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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE  
AND NATURAL HABITATS

**Standing Committee**

36<sup>th</sup> meeting  
Strasbourg, 15-18 November 2016

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**File open**

**Wind farms in Balchik and Kaliakra  
–Via Pontica (Bulgaria)**

**- REPORT BY THE NGO -**

*Document prepared by  
the Bulgarian Society for the Protection of Birds / BirdLife Bulgaria*

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**WINDFARMS IN BALCHIK AND KALIAKRA – VIA PONTICA (BULGARIA)  
FOLLOW-UP OF THE NGO`S REPORT**

Document prepared by  
the Bulgarian Society for the Protection of Birds / BirdLife Bulgaria),

- October 2016 -



Изх.№ 145/20.10.2016 г.

**To: Doc. Dr Ivan N. Ivanov  
Chairman  
Commission for Energy and Water  
Regulation  
Sofia**

**Copy: Ivelina Vasileva  
Minister of environment and water**

**Temenuzhka Petkova  
Minister of energy**

**Daniel Mitov  
Minister of Foreign Affairs**

**European Commission  
DG "Environment"**

**European Commission  
DG "Energy"**

**Council of Europe  
Bern Convention Secretariat**

**Regarding: Application ent. № E-3JP-ПД-14/4.4.2016 by „Kaliakra Wind Power” Corp. to extend the license for electricity production and the decision of the European Court of Justice on the Case C-141/14 („Kaliakra”)**

Dear Mr President,

The Bulgarian Society of the Protection of Birds(BSPB), partner of BirdLife International in Bulgaria, is one of the leading environmental organizations in the country, registered for public benefit and working professionally for conservation and sustainable use of natural resources. More than 20 years we have been working purposefully for the conservation of endangered bird species and their habitats for strict compliance and full implementation of environmental legislation and international treaties by which to ensure the conservation and sustainable environmentally sound development of our society.

From the website of the Commission for Energy and Water Regulation (CEWR) we learned that on 4.4.2016 "Kaliakra Wind Power" Corp. submitted to CEWR an application ent. № E-MPA-PD-14 JSC with request to extend the license for electricity production. From the Report of the department "Electrical power system" and the department "Legal", as well as from the minutes of the public meeting of CEWR held on 21.7.2016 we have learned that questions were raised about the reasons why the investor "Kaliakra Wind Power" Corp. wishes to continue the aforementioned license 11 years before the expiry of its term. A number of economic reasons are also highlighted why the Committee did not find it appropriate to extend the license in question at the meeting on 21.7.2016, therefore it is scheduled later meeting on 08.18.2016. We do not know what decision the regulator has taken at this last meeting.

From the Report of the department "Electrical power system" and the department "Legal", as well as from the minutes of the public meeting of CEWR held on 21.7.2016 we understood that probably you are not informed about the **JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE (ECJ) ON THE CASE C-141/14 („KALIAKRA”)** and the burdens and consequences that it imposes on the wind farm of "Kaliakra Wind Power" Corp.

It is not in our competence to express opinion on economic considerations CEWR and economic data presented by the investor at the meeting on 21.7.2016, but we wish to draw your attention to enforceable **JUDGMENT OF THE ECJ IN CASE C-141/14 ("KALIAKRA ")**, which directly concerns the wind farm of "Kaliakra Wind Power" Corp. The decision of the Court clearly states that "by approving the implementation of the projects ‘Kaliakra Wind Power’, ‘EVN Enertrag Kavarna’ and ‘Vertikal — Petkov & Cie’, and of the ‘Thracian Cliffs Golf & Spa Resort’, in the territory of the special protection areas covering the regions of Kaliakra and Belite Skali respectively, the Republic of Bulgaria has failed to fulfill its obligations under Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora”.

The full text of the judgment is attached hereto and is available on the website of the European Court of Justice. The above cited decision of the ECJ t is the first for Bulgaria, which refers to default of the BG Government on its obligations related to the implementation of the Birds Directive and the Habitats Directive. According to Art. 260 of the EU Treaty Bulgaria is legally obliged to take the necessary measures to comply with the judgment of the Court. From February 2016 and currently Bulgarian government is in talks with the European Commission about measures that our country will take to rectify the situation.

According to the facts presented above is unambiguously clear that wind power park of "Kaliakra Wind Power" Corp. is built in violation of European legal norms, which are in force for Bulgaria. For this reason, the government will have to take appropriate measures, which could include stopping and dismantling facilities. The application of "Kaliakra Wind Power" Corp. is submitted to CEWR very soon after the judgment of ECJ. So we have reason to suppose that it is possible that the investor seeks an extension of his license right now, long before the deadline as insurance against future acts of government to implement the judgment in Case C-141/14.

Following the above, in our opinion the license of "Kaliakra Wind Power" Corp. should not be extended. Therefore, we most urgently ask you before taking a decision relating to the application of "Kaliakra Wind Power" Corp. for an extension of the license to explore thoroughly the question of the consequences of such premature extension of the license of the wind farm, which is subject to court judgment.

Please inform us of your final decision on the application ent. № E-MPA-PD-14 "Kaliakra Wind Power" Corp. to extend the license for generation of electricity.

Appendices:

**Appendix 1:** Judgment of The European Court of Justice on the case C-141/14 („Kaliakra”)

Sincerely yours,

Nada Tosheva-Ilieva  
Executive Director

BSPB



Изх.№ 146/20.10.2016 г.

**To: Temenuzhka Petkova  
Minister of energy**

**Copy: Ivelina Vasileva  
Minister of environment and water**

**Daniel Mitov  
Minister of Foreign Affairs**

**European Commission  
DG "Environment"**

**European Commission  
DG "Energy"**

**Council of Europe  
Bern Convention Secretariat**

**Regarding: State aid SA.44840 (2016/NN) — Bulgaria Support the production of renewable energy in Bulgaria and the decision of the European Court of Justice on the Case C-141/14 („Kaliakra”)**

Dear Mrs Minister,

The Bulgarian Society of the Protection of Birds(BSPB), partner of BirdLife International in Bulgaria, is one of the leading environmental organizations in the country, registered for public benefit and working professionally for conservation and sustainable use of natural resources. More than 20 years we have been working purposefully for the conservation of endangered bird species and their habitats for strict compliance and full implementation of environmental legislation and international treaties by which to ensure the conservation and sustainable environmentally sound development of our society.

On 13 September 2016 the European Commission published on its website Decision C (2016) 5205 final on "State aid SA.44840 (2016 / NN) - Bulgaria. Support the production of renewable energy in Bulgaria." In the paragraph 86 of the decision the Commission states:

„Regarding the Court's judgment in Case C-141/14 Commission / Bulgaria, Bulgarian authorities said none of wind facilities that are part of the scope of this aid measure are not subject to the mentioned judgment. Therefore, the Commission notes that, as claimed by the Bulgarian authorities, none of the wind facilities covered by the judgment mentioned above will be given assistance under this aid measure, which is notified.“

We would like to remind that according to the judgment of the ECJ the wind farms of „AES Geo Energy“, „Disib“, „Longman Investment“, „Kaliakra Wind Power“, „EVN Enertrag Kavarna“, „Vertikal — Petkov & Cie“, „Windtech“, „Brestiom“ and „Eco Energy“ on the territory of „Kaliakra” SPA are subject of the court case C-141/14 Commission / Bulgaria. Therefore, according

to the statement in paragraph 86 none of the above listed wind farms should not receive state aid to support the production of electricity from renewable sources.

In our view, at this stage, the Government statement in paragraph 86 of Decision “C (2016) 5205 final” does not meet the factual context for the following reasons:

1. In paragraph 7 of the transitional and final provisions of the Act on Renewable and Alternative Energy Sources and Biofuels (ARAEB) since 2011, are defined the terms and conditions under which the power stations built before the entry into force of this Act continue to receive state aid. It is stated that energy power stations, with the exception of hydroelectric power plants with a total installed capacity above 10 MW, put into operation on the date of entry into force of the law, long-term contracts to purchase electricity from renewable sources retain their effect, where the preferential price purchase is current on the date of entry into force of the law. On the basis of that transitional provision of ARAEB the same power plants receive now so called “fixed preferential price” under ARAEB. For example, when checking the annual financial reports of the companies "AES Geo Energy" and "Kaliakra wind power" for the years 2014 and 2015, published in the commercial register, we found that they have taken state aid, namely pursuant to paragraph 7 of the transitional and final provisions of ARAEB. This example demonstrates that wind farms that are subject to judgment in Case C-141/14 receive state aid under ARAEB.
2. In the governmental report to the Bern Convention “T-VPS/Files (2016) 12. Wind farms in Balchik and Kaliakra – Via Pontica (Bulgaria). Report by the Government” in relation to the open case file and the Recommendation 130(2007) of the Convention на Конвенцията about wind farm in the region of Kaliakra, the Government **do not present stopping of the state aid for the wind farms, which are subject of the ECJ judgment on the case C-141/14 as a measure for implementation of the court judgment.**
3. We are not aware about existence of any legal act or other official decision, which is publically available, and is issued after the entry into force of the judgment in Case C-141/14 Commission / Bulgaria, which clearly and unequivocally states that contracts for the purchase of electricity the aforementioned investors, have changed and state aid is stopped.

The above cited decision of the ECJ is the first for Bulgaria, which refers to default of the BG Government on its obligations related to the implementation of the Birds Directive and the Habitats Directive. According to Art. 260 of the EU Treaty Bulgaria is legally obliged to take the necessary measures to comply with the judgment of the Court. From February 2016 and currently Bulgarian government is in talks with the European Commission about measures that our country will take to rectify the situation.

Following the facts presented above, we would like to ask you to provide us with decisions or other legal acts, on a base of which the state aid was stopped to support the production of renewable energy for wind farms of „AES Geo Energy“, „Disib“, „Longman Investment“, „Kaliakra Wind Power“, „EVN Enertrag Kavarna“, „Vertikal — Petkov & Cie“, „Windtech“, „Brestiom“ and „Eco Energy“ on the territory of “Kaliakra” SPA that are subject to case C-141/14.

In the event that to date no action has been taken to stop the state aid for wind farms to the aforementioned investors, we do ask you to use your power and on the basis of the ECJ judgment in Case C-141/14 („KALIAKRA") to stop as soon as possible state aid to support the production of renewable energy for wind farms of the above investors on the territory of "Kaliakra" SPA. This is the softest measure that should be taken in respect of these wind farms in the enforcement of a judgment C-141/14 Commission / Bulgaria.

Sincerely yours,

Nada Tosheva-Ilieva  
Executive Director  
BSPB

## **WINDFARMS IN BALCHIK AND KALIAKRA – VIA PONTICA (BULGARIA) FOLLOW-UP OF THE NGO`S REPORT**

Document prepared by  
the Bulgarian Society for the Protection of Birds / BirdLife Bulgaria),

- February 2016 -

### **SUMMARY**

This document provides a follow up update of the report submitted by NGOs to the Bern Convention Standing Committee in 2015 - T-PVS/Files (2015) 35.

On 14 January 2016 the European Court of Justice issued a ruling in regard to the Kaliakra case (C-141/14), where it found that Bulgaria failed to comply with EU nature conservation law, in particular the Birds Directive, Habitats Directive and EIA Directive. Bulgaria is under a legal obligation to take the necessary measures to comply with the judgment of the Court (art. 260 TFEU). The decision of the Court confirmed at the highest level, what was also set in the Recommendation 130 (2007) of the Bern Convention, in particular to inadequate protection of the Kaliakra IBA, because of construction of the wind turbines.

After reviewing the ECJ judgment we state that the impacts on the site should be removed and the sites restored and we believe that the way to do that is to remove the wind turbines. If further independent studies need to be undertaken to study impact and review the present evidence, then these need to be done in a timely manner, and measures taken in the interim to avoid further deterioration of the sites. These actions are also in compliance of the requirements set in the Recommendation 130 (2007).

Unfortunately a month and a half after the ruling of the European Court of Justice we are not aware of any actions that Bulgarian Government is planning to take in order to comply with EU law. We are also not aware of any plan of the Government to take actions to fully implement the Recommendation 130 (2007) of the Bern Convention and to organise a comprehensive, independent and quality assessment on the impacts of windfarm developments in the concerned area.

We will appreciate any further efforts by the Convention to investigate the case (as for example on-spot appraisal) in order to give further guidance and help the Bulgarian Government to fully implement the Recommendation 130 (2007).

### **SUMMARY OF MAIN ACTIONS TAKEN SINCE DECEMBER 2015**

#### **1. European Court of Justice**

On 14 January 2016 the European Court of Justice issued a ruling in regard to the Kaliakra case (C-141/14), where it found that Bulgaria failed to comply with EU nature conservation law, in particular Birds Directive, Habitats Directive and EIA Directive. Bulgaria is under a legal obligation to take the necessary measures to comply with the judgment of the Court (art. 260 TFEU).

The important statements of Court judgment related in particular to windfarms in Kaliakra are as follows:

##### ***A) On proper protection /adequate measures that should be taken within the SPA***

This topic refers to the windfarms of ‘Mitsubishi Heavy Industry’ and ‘EVN’ that are located in Kaliakra SPA. It is clearly stated in par. 55 and 56, that the obligations for implementation of adequate measures exist even though the projects were authorised before the Nature Directives came into force, and also for the four projects in question “an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives. The judgment appears to leave room for Bulgaria to demonstrate on the basis of a new assessment that the projects involved do not cause significant disturbance and deterioration of the species and habitats involved. However, the Court states that to establish failure to fulfill obligations under Article 6(2) of the Habitats Directive

one does not need to establish “a cause-and-effect relationship between the operation of installations resulting from a project and significant disturbance caused to the species concerned. It is sufficient for the Commission to establish that there is a probability or risk that that operation might cause such disturbances.” (par. 58). This is in line with previous judgments of the Court that have established that these provisions are to be interpreted in line with the precautionary principle. **This also implies that Bulgaria should take action now to prevent further damage and not await the results of new studies.** As the Court states (par. 56) “an activity complies with Article 6(2) of the Habitats Directive only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives.” Also the court states in par. 59 that “given the high density of wind-power installations within the Kaliakra SPA, in particular in the context of the ‘Kaliakra Wind Power’ project, their activity could cause significant disturbances and deterioration to the habitats of protected species of birds.”

***B) On proper protection in the area of IBA that was not classified as SPA***

This topic refers to the windfarms of ‘AES Geo Energy’, ‘Disib’ and ‘Longman Investment’ that are located in the area of Kaliakra IBA that was not classified as SPA. The ruling repeats what is known from previous ECJ rulings and confirms that this legal practice applies also for Kaliakra IBA (par.67). The court recognizes the displacement effect on Red-breasted geese, caused by wind farms (par.77). The recent studies under the Red-breasted Goose LIFE project, as well as the Sensitivity Mapping project of MoEW provide additional evidence for significant impacts, although these were not mentioned by the court. The Court states that to establish failure to fulfill obligations under Article 6(2) of the Habitats Directive one does not need to establish “a cause-and-effect relationship between the operation of installations resulting from a project and significant disturbance caused to the species concerned. It is sufficient for the Commission to establish that there is a probability or risk that that operation might cause such disturbances.” (par. 70). As a conclusion the windfarms in question (‘AES Geo Energy’, ‘Disib’ and ‘Longman Investment’) are in violation of the obligations under Article 4(4) of the Birds Directive (par.78).

***C) On the EIA directive – cumulative effect***

In terms of general practice of implementation of the EIA procedure in Bulgaria the statements under par. 95 and 97 are particularly important, because the salami-slicing approach to avoid EIA was widely applied in Bulgaria for the last 10 years (and still applies) and lack of assessment of cumulative effects was one of the main reasons for success in implementing this approach. There is an important statement also in par.96, which clearly says that “mere claim, by the Republic of Bulgaria, that there will be no cumulative effects does not, however, prove that that finding was established on the basis of a detailed assessment, since that Member State has, moreover, adduced no evidence in that regard”. It is also widely implemented bad practice that statements on lack of cumulative effects or significant impacts are placed and used in EIA procedures without being supported by any evidence and justification.

**The judgment of the European Court of Justice require actions to be taken by Bulgarian Government in order to comply with EU Law.** The following actions of Recommendation 130(2007) of the Bern Convention are still relevant to the ruling and thus the Bureau should encourage the government to fully implement them:

2. Fully reconsider the development of approved wind farm projects in the Balchik and Kaliakra region situated within or nearby sites designated as important bird areas and special areas of conservation;
3. Investigate the possibility of relocating the windfarm projects already under construction as well as the single turbines (whose building is possible without EIA) in order to restore the integrity of sites to be considered as Natura 2000 sites, IBAs, or under other protection status;
4. Select alternative locations for future and not yet operating turbines based on appropriate data (including long-term monitoring of biodiversity) and assessments (e.g. using multicriteria-analysis); key bird areas, potential SPAs, IBAs, intensive bird migration corridors and sites regularly used by large flocks of roosting species such as storks and wintering geese must be avoided by windfarm development;

5. Assess the impact of the current operating turbines;
8. Respect the need to focus on the avoidance of the impacts coming from outside having negative effects on areas of recognised conservation importance;

If any study or assessment should be conducted for the wind farms (according to point 5 above) it has to be executed by independent experts (most suitably appointed by the Bern Convention), all the collected raw data by the investors and other institutions should be provided, as well as the possibility for field studies to be conducted with full access to the territories and without intervention by the investors and their monitoring team or staff. Also such assessment and study should not be longer than the end of 2016. Such assessment should continue after removal of wind farms in order to document the level of restoration.

## 2. Ministry of Environment and Water

In February 2016 the court case in the Higher Administrative Court that related to “Smin” wind farm is still open.

We are not aware of any actions that Bulgarian Government is planning to take in order to comply with EU law. We are also not aware of any plan of the Government to take actions to fully implement the Recommendation 130 (2007) of the Bern Convention and to organise comprehensive, independent and quality assessment on the impacts of windfarms’ developments in the concerned area.

## 3. Bulgarian Society for the Protection of Birds (BSPB)

In Mid-January BSPB had meeting with representatives of DG Environment of the European Commission during their visit in Bulgaria. In relation to the follow up of Kaliakra case the Commission answered to BSPB that it will wait for the Bulgarian Government to present what action it plans to take in order to comply with the EU legislation in regard to Kaliakra.

BSPB in partnership with RSPB and the European Office of BirdLife International started to elaborate detailed analysis of ECJ judgment and when it is finalised, we will provide a justified statement on what actions we believe are appropriate to be taken in order for Bulgaria to comply with EU Law. Our vision is that at least the following actions should be taken:

- Remove windfarms that were subject of the ruling
  - ✓ *Remove AES WF and Disib WF, based on p. 67, 77 and 78 of ruling, including also scientific data on reduction of foraging area for RBG within the whole region by 6% and that there are a lot of wind turbines approved outside the SPA already on arable land; not efficient work of the radar and the established early warning system to mitigate the significant impact;*
  - ✓ *Remove Mitsubishi and EVN WF, based on p 56, 58 and 59 of the ruling – giving as argument deterioration of steppe habitats, barrier effects, registered under RBG project as well as the result of the Mapping project of MoEW*
- Full independent scientific assessment of the damage that has been done to bird habitat on the site since accession
- Restore steppe habitats used by SPAs birds that have been damaged
  - ✓ *Assess scale of damage and restore habitats for birds in Belite skali SPA by all activities, including golf course and develop restoration measures*
- Interim measures and an Article 260 case if further deterioration of bird habitat occurs on the site.

By taking these actions we believe that the Recommendation 130(2007) of the Bern Convention Standing Committee also will be sufficiently implemented. Thus we will appreciate any further efforts by the Convention to investigate the case (as for example by an on-spot appraisal) in order to give further guidance and help the Bulgarian Government to fully implement the Recommendation 130 (2007).