitored by the Bureau and Standing Committee of the Bern Convention for years and as part of this process Recommendation No. 98 (2002) has been issued. Following a complaint from local NGOs, the progress of the project has been reported at the 35th, 36th and 37th Meetings of the Standing Committee, and reviewed at meetings of the Bureau in 2015, 2016 and 2017.

This report summarises the progress of the environmental procedures and project preparation since December 2018. At its 37th meeting the Standing Committee decided to leave the file as a possible file in the light of the pending national court appeal of the EIA/AA and the pending submission of an application package to the European Commission for the funding of the Lot 3.2 construction of Struma Motorway.

In this regard, and given the upcoming Bureau meeting, to be held on 19 March 2018, we provide you up-to-date information about the progress of this case.

2. Project Summary

Struma Motorway is an important road link connecting the capital of Bulgaria, Sofia, and Greece. The largest part of the motorway has been constructed but the most difficult section through the environmentally sensitive Kresna Gorge remains unconstructed. It is called Lot 3 of Struma Motorway and is the main priority of Operational Programme Transport and Transport Infrastructure 2014-2020.

There is an existing road (E-79) in the direction of Struma Motorway that passes Kresna Gorge for about 20 km. The gorge hosts two Natura 2000 sites, as well as a number of national protected areas. Due to the difficult terrain and the high volume of heavy goods vehicles using the existing road there is a very high rate of traffic accidents in the gorge area. The road also passes through Kresna town which increases the exposure of the population to accidents, noise and pollution. The accidents in Kresna town are also a serious issue demanding solution.

There has been an EIA procedure carried out in 2007 and a new formal EIA procedure has commenced in 2014 and was completed and approved in 2017 with EIA Decision No 3-3 / 19.10.2017 of the Minister of Environment and Water for approval of the investment proposal for "Improvement of Lot 3.2 of the Struma Motorway option D 10.50 ".

3. Developments

1. Decision No 3-3 / 19.10.2017 of the Minister of Environment and Waste was appealed in the Supreme Administrative Court and the Court has ruled. administrative case No 13132/2017. The complainants are the Association for the Earth - Access to Justice, represented by Dimitar Vassilev and architect Dimitar Dimitrov.

The hearing was held on 19.02.2018, and during the session the lawyer of the complainants was requested to provide evidences for the case. They were partially accepted by the court. In this regard the court ordered the MOEW to submit the '2007 Appropriate Assessment Report' and the 'Geotechnical Report', quoted in the EIA Report 2017 year. The case was postponed to 02.04.2018.

2. In the last quarter of 2017 a selection procedure was carried out for the contractor for "Preparation of Application Form for Financing the Struma Motorway Project, Lot 3.2". In January 2018 the Chairman of the Management Board of the Road Infrastructure Agency issued a decision for the selection of a contractor for preparation of the draft Application Form. The contract with the selected consultant is expected to be signed by the end of February.

The Application Form should be prepared by May 2018 for submission for review by Jaspers and the management authority of the Operational program 'Transport and transport infrastructure'.