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AND NATURAL HABITATS

Standing Committee

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Bureau of the Standing Committee

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**Follow-up of Recommendations 98 (2002) and
212 (2021) on the project to build a motorway
through the Kresna Gorge (Bulgaria)**

- REPORT BY THE COMPLAINANT -

*Document prepared by the
BALKANI Wildlife Society, Environmental Association "Za Zemiata" (For the Earth)/Friends of the
Earth Bulgaria, Bulgarian Society for the Protection of Birds, Green Policy Institute, Vlahi Nature
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Strasbourg, 04 November 2024

Follow-up of Recommendations 98 (2002) and 212 (2021) on the project to build a motorway through the Kresna Gorge

(Bulgaria)

- REPORT BY THE COMPLAINANT -

Dear Standing Committee Delegates,

The undersigned NGOs find that the “way forward” approved in 2024 by the Bulgarian government and the European Commission - not to carry out a full and exhaustive revised EIA/AA of all reasonable alternatives and the decision taken by the government that the construction of the eastern lane and part of the western lane of the motorway should start immediately based on the EIA/AA from 2017 – **violate Recommendations 98 (2002) and 212 (2021)**. The decision of the 42nd Standing Committee requiring a revised EIA of all meaningful alternatives before construction begins has also been completely ignored.¹

The undersigned NGOs **call for the opening of the case file** at the 44th meeting of the Standing Committee with a decision for:

- New revised EIA/AA to be provided prior to construction as soon as possible, by assessment of all meaningful alternatives without predetermining one of the lanes of the motorway and thus, without limiting the scope of the EIA/AA;
- Assessment of all cumulative impacts from both lanes of the motorway traffic. This includes assessing the integrated effectiveness of mitigation measures along both motorway lanes. It is particularly important to assess the damage to the linear habitats of reptile species in the Kresna Gorge (for two key species of snakes and two tortoise species) and the degree of defragmentation for large carnivores (bear and wolf) and, thus, to take into consideration the joint scientific conclusions of the Technical Workshop in Kresna in April 2024.
- Bulgarian government to ensure that the complainants and all environmental defenders in Bulgaria are not penalised, persecuted, or harassed in line with Art.3(8) of the Aarhus Convention.

The NGOs welcome the consensus conclusions reached during the Technical Workshop in Kresna in April 2024. They would like to thank the Secretariat of the Convention, the IENE experts, the representatives of the Bulgarian government, the scientists, and all other participants. We assess that

¹ Standing Committee, 42nd meeting 28 November - 2 December 2022 Strasbourg, list of decisions and adopted texts, T-PVS(2022)MISC, 2nd December 2022, pages 19-20, Point 7.2 Possible files, 2001/4 - Bulgaria: Motorway through the Kresna Gorge, penultimate paragraph on page 20: "The Standing Committee appealed to the Government, together with the Complainants, to fully implement Recommendation 212 (2021) and to revise the EIA/AA report, following the advice of the European Commission, on the potential impact of the motorway, thus respecting Recommendation 98 (2002). It reminded Bulgaria not to start any construction before the Recommendation was fulfilled." <https://rm.coe.int/misc-e-2022/1680a948d2>

key findings and conclusions have been reached regarding impacts and mitigation measures on both motorway lanes. The decision to start construction without incorporating these findings and conclusions into a new revised EIA/AA leads to the impossibility of their actual implementation. It dramatically reduces the meaning of the entire workshop and the efforts invested in it.

1. "Way forward" approved by the Bulgarian Government and the European Commission.

In the beginning of March 2024, NGOs received access to a letter sent by the European Commission to the Bulgarian Government on February 29, 2024².

The letter reflects decisions taken during a non-public meeting between the EC services and the Bulgarian government on February 8, 2024. During this meeting, a so-called "way forward" was agreed upon, including the timelines and the project implementation plan in relation to the EIA procedures and other environmental measures. At the end of the letter, the EC services imperatively request the Bulgarian government to implement a way forward with legally binding acts at the national level. In essence, the "way forward" includes the following points:

- A decision to start construction of the motorway lane outside the Kresna Gorge (the direction from the Greek border towards Sofia) without delay. This means construction works would start without an EIA revision based on the EIA/AA decision 2017. Thus, the "way forward" disregards the decision of the 42nd Standing Committee meeting.
- Measures for further planning and environmental assessment of the north-south direction of the traffic from Sofia towards the Greek border – possibly, but not obligatory, outside of the Kresna Gorge. **The "way forward" leaves the possibility of using the now existing road through the Kresna Gorge as a motorway lane for this traffic direction, thus clearly disregarding Recommendations 98 (2002).**
- Requirement to carry out a partial EIA only for this second traffic lane with already predetermined route for the first lane – without including a revised EIA of the entire project, thus excluding from the assessment and the decision all alternatives which require a change to the first lane.
- The "way forward" is grounded on several reasons of overriding public interest, which justify the fast start of the construction.

A subsequent act followed this letter, and the "way forward" was officially approved by the Council of Ministers of the Republic of Bulgaria with decision No. 146 of February 29, 2024. As a next step, based on this decision, on June 11, 2024, the Ministry of Environment and Waters issued a screening decision not to request an EIA of the changes that occurred in the project after 2017.

The NGOs are seriously concerned by this development:

- The "way forward" divides the project into parts and bypasses the overall assessment of all the combined impacts of these parts - essentially a "salami slicing" approach. The application of "salami slicing" began after 2013, when the construction of the other sections of the Struma Motorway began without priority planning and construction of the section in the area of Kresna

² Ref.Ares(2024)1562893-29/02/2024, – see a copy of the letter as Appendix 1

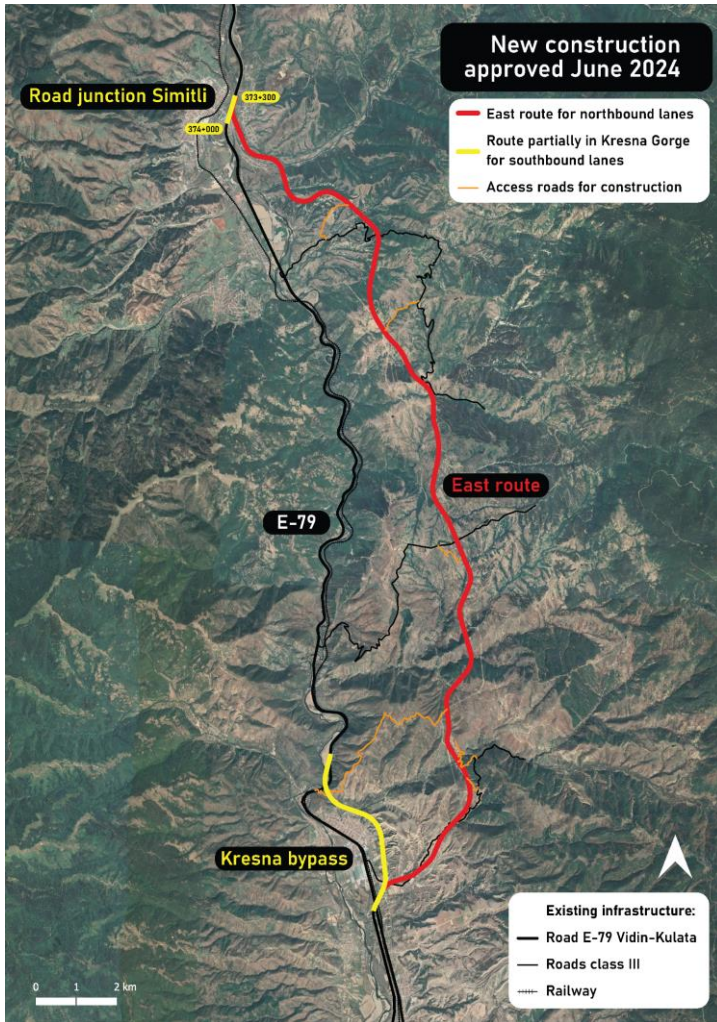
Gorge – and outside the Gorge. And with that, the mitigating measures of the EIA decision 2008 for the entire Struma Motorway and reflecting the cumulative impacts of construction in all sections - were disregarded.

- The “way forward” makes it impossible to assess the effectiveness of mitigation measures as they need integrated planning, assessment, and construction. For example, pre-determining the first lane and its defragmentation measures for wolf and bear can make it impossible to plan, assess, and construct such effective measures on the second lane due to technical and other constraints and thus undermine the overall effectiveness of the defragmentation measures.
- The “way forward” circumvents, ignores, and effectively annuls the findings of the EC from 2019 that the EIA decision 2017 significantly violates Art. 6, par. 3 of Directive 92/43/EEC. This decision actually states that construction would begin in violation of Art. 6, par. 3 of Directive 92/43/EEC.
- The “way forward” was the legal basis for the Bulgarian Ministry of Environment and Water to justify the immediate implementation of its screening decision from June 2024 not to carry out an EIA for the amended "G10,5 Eastern" alternative and thus disregarding the significant changes in the project design since 2017 and doubling the direct impacts of the motorway (area directly destroyed by construction) compared with the EIA/AA 2017.
- The “way forward” bypasses all EIA procedures, public participation in them, and the right of the public to seek judicial review. The “way forward”, in fact, acts similarly as an EIA and Appropriate Assessment decision, but the procedures under Art. 9 of Regulation No 1367/2006 requiring public participation prior to decision-making to be guaranteed by the EC services – were not applied at all.
- The "way forward" bypasses Art. 6, par. 3 and par. 4 of Directive 92/43/EEC, which set up the norms and procedures that are applicable in the presence of an overriding public interest.

2. Screening Decision (preliminary decision on the need of EIA/AA) of June 11, 2024 of the Minister of the Environment and Waters (MoEW)³ authorizing the start of construction of amended alternative G10.5 Eastern (from 2017) without revision of the EIA.

On 11 June 2024, the Minister of Environment and Water approved the project of the Struma Motorway in the area of the Kresna Gorge - with a decision not to conduct a new EIA. The approved project is for the “G10.5 Eastern” alternative adopted in 2017, but with significant additions and changes in the detailed design. The decision is issued with the so-called "preliminary enforcement", or, in other words - its enforcement can begin without waiting for court rulings on the decision. The decision is implemented, and its preliminary enforcement is grounded on the Council of Ministers decision No. 146 of February 29, 2024 (which in turn applies the "way forward").

³ <https://www.moew.government.bg/bg/reshenie-5-pr-2024-g-za-investicionno-predlojenie-izmenenie-na-investicionno-predlojenie-podobryavane-na-traseto-na-lot-3-2-na-avtomagistrala-am-struma-po-iztochen-variant-g-10-50-s-vuzlojitel-agenciya-putna-infrastruktura-17269/>



Map of approved new construction without EIA/AA

2.1. The June 2024 screening decision violates the “way forward”.

The "way forward" stipulated that the construction of an eastern traffic lane in the direction from the Greek border towards Sofia and outside the Kresna Gorge should be started immediately and without a new EIA/AA. **However, the screening decision from 11 June approved the start of construction without a new EIA/AA of an additional 5.5 km of the western lane in the direction from Sofia to the Greek border and inside the Kresna Gorge (entering the southernmost parts of the Gorge)[3]. Thus, the June 2024 screening decision violated the “way forward” and predetermined that the second lane of the motorway will be an existing road in the Kresna Gorge.** The June 2024 screening decision doesn't require nor mention any new EIA procedure.

2.2. The June 2024 screening decision completely ignores possible significant effects arising from changes in project design between 2017 and 2024 and thus violates Art. 6, par. 3 of Directive 92/43/EEC (see for more information also Appendix 2)

The amended project approved in June 2024 complies with the 2017 alternative in principle, but makes significant changes in the detailed design. Two times larger areas and different habitats are affected compared to the 2017 project, and the route in places is shifted by more than 150-200 meters compared to the 2017 project. The total length of tunnels and viaducts is slightly decreased. None of these

significant changes and their effect on biodiversity will be assessed in any EIA/AA procedure prior to construction.

2.3. The June 2024 screening decision completely ignores the joint conclusions reached at the Kresna Workshop (see for more information also Appendix 3)

The joint conclusions reached at the Kresna Workshop did not discuss procedural and legal issues, only scientific ones. But the final joint conclusions clearly show the need for a new revised EIA/AA assessment and decision because of several reasons, including:

- the uncertainty in the effectiveness of mitigation measures and the need for additional studies on them;
- the impact of traffic in the Kresna Gorge on the daily movements of reptiles and their linear habitats in the Gorge;
- the need for traffic reduction along the existing road in the Gorge as a mitigation measure.

3. Construction works

On 28 June 2024, the two construction contracts were amended by the Roads Executive Agency and reflected some requirements of the "way forward", which allowed their immediate implementation. On October 8, 2024, Bulgarian media reported that the government had already provided construction companies with BGN 111 million (55.5 million euros) to start construction. In mid-August 2024, NGOs observed the start of preparatory construction works and some of them in the southernmost part of the Kresna Gorge – geological drillings and construction of temporary access roads. To date, there are no approved Detailed Master Plans and Construction Permits. According to the media, construction will start in the early spring of 2025.

4. Litigation in the national court by NGOs and citizens related to the Kresna case

There are currently four cases pending in the national courts (see more information in Appendix 4). In one of the court cases, on 8 October 2024, the NGO complainants submitted to the Supreme Administrative Court a request for referral to the European Court of Justice for violation of Art. 6, para. 3 and para. 4 of Directive 92/43/EIO in the Screening Decision of June 2024 in relation to the implementation of the "way forward" (pending decision of the court to submit or not the referral).

5. Democracy at risk - an ongoing smear and harassment campaign against NGO activists working on the Kresna case.

Over the past year, an active public campaign against individual NGO activists has continued in private printed and electronic media and through other public actions, such as public blaming and shaming on a billboard along the current route in the Kresna Gorge:



The billboard text says, "thank THEM for the traffic jams" and shows photos of Andrei Kovatchev (Balkani Wildlife Society), Toma Belev (Association of Parks in Bulgaria), Borislav Sandov (former Minister of Environment and Waters 2021-2022)

The campaign has included accusations, presenting false information, and is in clear violation of Art. 3(8) of the Aarhus Convention which states that "Each Party shall ensure that persons exercising their rights in accordance with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement.". It has been presented in an investigation by Radio Free Europe/Radio Liberty (RFE/RL). This creates an overall public intolerance towards environmental defenders and citizens' rights to send signals and positions and to access judicial review on environmental issues. To date, state authorities have not taken any preventive or deterrent action against this harassment.

6. Diplomatic pressure by the Bulgarian government before the Standing Committee

In October 2024, it became known that the government was undertaking a diplomatic campaign in relation to the 44th Committee of the Bern Convention to prevent the opening of the case file at the Convention and to prevent a new EIA of the project. In a non-public report to the other ministers, the MoEW specifically stated similar motives to those used in the private media. According to the MoEW, the NGO activists were submitting false information to the Bern Convention, and the proposal of the Bureau to open the case was an interference in the country's internal affairs.

The last three years of discussion and decision-making on the Kresna Gorge case clearly show that countries with systematic environmental issues support each other, including in the voting, which compromises to decline the environmental protection of protected areas in favor of governmental or private projects. We call the honourable delegates of the Standing Committee and the Bureau to firmly oppose any attempt of non-democratic political or diplomatic actions that aim to weaken and abate the instruments of the Convention to protect our common biodiversity heritage.

In conclusion, we firmly believe that Recommendations 98 (2002) and 212 (2021), Art. 6, par. 3 and Par. 4 of Directive 92/43/EEC, the precautionary and preventive principles of Article 191, Para. 2 of the TFEU and public participation rights settled in the Aarhus Convention and Art. 9 of Regulation No 1367/2006 are disregarded. If urgently effective measures are not taken, the actual permanent destruction of NATURA 2000/Emerald sites in the Kresna Gorge will happen without the possibility of even compensating these impacts.

Appendices:

Appendix 1. Letter of the EC to Bulgarian government from 29 Feb 2024 (so called “way forward”)

Appendix 2. Additional information on examples of significant impacts and changes in the 2024 project compared with the 2017 project

Appendix 3. Comments and arguments on the conclusions of the Kresna Workshop, which show the need of a new EIA

Appendix 4. Description of litigations in the national courts

With respect, on behalf of all the complainants,

Document prepared by:

BALKANI Wildlife Society, Environmental Association "Za Zemiata" (For the Earth)/Friends of the Earth Bulgaria, Bulgarian Society for the Protection of Birds, Green Policy Institute, Vlahi Nature School, CEE Bankwatch Network.

Appendix 1



EUROPEAN COMMISSION
DIRECTORATE-GENERAL ENVIRONMENT
Compliance, Governance & Support to Member States
DIRECTORATE-GENERAL REGIONAL AND URBAN POLICY
Administrative Capacity Building and Programme Implementation II
The Directors

Ref. Ares(2024)1562893 - 29/02/2024

Brussels,
REGIO/E.3/DY/gfk/(2024)1712208

Subject: Struma Motorway, Lot 3.2 Krupnik – Kresna (Kresna gorge)

Dear Ministers,

We would like to thank you for the constructive meeting and exchange with your services on 8 February 2024 on the follow-up implementation of the Struma Motorway, Lot 3.2 Krupnik – Kresna (Kresna gorge).

We would like to extend our gratitude to the Bulgarian authorities for the fruitful cooperation, joint efforts and commitment. These have allowed to reach the enclosed agreement on the way forward on the implementation of the Struma Motorway, Lot 3.2.

The completion of the remaining part of the Struma Motorway is a high priority and it is important for multiple reasons. The motorway ensures better connectivity between Bulgaria and its neighbours and between the North and South of Europe. The road axis connecting Bulgaria and Greece is strategically significant because it may form part of the solidarity lanes necessitated by Russia's aggression against Ukraine. In addition, the construction of Lot 3.2 contributes to achieving the objectives of the core trans-European transport (TEN-T) network and the future interconnection of the European road infrastructure, which the Struma Motorway is part of.

The Commission services will continue to closely monitor the implementation of the Struma Motorway, Lot 3.2 project and ensure compliance with the applicable EU environmental legislation.

The competent national authorities must ensure that legal, technical and environmental aspects, including those related to the preservation and protection of the unique biodiversity in the area, are duly taken into account during the project preparation and implementation. Furthermore, the successful completion of the project will improve the road safety, the social and territorial cohesion by ensuring more efficient inter-urban and cross-border mobility, as well as generating economic growth.

Mr Andrei Tsekov, Minister of Regional Development and Public Works
Mr Georgi Gvozdeykov, Minister of Transport and Communications
Mr Julian Popov, Minister of Environment and Water

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111

We look forward to the consensual and successful completion of the remaining part of the Struma Motorway, Lot 3.2. Both Directorate-General for Regional and Urban Policy and Directorate-General for Environment services remain available to support you in this endeavour.

Yours faithfully,

Paul Speight
(e-signed)

Sofia Alves
(e-signed)

Enclosed: Conclusions for the meeting of 8 February 2024 on the way forward on the Struma Motorway Lot 3.2.

cc: Mr Ivan Ivanov, Director, Central Coordination Unit, Ministry of Finance
Mr Yassen Yordanov, Chair of the Management Board, Road Infrastructure Agency
Mr Martin Georgiev, Head of Managing Authority, Operational Programme Transport and Transport Infrastructure/Programme Transport Connectivity, Ministry of Transport and Communications
Ms Malina Kroumova, Chairperson of State Agency Road Safety

Annex

Conclusions for the meeting of 8 February 2024 on the way forward on Struma Motorway Lot 3.2

1. Commission observations on the compliance of the project with EU environmental legislation

- In its observation letter of 2019, the Commission identified several flaws concerning the EIA/AA decision of 2017.
- After a series of communications and meetings with the Bulgarian authorities concerning the *Analysis of the coherence of the EIA/AA 2017 conclusions with the specific objectives of the two affected Natura 2000 sites (2023 Analysis)*, the Commission services still have concerns regarding the compliance of the project Lot 3.2 (alternative G.10.50) with EU environmental legislation.

2. Proposed way forward

Taking into account the need to ensure compliance with EU law and that it is important to make progress on the project in order to improve this vital transport connection, the agreed way forward is as follows:

- A. The Bulgarian authorities will carry out the following actions:
1. The maintenance of the existing defragmentation facilities (cleaning up and adaptation of existing culverts) on the E79 road and the construction of 3 new culverts and appropriate fencing, in order to minimise mortality of protected species and maximise connectivity in the gorge (timing: immediate and urgent action);
 2. The necessary measures for ensuring the safe operation of the E79 road, such as the enforcement of the existing speed limitations (poles, speed cameras) plus the renovation of 6 emergency resting areas should be enacted immediately;
 3. The construction of the eastern lane, going from Kulata to Sofia outside of the gorge (as included in the G.10.50 alternative) (timing: as soon as possible for the Bulgarian Authorities);
 4. The assessment of the impact of the lane of the Struma Motorway Lot 3.2 going from Sofia to Kulata:
 - The Bulgarian Authorities to include in the ToR for the feasibility study for the new road complementing Struma Motorway an obligation for the Consultant to study an option of the new route outside the gorge to act as the lane from Sofia to Kulata of the Struma Motorway. The study should cover reasonable alternatives, which will be subject to an EIA/AA procedure;
 - If the Authorities decided that the Sofia to Kulata lane of the Struma Motorway Lot 3.2 should be implemented on the existing E79 road, the implementation will be preceded by an impact assessment in view of the SSCOs, fully considering the "improvement" SSCOs and fully addressing the concerns expressed since October 2019 by the Commission (i.e. ensuring all project components are assessed; the cumulative impacts are properly assessed, including with the railway; the criteria for assessing the impacts are scientifically based and comprehensive; the

effectiveness of mitigation measures is ensured). The result of this assessment should be endorsed within an EIA/AA procedure.

- B. The construction of the eastern lane going from Kulata to Sofia (point 3 above) should be done in a way that does not prevent the realisation of alternatives for the construction of the remaining lane going from Sofia to Kulata;
- C. The construction of the remaining lane going from Sofia to Kulata, should only start after the assessment of the impacts is performed (as expressed in point 4 above) and having ascertained that the chosen alternative will not adversely affect the integrity of the site concerned.

Given that Bulgaria is fully responsible for ensuring conformity of all EU funded projects with EU law under shared management, a legally binding decision to seal the agreement and enact the above conditions should be taken.

The Commission will continue to monitor the general compliance of Bulgaria with authorisation of developments under the Habitats Directive through its case 2008(4461).

Appendix 2

Additional information on examples of significant impacts and changes in the 2024 project compared with the 2017 project

Here are briefly described the expected significant impacts on the NATURA 2000 sites of the modified "G10,5 East" variant/alternative of Struma Motorway, which were not assessed in the previous EIA/AA decision of 2017 and require the conducting of the full Appropriate Assessment according to Article 6, paragraph 3 of Directive 92/43/EEC. However, in June 2024, the Ministry of Environment and Water (MoEW) decided not to undertake an EIA and Appropriate Assessment (AA) of the amended "G10.5 East" option/alternative.

These significant impacts resulted from:

- The changes that have occurred to the "G10,5 East" variant due to the detailed design of it. In 2017 when it was approved by EIA/AA decision - it was at the pre-feasibility study stage. In 2024 it is at the detailed conceptual design stage. The changes that have occurred are significant;
- Lapses and unassessed impacts in the 2017 EIA/AA;
- New scientific information appeared and impacts identified that were not accounted for in the 2017 EIA/AA (including relevant conclusions of the Kresna Workshop – see Appendix 3).

All these reasons clearly correspond to the rulings of the CJEU on the need for completeness and timeliness of AA procedures and decisions.

1. The amended alternative "East option G 10.50" leads to an almost double increase in the directly affected and damaged area - in the 2017 EIA/AA assessment, this impact was estimated at 1,107,898 decares, and in the current amended alternative in 2024 the impact area is 2,083,002 decares. These are significant changes implying an inevitable risk of changed areas of destroyed and/or damaged habitats and habitats of species and hence of affecting the priorities and conservation objectives of all directly affected habitats and species subject to protection in the NATURA 2000 sites. In the project documentation (official documentation and project description in the screening report submitted by the Road Executive Agency in the Ministry of Environment and Waters⁴) this is clearly stated in several places:

*Page 58 of the screening report: "According to the assessment made in the EIA in 2017, according to the basic characteristics and technical parameters of the linear part of Lot 3.2 and the facilities to it for the realization of the eastern variant G10.50, **the expected permanent violations according to the balance of the affected lands provided by the Contracting Authority and soils are in the amount of 1,107,898 decares, and it is explicitly stated that at the time of the EIA preparation, parcel plans for all proposed project options were not drawn up, according to the Law on Territorial Planning and Ordinance No. 8/14.06.2001. for the volume and content of development schemes and plans.***

The optimized parameters of Lot 3.2 with the amendment of the project based on the prepared conceptual design are related to the refinement of the route in relation to the terrain conditions, the available engineering networks, the built facilities of other departments, sensitive areas with the corresponding restrictive regimes and optimization of the technical slutions, as well as the implementation of restrictions related to the protection of the environment and biodiversity, respectively, of the protected areas and protected territories of the National Ecological Network

⁴ <https://registers.moew.government.bg/ovos/lot/46320>

Natura 2000. All this also necessitates the correction of the affected areas compared to those considered in the EIA from 2017."

Page 74: *"The total permanently affected area during the implementation of the project is 2,083,002 decares, of which with a change in the purpose of the land - 1,970,572 decares, of which - the area for compensation - 576,714 decares."*

In addition to all other possible negative impacts - these construction interventions directly affect at least, but not only, the following habitats and NATURA 2000 sites and accordingly carry a risk of significant damage to the sites' objectives and need an Appropriate Assessment: natural habitats: 6210, 6220, 91E0; 92C0; 92D0 and habitats of species: Leopard Snake (*Elaphe situla*), Four-lined Snake (*Elaphe sauromates*); Greek Tortoise (*Testudo graeca*); Hemran's tortoise (*Eurotestudo hermanni*); Otter (*Lutra lutra*); Wolf (*Canis lupus*) and species of bats. And these significant direct impacts differ clearly from those assessed in the 2017 EIA/AA.

2. The amended alternative "East option G 10.50" includes mitigating measures that were not evaluated in the EIA/AA 2017. This is explicitly and unequivocally stated in the screening report from 2024, which we quote verbatim (the documentation assesses that the implementation of the measure no longer significantly affects the objectives of the area - but such a conclusion can only be made within the framework of a full Appropriate Assessment procedure):

Page 28-29: *"5) Section from km 383+220 to km 385+340.55=km 385+419.46 (2199 m). In this section, the displacement of the route of the eastern variant G10.50 of LOT 3.2 is required in connection with the specific objectives and measures adopted in 2022 for and NATURA 2000 sites BG0000366 "Kresna-Ilindenci" and BG0002003 "Kresna". After an analysis of the objectives and the affected habitats, a quantitative assessment of the extent of the impact, of the expected impact and an assessment of its extent, it was established that the habitats of the southern crested newt are affected in the range of the route approximately between km 383+980 and km 384+380 (Triturus karelinii) - a species subject to conservation in protected area BG0000366 "Kresna-Ilindenci". The habitats have a small area in the area, which is why the route affects them impermissibly in relation to the objectives of its protection. In view of this, in order to comply with the requirements of the adopted specific and detailed objectives, it was necessary to shift the route in a western direction, about 200 m from the axis of the road, thus ensuring the preservation of the population of the species and its habitat. The displacement does not significantly affect other habitats and meets the specific and detailed objectives of the PA."*

3. The amended alternative "East option G 10.50" in 2024 includes, similar to the same alternative of 2017, the current road through Kresna Gorge as a north-south motorway lane (from Sofia to the Greek border). The June 2024 screening decision assessing the need for EIA/AA formally states that it does not address this lane of the motorway. Although it approves construction without EIA/AA of precisely the modified "East option G 10.50" alternative and nothing else. And it approves southernmost 5.5 km of this lane (north to south) – from the southern entrance of the Gorge to the nearby motorway junction (where it brings together with the other motorway lane) and by-passing Kresna town (see map in Appendix 2). The decision states that the remaining km of the north-south lane (particularly the current road through Kresna Gorge) are not part of the decision.

Thus salami-slicing and avoiding the screening at phase of the need for EIA/AA of all cumulative significant effects. Even though it is essentially predetermined that the final decision will be for the north-south direction of travel precisely the lane through Kresna Gorge (all other possibilities are effectively ruled out with 5.5 km of this lane already built).

The assessment decision of June 2024 thus completely ignores the joint consensus conclusions of the technical workshop in Kresna/Sandanski in accordance with the Recommendation No. 212 (2021) of the Bern Convention:

"Challenges and opportunities for the conservation of reptiles and large carnivores during the development of linear infrastructure in South-Eastern Europe: case study for the region of Kresna, Bulgaria". Specifically it ignores the damage to the populations in the linear habitat in the Kresna gorge of the 4 species of reptiles *Testudo graeca*, *Eurotestudo hermanni*, *Elaphe quatorlineata* and *Elaphe situla*, which is a result of the barrier effect and high mortality between key habitats of these species on the slopes and in the valley and disruption of daily and seasonal movements (see Appendix 3 as well). The conclusions of the seminar are unambiguous and consensual (i.e. accepted by the Bulgarian government) - this impact leads to damage to the populations of the 4 species. The EIA/AA decision and its 2017 report do not address this impact at all - it is not mentioned or assessed there. The EIA report assesses the presence of high mortality, but the secondary effect of this mortality - the barrier effect on daily and seasonal movements to key linear habitats - is completely missing, as is the assessment of the effect of this impact - the damage to populations in these habitats. The same applies to the current project and its screening report and Annex 1 of it, where information is submitted on the expected impacts on NATURA 2000 - but this secondary impact is completely missing.

It can be seen that, in essence, the adopted construction with the 2024 EIA/AA screening decision is the first stage of a complete construction of the amended alternative "East option G 10.50". According to the technical description of the alternative in the screening report from 2024 the next stages of project implementation include the temporary shift of all traffic to the new constructed left lane (south-north direction) and the construction of the defragmentation measures on the current road (north-south direction) as planned in 2017 (the measures with not confirmed effectiveness), and in the third stage the use of the current road already as the north-south lane.

Completely ignored are the findings of the Kresna Workshop which clearly state that the effectiveness of these defragmentation measures has not been proven and this requires further scientific studies, and that partial reductions in traffic do not guarantee recovery of damaged reptile populations (see further Appendix 3). Which, according to the precautionary principle and preventive conservation and according to the case law of the European Court of Justice, is a violation of Article 6(3) of Directive 92/43/EEC, insofar as the amended alternative "East option G 10.50" lacks an AA procedure and hence lacks an assessment of all these cumulative impacts and their mitigation measures.

4. The June 2024 EIA/AA screening decision ignores the real scientific information explicitly stated in the Conference conclusions that the entire length of the Kresna Gorge represents suitable connecting habitats for the bear (*Ursus arctos*) and the wolf (*Canis lupus*) and still claims that the bear migrates on fictional and not existing in reality narrow migration corridors and builds inferences of no impact based on this completely fabricated "scientific" information". The conclusions of the workshop are clear - it is necessary at least to conduct an analysis of the connectivity, both of the left lane outside the Gorge (south - north direction), and of the right lane in the Gorge (north-south direction) regarding these 2 types including their joint impact. Neither the EIA/AA 2017 nor the 2024 EIA/AA screening decision provides for such an analysis.

Appendix 3

The Kresna workshop held in April 2024 has adopted joint conclusions. Here we cited several conclusions and we give our comments and arguments why these conclusions require a new revised EIA.

1. The joint conclusions in the first sub-section “Acknowledging that the case is complex and challenging because:”

1.1. Paragraph 5: “Traffic in the gorge poses increasing pressure on wildlife in the gorge and damages the populations of reptiles including *Testudo graeca*, *Testudo hermanni*, *Elaphe quatorlineata*, and *Elaphe situla*. All 4 species have linear habitats in the area, and individual home ranges are structured along valleys with seasonal/daily movements from slopes to valleys and key seasonal (mid-summer) habitats situated in the bottom of valleys (thermal and water regime)” - **this impact is not assessed at all in the 2017 EIA report and EIA decision and clearly needs new assessment;**

1.2. Paragraph 7: *It is unclear whether traffic reduction on the existing road without defragmentation will be enough for the restoration of populations. ...* **This paragraph clearly indicates the need for traffic reduction on the existing road - measure not provided by the 2017 alternative “G10.5 Eastern” and missing in 2017 EIA decision.** (за footnote следното пояснение: “The mean traffic in 2017 was about 9 000 cars per day. The fast growth in traffic levels will lead to a mean traffic of more than 20 000 cars per day to the end of 2030. Thus leaving half of the traffic on the existing road, as it is envisaged by the alternative “G10.5 Eastern”, will not provide traffic reduction.”) **It also clearly indicates uncertainty in the efficiency of the mitigation measures along the existing road - also requiring new EIA re-evaluation and decision.**

1.3. Paragraph 8: “At present there are conflicting views on the efficiency of mitigation measures. Further scientific data is needed to confirm one of the two opposing views”. **The 2017 EIA decision accepted the discussed mitigation measures as efficient, without necessary scientific certainty. This paragraph again clearly indicates the uncertainty in the efficiency of the mitigation measures along the existing road - thus requiring new EIA re-evaluation and decision.**

2. The joint conclusions in the second sub-section “The participants call for the:”

2.1. Paragraph 2: “Avoidance as much as possible of the destruction of currently unaffected landscapes with new infrastructure developments;” **The amended alternative “G10.5 Eastern” destroy directly twice more habitats in currently unaffected landscapes compared to 2017 EIA decision - but still the decision from June 2024 is not to carry out a new EIA, which clearly ignores the “Joint conclusions”.**

2.2. Paragraph 4: *“Provision of sufficient measures to ensure the restoration of populations and habitats connectivity of Testudo graeca, Testudo hermanni, Elaphe quatorlineata, Elaphe situla and guarantee daily movements of individuals,”* **As we indicated above - the impact on daily movements of individuals and quality and vitality of their linear habitat in the Kresna Gorge is not assessed in the EIA 2017 - and clearly needs new EIA.**

3. The joint conclusions in the third sub-section “and draw attention to the following best practices, approaches and methods to be utilised in similar cases in the planning, implementation and maintenance of transport infrastructure:”

3.1. Paragraph 3: *“Zero solution is the worst solution especially when there is a known pressure exerted on wildlife by existing infrastructure and a clear need to construct new infrastructure. It is therefore not in the public interest to stall development until all data is gathered (it can never be complete because situation constantly changes) and decisions based on the best available scientific knowledge are justified.”* **This paragraph clearly indicates the need for a new EIA decision - which should reassess different alternatives and their mitigation measures applying correctly the precautionary principle. And to start construction even in case of uncertainty of the mitigation measures - but after assessment and choice of alternatives based on the precautionary principle. The precautionary principle was not applied in the 2017 EIA decision and the choice of alternative “G10.5 Eastern” was made on the base of unjustified presumption for effective mitigation measures.** (пояснение във footnote: “This is one of the findings of the European Commission in their comments to the 2017 EIA from 2019 - reported in our previous reports)

3.2. Paragraph 4: *“Test actions/measures (design of facilities, location, etc.) and make the results widely available. Agree with stakeholders on the success indicators and possible contingency measures.”* and Paragraph 5: *“The degree of efficiency of defragmentation measures can only be established based on scientifically verified data. Otherwise claims that they work or do not work are unsupported. Expert opinions and hypothesis need to be backed by data, which can inform decisions to make changes to initially planned designs.”* **The same for the certainty in the efficiency of mitigation measures and the need for their scientific evaluation (see our comments above).**

3.3. Paragraph 7: *“Guarantee long-term maintenance of facilities by integrating the necessary expenditures and performance indicators in the maintenance contracts. Use automated methods to monitor integrity and usage of facilities. Ensure control of the monitoring activities and the functioning of the facilities by the competent authorities.”* **These measures are in fact coherent part of necessary mitigation measures - but they completely miss in the 2017 EIA decision.**

Appendix 4

The 4 pending litigations in the national court related to the Kresna case

Case 1 Two NGO activists (Mr. Dimitar Vasilev and Mr. Andrey Kovachev - (both are complainants to the Bern Convention)) are appealing the validity period of the EIA/AA decision from 2017, claiming that the decision has expired after October 2022 due to the 5-year statute of limitations of the decision.

A.1) NGO arguments: the NGOs argue that the EIA/Appropriate Assessment (AA) decision from 2017 ceased to be in force in October 2022 due to the expiry of 5 years from its signing, which occurred October 2022 (the decision incorporates both the EIA and AA into a single procedure). They refer to the procedural rules of the Bulgarian legislation in which this time limit is set for both EIA and Appropriate Assessment (AA) decisions. Further more detailed arguments are:

- That, the decision was made with provisional execution and therefore started to apply immediately after the signing of the decision in October 2017 - insofar as according to the EIA legislation the validity period of 5 years for EIA decisions applies not from the moment of signing, but from the moment the decision enters into force.
- That, the decision incorporates the AA, which has its own stricter procedural rules (compared to those for EIA) and under the law there the 5 year time limit explicitly runs from the time the AA decision is signed, not from the time it comes into force. And that in such cases the stricter legal rule applies.
- That, the AA part of the decision, according to European Court of Justice (ECJ) case law, needs to be up to date both in terms of impact assessment and scientific data, and that the 5 year timeframe from the conclusion of the AA procedure in 2017 is already too long and this requires a new up to date assessment. And that this substantive argument should guide the interpretation of the AA procedural rules.

B.1) The Ministry of Environment and Water's (MoEW) arguments are procedural (this case involves a regional division of that Ministry), arguing that the 5 year time limit should be calculated not from the time the decision was signed and the assessment procedure completed - but from the time when all court appeals against the decision were completed and it became a stable administrative act, which happened in May 2018. And according to the MoEW's reasoning, the expiry date for the decision was therefore May 2023. Further, MoEW argues that because the EIA and AA procedures and decisions were combined into one decision - that decision was subject to the general EIA procedural rule and not the strict AA procedural rule. In May 2023, the Bulgarian authorities fast-tracked the construction of several hundred meters of motorway at the road junction at Kresna and argued before the court that this action commenced, within the procedural timeframe of Bulgarian law for the application of the EIA/AA decision from 2017 and therefore it has not lost its legal effect.

C.1) Procedure - so far the case has been heard at first instance in the Sofia-town Administrative Court (ACS), which dismissed the appeal, ignoring a significant part of the NGOs' arguments. A cassation appeal to the Supreme Administrative Court (SAC) and its decision ordered the case to be sent back to the ASC for a retrial and consideration of all arguments. Subsequently, a second decision of the SAC was taken which again dismissed the NGOs' appeals with similar defects as the first and a new cassation appeal was filed with the SAC. The case is scheduled to be heard on 12 March 2025.

Note: this case is preemptive of the case in which the June 2024 decision is appealed, insofar as that 2024 decision was based entirely on the 2017 EIS/AA decision.

Case 2 BALKANI Wildlife Society is appealing the lack of any legally meaningful environmental procedure (SEA/EIA/AA) for approval of the construction of the road junction at Kresna Town (part of the motorway and of G10,5 Eastern option) which started in May 2023. This project was started without any environmental permit - it was approved by a MoEW letter. But this letter is not a decision and has not been issued under any legitimate assessment procedure, yet it states that there does not

need to be an EA/EIA/AA. This project is part of the G10.5 East option approved in 2017, but is a significantly amended to it - and these new amendments are not assessed in the EIA/AA 2017 decision.

A.2) Arguments of NGOs: NGOs argue that the construction of the road junction, though a small project, requires a preliminary assessment to be made as to whether an EA/EIA/AA is required. And that the letter with which the project was approved by MoEW is not a legitimate decision and essentially no EO/EIA/AA procedure were conducted.

B.2) The Ministry of Environment and Water's (MoEW) arguments are stated on formal grounds - that the MoEW's letter saying that no EA/EIA/AA procedure was required - was not an administrative act/decision and therefore not appealable in the court.

C.2) Procedure - so far the case has been heard at first instance in the Sofia-town Administrative Court (ACS), which dismissed the appeal, agreeing with MoEW's argument that there was no act/decision to appeal. The decision was appealed to the SAC and remanded, with the Supreme Court holding that although MoEW's letter was not an act/decision, there should nevertheless have been a decision assessing the need for an EA/EIA/AA which was an appealable act and remanding the case back to the ACS at first instance. Hearing of the case is scheduled for 27 November 2024.

Case 3 Four NGOs - BALKANI Wildlife Society, For the Earth/Za Zemiata, Bulgarian Biodiversity Foundation and the Parks Association are appealing the screening decision from June 2024 to approve the amended project of 2017 without EIA/AA procedure.

3.A) Arguments of the NGOs: The NGOs argue that the Struma Motorway project approved in 2017 - "G10.5 Eastern" option has been significantly modified, resulting in new and unassessed in the EIA/AA 2017 decision possible significant impacts, therefore the screening decision not to make AA on the modified 2024 project is in violation of the law. The NGOs further argue that the court case on expire of 2017 EIA/AA decision (see Case 1) is dispositive of this case because the June 2024 screening decision not to do a full EIA/AA relied entirely on the 2017 EIA/AA decision.

In addition to these arguments, the NGOs submitted a request to the court on 8 October 2024 for a preliminary ruling to the ECJ. The NGOs ask the ECJ to determine whether Article 6(3) and (4) of Directive 92/43/EEC has been breached on the following 4 issues:

- Whether the decision not to carry out an AA in 2024 on the amended "G10.5 Eastern" option is a breach since the initial EIA/AA decision of 2017 approving the project significantly breached the requirements of Article 6(3);
- Whether it is a violation that the MoEW essentially made an assessment of the significance of impacts on the NATURA 2000 sites' objectives in its June 2024 screening decision and since this was done in the preliminary screening procedure, not in the full AA procedure;
- Is the separation of the motorway project into parts - one motorway lane and direction of traffic is not being evaluated in an AA and construction begins immediately, and the other lane (the opposite direction of traffic) will subsequently undergo an AA p? Is it possible to comprehensively evaluate the effectiveness of the prescribed mitigation measures, and evaluate all alternatives, in such a split?
- Whether it was a breach to split the motorway project into 2 parts - one of which did not pass AA, the decision to do so being motivated by overriding public interest reasons and "Way Forward" and the Government's decision to implement "Way Forward" based on it

3.B) The substantive arguments in the MoEW in the court case are not yet known insofar as the case has not been heard on the merits.

3.C) Procedure - The appeal in this procedure will have only 1 instance at the SAC. A first hearing was held on 8 October 2024 - discussed for evidence issues and not yet heard on the merits, with the NGOs requesting a postponement of the case after the validity of the 2017 EIA/AA decision is decided. The Court has accepted this argument and a substantive hearing has been scheduled for 25 March 2025.

Case 4 Three NGOs - BALKANI Wildlife Society, the Bulgarian Biodiversity Foundation and the Association of Parks are appealing the decision to provisionally implement the MoEW's screening decision from June 2024, as this decision is motivated by reasons of overriding public interest - both economic and allegedly addressing safety concerns, but also political ones (the war in Ukraine and the establishment of solidarity lines).

A.4) NGO Arguments: The NGOs argue that overriding public interest reasons cannot justify a derogation from the assessment and conservation requirements and that such implementation may result in irreparable harm to the conservation targets.

B.4) The substantive arguments in the MoEW case reiterate the overriding public interest reasoning.

C.4) Course of Proceedings - Appeals in this proceeding were held in various cases. The appeals of the Bulgarian Biodiversity Foundation and the Parks Association were finally rejected by the courts. The appeal of BALKANI Wildlife Society is to be heard for a second instance in the SAC but no case has been scheduled yet.

31 July 2024

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

**Possible case file on Recommendation No. 98 (2002) on the project to build a motorway
through the Kresna Gorge
(Bulgaria)**

NGOs FOLLOW UP TO THE CASE

Document prepared by:

BALKANI Wildlife Society, Environmental Association "Za Zemiata" (For the Earth)/Friends of the Earth Bulgaria, Bulgarian Society for the Protection of Birds, Green Policy Institute, Vlahi Nature School, CEE Bankwatch Network.

This Report reflects the latest developments in the Kresna case after 27 February 2024.

The NGOs welcome the general consensus conclusions reached during the Technical Workshop in Kresna in April this year and want to thank the Secretariat of the convention, the IENE experts, the representatives of the Bulgarian government, the scientists and all other participants. Our assessment is that key agreements have been reached regarding impacts and mitigation measures. Unfortunately, we have to report a serious negative development in the case since our last reporting on 27 February 2024 in spite of the Workshop agreements.

1. "Way forward" approved by the Bulgarian Government and the European Commission.

In the beginning of March 2024 NGOs received access to a letter sent by the European Commission to the Bulgarian Government on February 29, 2024⁵ – we have attached a copy of the letter as Appendix 1. The letter reflects decisions taken during a non-public meeting between the EC services and the Bulgarian government on February 8, 2024. During this meeting, a so-called "way forward" was agreed, including the timelines and the project implementation plan. In essence, the "way forward" thus scheduled is an executive decision, an act of approving an alternative:

- An alternative to build only one direction of traffic of the so-called "motorway" is indicated (see below our comments on the compliance of the project with TEN-T) in outside the Kresna Gorge - the direction from the Greek border towards Sofia. The approval is given to start construction of this direction of traffic as soon as possible – without a revised EIA/AA decision.
- Provides measures for further planning and evaluation of the other direction of traffic from Sofia towards the Greek border – possibly, but not obligatory outside the Kresna Gorge. The decision leaves the possibility for using the now existing road through the Kresna Gorge for the direction.

⁵ Ref.Ares(2024)1562893-29/02/2024

- Requires a partial EIA to be conducted only for this second traffic lane – without including a revised EIA of the entire project as a whole and without revising any of the previous EIA decisions.

This letter was followed by a subsequent act and the "way forward" was officially approved by the Council of Ministers of the Republic of Bulgaria with decision No. 146 of February 29, 2024. And as a next step, on the basis of this decision, on June 11, 2024, the Ministry of Environment and Water issued another decision to not request an EIA of the changes that occurred in the project after 2017 (we reported on these changes in our previous reports).

NGOs are strongly worried by this development:

- The “way forward” divides the project into parts and bypasses the overall assessment of all the combined impacts of these parts - essentially a "salami slicing” approach. The application of "salami slicing" began already after 2013, when the construction of the other sections of the Struma Motorway began without priority planning and construction of the section in the area of Kresna Gorge – and outside the Gorge. And with that, the mitigating measures of the EIA decision from 2008 for the entire Struma Motorway and reflecting the cumulative impacts of construction in all sections - were disregarded.
- The “way forward” in fact acts similarly as an EIA and Appropriate Assessment decision, which provides starting construction without revision of the EIA decision from 2017. The “way forward” was adopted by both the European Commission and the Council of Ministers of the Bulgarian Government - by persons who have no legal powers and responsibilities to carry out EIA and to take relevant decisions. Subsequently, the “way forward” (particularly the decision of the Council of Ministers) was the legal basis for the Bulgarian Ministry of Environment and Water, which is the legally responsible authority for EIA decisions, to justify its screening decision not to carry out an EIA for the amended "G10,5 Eastern " alternative.
- The “way forward” circumvents, ignores and effectively annuls the findings of the EC from 2019 that the EIA decision from 2017 significantly violates Art. 6, par. 3 of Directive 92/43/EEC. This decision actually states that construction will begin in violation of Art. 6, par. 3 of Directive 92/43/EEC.
- The “way forward” bypasses all EIA procedures, public participation in them and the public's right to seek judicial review.

2. Decision of June 11, 2024 of the Minister of the Environment and Waters authorizing the start of construction of amended alternative G10.5 Eastern (from 2017) without revision of the EIA.

On June 11, 2024, the Minister of Environment and Water (MoEW) approved the project of the "Struma" Motorway in the area of the Kresna Gorge - with a decision not to conduct a new EIA⁶. The approved project is for the "G10.5 Eastern" alternative adopted in 2017 - but with significant additions

⁶ <https://www.moew.government.bg/bg/reshenie-5-pr-2024-g-za-investicionno-predlojenie-izmenenie-na-investicionno-predlojenie-podobryavane-na-traseto-na-lot-3-2-na-avtomagistrala-am-struma-po-iztochen-variant-g-10-50-s-vuzlojitel-agenciya-putna-infrastruku-17269/>

and changes in the detailed design. The decision is issued with the so-called "preliminary enforcement" - or in other words, its enforcement can begin without waiting for court rulings on the decision.

- The decision is based on the "Way forward" letter and the Council of Ministers decision No. 146 of February 29, 2024. But it in fact violates the "Way forward". The amended project approved in June 2024 complies with the 2017 alternative in principle, but makes significant changes in the detailed design. One direction of traffic from Sofia towards the Greek border will remain on the current road in the gorge. The adopted project includes new construction of two sections of the motorway in the direction of Sofia-Greek border leading to the entrance of the Kresna Gorge thus completely predetermining the final alternative being through the Gorge again. The decision doesn't require nor mention any new EIA procedure. **The approval and predetermining of direction of traffic from Sofia towards the Greek border to follow the existing road in the Gorge - without a new or revised EIA nor alternatives analysis directly contradicts the "Way forward" (see Appendix 2 with map of adopted new construction)**
- The decision completely ignores the major changes in the project and the new scientific information collected since 2017 - a requirement by themselves to carry out a new EIA:

- 2 times larger area territories and more habitats are affected compared to the 2017 project⁷, and the route in places is shifted by more than 150-200 meters compared to the 2017. The total length of tunnels and viaducts is decreased.

- the joint conclusions reached at the Kresna Workshop, which clearly show the need for a new revised EIA decision, are completely ignored, namely: the uncertainty in the effectiveness of mitigation measures and the need for additional studies on them; the impact of traffic in the Kresna Gorge on the daily movements of reptiles and on their linear habitats in the Gorge; the need of traffic reduction along the existing road in the Gorge as an mitigation measure etc. See Appendix 3 for detailed reference and our comments to the document "Joint conclusions" from the Kresna workshop".

With this decision the implementation of building contracts signed in April 2023 can start immediately without any change in these contracts. For this purpose, a little more than 135 million Euros have been set aside for this activity in the country's budget for 2024.⁸

3. The 2017 alternative does not meet the TEN-T requirements for an European motorway

The European TEN-T regulation requires a motorway to be built and the existing railway line to be upgraded in the transport corridor from Sofia to the Greek border by 2030. These requirements and this deadline is the main ground for approving the "Way forward". The "Way forward" essentially creates the deceptive impression that compliance with the TEN-T Regulation is intended, but actually violates

⁷ In the 2017 EIA report, it is recorded that the "G10.5 Eastern" alternative (pre-investment study) covers an area of 1107,898 decares. In the official documentation for assessing the need for an EIA from 2024, it is recorded that the "G10.5 East" alternative (detailed conceptual design) covers an area of 2083,002 decares."

⁸ : Link to adopted law for country's budget for 2024 (in Bulgarian) <https://www.parliament.bg/bg/bills/ID/165235> - see Appendix 2 of the law, row 193 of the table indicating amount of 269 426 000,7 Bulgarian Leva allocated for the Struma Motorway

that regulation. The reason is not only in the unresolved environmental problems and the contradiction with Directive 92/43/EEC. The alternative approved in 2017 in all its parts does not even cover the basic requirements of the TEN-T Regulation for the construction of a European motorway and an integrated transport corridor (see [Appendix 4](#) with short description of non-compliance with TEN-T Regulation).

It is absurd for the application of such a project to justify a derogation from the requirements of Directive 92/43/EEC with an overriding public interest in implementing the TEN-T Regulation. By itself, starting construction on this alternative without a new revised EIA of all reasonable alternatives violates Art. 6, par. 3 of Directive 92/43/EEC and creates a serious risk of permanent and non-compensable damage to the integrity of NATURA 2000 sites and damage to protected habitats and species. **The lack of a project to meet the requirements of TEN-T means that there will inevitably be new projects and new construction in the future – which will lead to the accumulation of new risks of damaging impacts on NATURA 2000 sites. Thus the function and purpose of the NATURA 2000/Emerald network in the area could be completely compromised.**

4. Ineffective measures by the European Commission to prevent violations of Art. 6, para. 3 of Directive 92/43/EEC

In August 2023, NGOs and citizens submitted a complaint to the EC for violation of Art. 6, para. 3 of Directive 92/43/EEC indicating all the developments of the case, including the lack of a new revised EIA of all meaningful alternatives, as well as the government's clear intention to approve the serious changes in the alternative from 2017 without a new EIA (intentions, which proved to be a fact with the decision of June 11, 2024). On March 7, 2024 (we attach it as [Appendix 5](#)), the European Commission sent a letter warning that it would close the procedure with the following reasons:

- The Commission argues with the approved "Way forward" letter immediately before the pre-closer;
- The Commission also argues with the horizontal procedures for violations of the Habitats Directive, which the Commission conducts.

NGOs sent an objection (we attach it as [Appendix 6](#)), arguing that the "Way forward" essentially leads to a violation of Art. 6, para. 3 of Directive 92/43/EEC and puts the commission services in a serious conflict of interest compared to their real duties to be the guardian of the European directives and not to be decision-making bodies on these. The NGOs also questioned the lack of effectiveness of the horizontal procedures for the Struma motorway project – an important argument especially in light of the precaution principle of the Treaty on the Functioning of the European Union. At the moment, the procedure is not closed - but the commission's offices are not taking any action, despite the subsequent negative developments and the June 2024 decision not to carry out an EIA. The NGOs have no feedback from the Commission after their letter from March 2024.

5. Litigation in the national court by NGOs and citizens related to the Kresna case

There are currently 3 cases pending in the national courts (see more information in [Appendix 7](#))

In conclusion - we strongly believe that if the Standing Committee independently and together with the European Commission do not take clear and strong actions to solve the case - we will probably witness one of the worst cases of complete disregard of the Bern Convention and the European legislation in a country of the union. The basic principles such as the precautionary and preventive principles⁹ and also public participation principle will be disregarded. The actual permanent destruction of NATURA 2000/Emerald sites in the Kresna Gorge will happen without the possibility of even compensating these impacts.

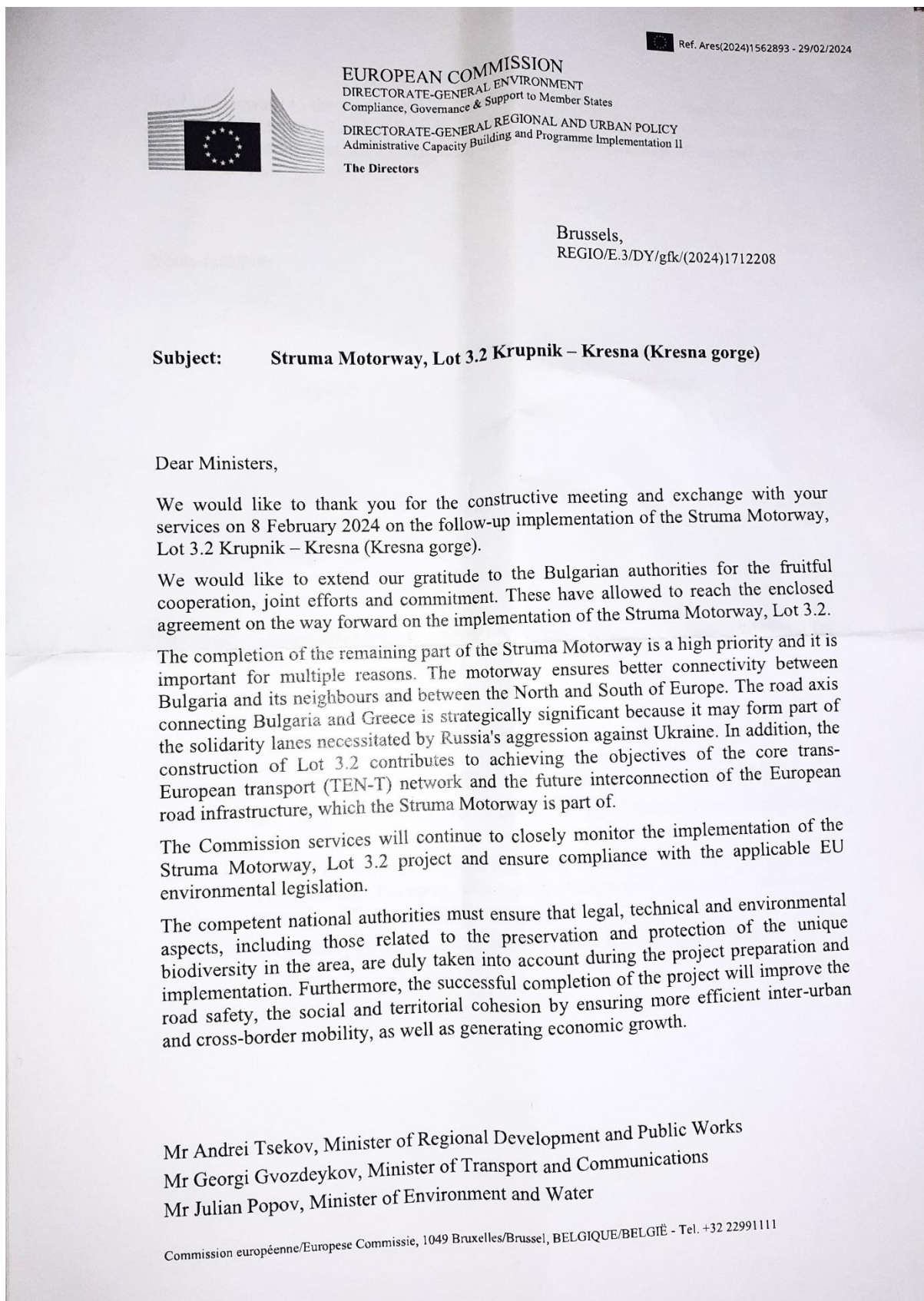
Appendices:

1. Letter of the EC to Bulgarian government from 29 Feb 2024
2. Map of adopted new construction
3. Comments and arguments on the conclusions of the Kresna Workshop of April 2024, which show the need of a new EIA
4. Short description of non-compliance of the alternative "G1055 Eastern" with TEN-T Regulation
- 5 Pre-closure letter from the European Commission, 7 March 2024
6. NGOs answer from to closure letter 20 April 2024
7. Description of litigations in the national court

With respect on behalf of all the complainers

Andrey Kovatchev and Andrey Ralev, BALKANI Wildlife Society and Desislava Stoyanova, Environmental Association "Za Zemiata" (For the Earth)/Friends of the Earth Bulgaria

⁹ Article 191, Para. 2 of the Treaty on the Functioning of the European Union: Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay

Appendix 1: Letter of the EC to Bulgarian government from 29 Feb 2024

We look forward to the consensual and successful completion of the remaining part of the Struma Motorway, Lot 3.2. Both Directorate-General for Regional and Urban Policy and Directorate-General for Environment services remain available to support you in this endeavour.

Yours faithfully,

Paul Speight
(e-signed)

Sofia Alves
(e-signed)

Enclosed: Conclusions for the meeting of 8 February 2024 on the way forward on the Struma Motorway Lot 3.2.

cc: Mr Ivan Ivanov, Director, Central Coordination Unit, Ministry of Finance
Mr Yassen Yordanov, Chair of the Management Board, Road Infrastructure Agency
Mr Martin Georgiev, Head of Managing Authority, Operational Programme Transport and Transport Infrastructure/Programme Transport Connectivity, Ministry of Transport and Communications
Ms Malina Kroumova, Chairperson of State Agency Road Safety

Annex

Conclusions for the meeting of 8 February 2024 on the way forward on Struma Motorway Lot 3.2

1. Commission observations on the compliance of the project with EU environmental legislation

- In its observation letter of 2019, the Commission identified several flaws concerning the EIA/AA decision of 2017.
- After a series of communications and meetings with the Bulgarian authorities concerning the *Analysis of the coherence of the EIA/AA 2017 conclusions with the specific objectives of the two affected Natura 2000 sites (2023 Analysis)*, the Commission services still have concerns regarding the compliance of the project Lot 3.2 (alternative G.10.50) with EU environmental legislation.

2. Proposed way forward

Taking into account the need to ensure compliance with EU law and that it is important to make progress on the project in order to improve this vital transport connection, the agreed way forward is as follows:

A. The Bulgarian authorities will carry out the following actions:

1. The maintenance of the existing defragmentation facilities (cleaning up and adaptation of existing culverts) on the E79 road and the construction of 3 new culverts and appropriate fencing, in order to minimise mortality of protected species and maximise connectivity in the gorge (timing: immediate and urgent action);
2. The necessary measures for ensuring the safe operation of the E79 road, such as the enforcement of the existing speed limitations (poles, speed cameras) plus the renovation of 6 emergency resting areas should be enacted immediately;
3. The construction of the eastern lane, going from Kulata to Sofia outside of the gorge (as included in the G.10.50 alternative) (timing: as soon as possible for the Bulgarian Authorities);
4. The assessment of the impact of the lane of the Struma Motorway Lot 3.2 going from Sofia to Kulata:
 - The Bulgarian Authorities to include in the ToR for the feasibility study for the new road complementing Struma Motorway an obligation for the Consultant to study an option of the new route outside the gorge to act as the lane from Sofia to Kulata of the Struma Motorway. The study should cover reasonable alternatives, which will be subject to an EIA/AA procedure;
 - If the Authorities decided that the Sofia to Kulata lane of the Struma Motorway Lot 3.2 should be implemented on the existing E79 road, the implementation will be preceded by an impact assessment in view of the SSCOs, fully considering the "improvement" SSCOs and fully addressing the concerns expressed since October 2019 by the Commission (i.e. ensuring all project components are assessed; the cumulative impacts are properly assessed, including with the railway; the criteria for assessing the impacts are scientifically based and comprehensive; the

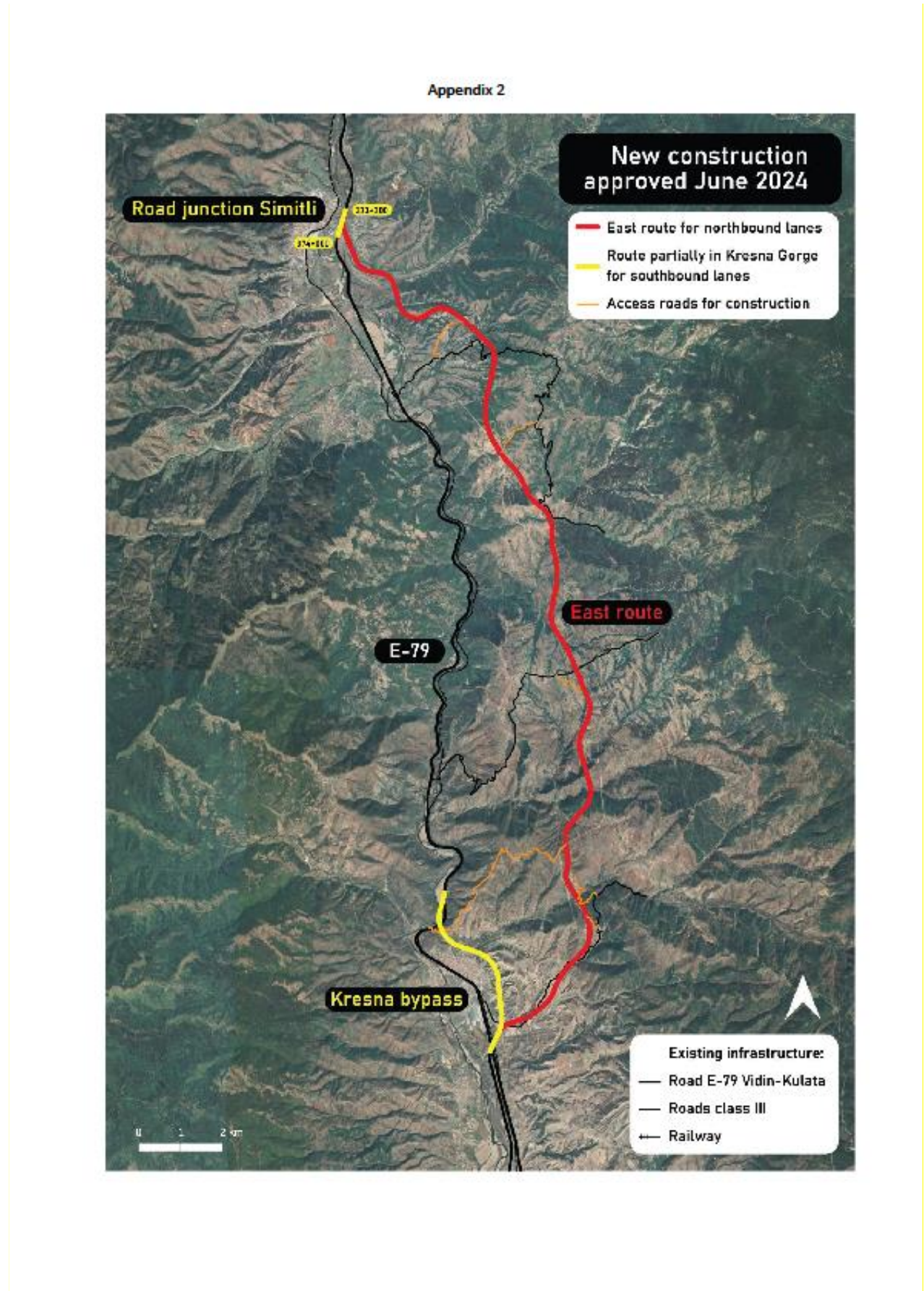
effectiveness of mitigation measures is ensured). The result of this assessment should be endorsed within an EIA/AA procedure.

- B. The construction of the eastern lane going from Kulata to Sofia (point 3 above) should be done in a way that does not prevent the realisation of alternatives for the construction of the remaining lane going from Sofia to Kulata;
- C. The construction of the remaining lane going from Sofia to Kulata, should only start after the assessment of the impacts is performed (as expressed in point 4 above) and having ascertained that the chosen alternative will not adversely affect the integrity of the site concerned.

Given that Bulgaria is fully responsible for ensuring conformity of all EU funded projects with EU law under shared management, a legally binding decision to seal the agreement and enact the above conditions should be taken.

The Commission will continue to monitor the general compliance of Bulgaria with authorisation of developments under the Habitats Directive through its case 2008(4461).

Appendix 2: Map of adopted new construction



Appendix 3: Comments and arguments on the conclusions of the Kresna Workshop, which show the need of a new EIA

The Kresna workshop held in April 2024 has adopted joint conclusions. Here we cited several conclusions and we give our comments and arguments why these conclusions require a new EIA.

1. The joint conclusions in the first sub-section “Acknowledging that the case is complex and challenging because:”

1.1. Paragraph 5: “Traffic in the gorge poses increasing pressure on wildlife in the gorge and damages the populations of reptiles including *Testudo graeca*, *Testudo hermanni*, *Elaphe quatorlineata*, and *Elaphe situla*. All 4 species have linear habitats in the area, and individual home ranges are structured along valleys with seasonal/daily movements from slopes to valleys and key seasonal (mid-summer) habitats situated in the bottom of valleys (thermal and water regime)” - **this impact is not assessed at all in the 2017 EIA report and EIA decision and clearly needs new assessment;**

1.2. Paragraph 7: *It is unclear whether traffic reduction on the existing road without defragmentation will be enough for the restoration of populations. ...* **This paragraph clearly indicates the need for traffic reduction on the existing road - measure not provided by the 2017 alternative “G10.5 Eastern” and missing in 2017 EIA decision.** (за footnote следното пояснение: “The mean traffic in 2017 was about 9 000 cars per day. The fast growth in traffic levels will lead to a mean traffic of more than 20 000 cars per day to the end of 2030. Thus leaving half of the traffic on the existing road, as it is envisaged by the alternative “G10.5 Eastern”, will not provide traffic reduction.”) **It also clearly indicates uncertainty in the efficiency of the mitigation measures along the existing road - also requiring new EIA re-evaluation and decision.**

1.3. Paragraph 8: “At present there are conflicting views on the efficiency of mitigation measures. Further scientific data is needed to confirm one of the two opposing views”. **The 2017 EIA decision accepted the discussed mitigation measures as efficient, without necessary scientific certainty. This paragraph again clearly indicates the uncertainty in the efficiency of the mitigation measures along the existing road - thus requiring new EIA re-evaluation and decision.**

2. The joint conclusions in the second sub-section “The participants call for the:”

2.1. Paragraph 2: “Avoidance as much as possible of the destruction of currently unaffected landscapes with new infrastructure developments;” **The amended alternative “G10.5 Eastern” destroy directly twice more habitats in currently unaffected landscapes compared to 2017 EIA decision - but still the decision from June 2024 is not to carry out a new EIA, which clearly ignores the “Joint conclusions”.**

2.2. Paragraph 4: “Provision of sufficient measures to ensure the restoration of populations and habitats connectivity of *Testudo graeca*, *Testudo hermanni*, *Elaphe quatorlineata*, *Elaphe situla* and guarantee daily movements of individuals,” **As we indicated above - the impact on daily movements of individuals and quality and vitality of their linear habitat in the Kresna Gorge is not assessed in the EIA 2017 - and clearly needs new EIA.**

3. The joint conclusions in the third sub-section “and draw attention to the following best practices, approaches and methods to be utilised in similar cases in the planning, implementation and maintenance of transport infrastructure:.”

3.1. Paragraph 3: “Zero solution is the worst solution especially when there is a known pressure exerted on wildlife by existing infrastructure and a clear need to construct new infrastructure. It is therefore not in the public interest to stall development until all data is gathered (it can never be complete because situation constantly changes) and decisions based on the best available scientific knowledge are justified.” **This paragraph clearly indicates the need for a new EIA decision - which should reassess different alternatives and their mitigation measures applying correctly the precautionary principle. And to start construction even in case of uncertainty of the mitigation measures - but after assessment and choice of alternatives based on the precautionary principle. The precautionary principle was not applied in the 2017 EIA decision and the choice of alternative “G10.5 Eastern” was made on the base of unjustified presumption for effective mitigation measures.** (пояснение във footnote: “This is one of the findings of the European Commission in their comments to the 2017 EIA from 2019 - reported in our previous reports)

3.2. Paragraph 4: “Test actions/measures (design of facilities, location, etc.) and make the results widely available. Agree with stakeholders on the success indicators and possible contingency measures.” and Paragraph 5: “The degree of efficiency of defragmentation measures can only be established based on scientifically verified data. Otherwise claims that they work or do not work are unsupported. Expert opinions and hypothesis need to be backed by data, which can inform decisions to make changes to initially planned designs.” **The same for the certainty in the efficiency of mitigation measures and the need for their scientific evaluation (see our comments above).**

3.3. Paragraph 7: “Guarantee long-term maintenance of facilities by integrating the necessary expenditures and performance indicators in the maintenance contracts. Use automated methods to monitor integrity and usage of facilities. Ensure control of the monitoring activities and the functioning of the facilities by the competent authorities.” **These measures are in fact coherent part of necessary mitigation measures - but they completely miss in the 2017 EIA decision.**

Appendix 4: Short description of non-compliance of the alternative “G10,5 Eastern” with TEN-T Regulation

Requirements of the TEN-T regulation not met by the "G10.5 Eastern" alternative.

1. The 2017 alternative requires that the local people should use it to access the territory and does not effectively separate transit traffic from local traffic – this directly violates the motorway requirements of the TEN-T regulation.¹⁰ The so-called “motorway” would serve the territory intensively and would be the only access to three settlements, agricultural and forest territories. Car lanes would be heavily used by pedestrians, tourists, domestic animals and wild animals. A number of connections on one level (thus directly contradicting TEN-T regulation) exist with other local, forestry and agricultural roads.

2. In 2017, the current “motorway” alternative was approved with average daily traffic levels at that time of around 9,000 cars and trucks per day and a long-term forecast of 2040 of 13,000 cars¹¹. As early as 2023, traffic has grown to almost 15,000 cars¹² and will surpass 20,000 cars in just a few years. In 2040 will be over 30,000 if the same level of traffic growth will remain.

3. All the technical characteristics of the 2017 alternative (turns, gradients, number and width of lanes, etc.) do not meet any technical standards for a motorway and even an expressway - in essence, this option is a mixture of a first-class road and a second-class local road. Thus, the 2017 alternative does not cover basic requirements of the TEN-T Regulation to ensure a quality and safe transport connection and to solve the problem of bottlenecks along the transport corridor.

4. The cumulative impacts from the construction of the 2017 motorway alternative completely limit the possibility of upgrading the international railway track in the Gorge - currently it has the characteristics of a slow local railway line with a speed of up to 60-80 km/h. An EIA decision was taken in 2016¹³ which decided to choose the zero alternative and not to upgrade the railway line due to significant cumulative impacts on NATURA 2000 resulting from the motorway project through the Kresna Gorge (thus prioritizing the motorway project and its alternative through the Gorge and to be an acceptable integrated transport solution, as required by the TEN-T Regulation, was not found).

¹⁰ Regulation No 1315/2013 on TEN-T, Article 17, para. 3 (a): “A motorway is a road specially designed and built for motor traffic, which does not serve properties bordering on it and which: (ii) does not cross at grade with any road, railway or tramway track, bicycle path or footpath

¹¹ This figures are provided in 2017 EIA report

¹² Information provided by the Governmnet in common - with NGOs - introductory presentation during the Kresna Workshop in April 2024

¹³ EIA decision № 4-4/2016 link to public electronic register of documents in this procedure <https://registers.moew.government.bg/ovos/lot/800>

Appendix 5: Pre-closure letter from the European Commission, 7 March 2024



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT

Directorate E – Compliance, Governance & Support to Member States

Brussels
ENV.E.3/ARK

Subject: Your complaint CPLT(2023)02047 of 1 August 2023 against Bulgaria

I refer to your complaint of 2 August 2023 relating to the construction of Lot 3.2. of the Struma Motorway in Bulgaria, registered under number CPLT(2023)02047 and the update provided with your email of 7 February 2024.

The Commission services have completed the examination of your complaint. On the basis of the information you supplied and the latest developments, we are not planning to propose that the Commission initiates an infringement procedure, for the reasons explained below.

In your complaint of August 2023 and the update of February 2024, you claim:

- 1) violation of Article 6(3) of the Habitats Directive in the approval of the project for construction of Lot 3.2 of the Struma Motorway;
- 2) violation of Article 6(2) of the Habitats Directive due to high pressure of the existing road E79 and lack of mitigating measures in the Kresna gorge.
- 3) that there was no feedback from the Commission after submitting your complaint in August 2023.

Let me start by reassuring you that an **acknowledgement of receipt** was sent on 8 September 2023 to the first complainant in the list of complainants, Mr Petko Tzvetkov at petko.tzvetkov@gmail.com. Please be aware that the complaints database can only accept one representative for automatic correspondence, such as the letter acknowledging receipt of a complaint. I would also like to recall that the state of play on the Struma Motorway was raised at the meeting between NGOs and DG.ENV services on 4 October 2023.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË – Tel. +32 22991111

On the substance of the complaint, the Commission has made clear on several occasions that the **completion of the Struma Motorway in Bulgaria remains a high priority** and is important for multiple reasons. The motorway ensures better connectivity between Bulgaria and its neighbours and between the North and South of Europe. The road axis connecting Bulgaria and Greece is strategically significant because it may form part of the solidarity lanes needed as a result of Russia's aggression against Ukraine. In addition, the construction of Lot 3.2 contributes to achieving the objectives of the core trans-European transport (TEN-T) network and the future interconnection of the European road infrastructure, which the Struma Motorway is part of.

You are aware that the sections of this strategic project, Lots 1, 2, 3.1, 3.3 and 4 are already operational.

As regards the **remaining section from Sofia to Kulata, Lot 3.2 Krupnik – Kresna (Kresna gorge)**, the Commission's position has not changed. The Bulgarian authorities must ensure that all EU legal requirements are fulfilled, and the relevant technical and environmental aspects are adequately addressed during the project's preparation and implementation, including those on the preservation of the unique biodiversity in the area.

Taking into account the need to ensure compliance with EU law and that it is important to make progress on the project in order to improve this vital transport connection, a way forward was agreed between the Commission and the Bulgarian authorities. The way forward will improve the road safety and ensure that the environment is protected.

As you rightly mention in your complaint, in early August 2019, the Bulgarian authorities submitted the application for co-financing of Lot 3.2 of the Struma motorway, crossing the Kresna Gorge. The Commission services evaluated the application and, in October 2019, sent a letter to the Bulgarian authorities presenting their observations and concerns on the fulfilment of the EU legislation. In January 2020, the Bulgarian authorities withdrew the application and requested technical assistance in addressing the shortcoming of the EIA/AA documentation.

In July 2022, the Commission services replied to the questions raised in an official letter sent by the former Minister of Regional Development and Public Works Mr Grozdan Karadjov. In their reply, the Commission services underlined that they were still awaiting that the Bulgarian authorities to revised the EIA/AA, including their thorough analysis of all reasonable alternatives for Lot 3.2, and that the re-assessment and revision of the Lot 3.2 project in light of the SSCOs was an essential part of the work before project resubmission to the Commission for approval. The Commission services urged the Bulgarian authorities to submit the application form for the preparatory and mitigation measures of Lot 3.2 of the Struma Motorway and the approved SSCOs without further delay. In May 2023, the Ministry of Regional Development and Public Works issued a building permit for a very small part of the road.

In 2023, the Bulgarian authorities analysed the coherence of the EIA/AA 2017 conclusions with the site-specific conservation objectives adopted for the two affected Natura 2000 sites. This analysis does not fully address the flaws identified in the Commission observation letter of 2019.

Therefore, the **agreed way forward includes specific conditions for the realisation of the most critical part of the project likely to affect the Kresna Gorge Natura 2000.**

The agreed way forward ensures that EU funding is only used for safety measures and measures to mitigate the impact of the operation of the existing road to protected species, maximise the connectivity in the gorge, and for construction works outside the gorge. The construction of the Eastern lane outside of the gorge (going from Kulata to Sofia) should not prevent the realisation of different alternatives for the construction of the remaining lane (going from Sofia to Kulata).

The agreed way forward envisages measures addressing the possible breach of Article 6(2) of the Habitats Directive. Bulgaria should take immediate action for the maintenance of the existing defragmentation facilities (cleaning up and adaptation of existing culverts) on the existing road and the construction of 3 new culverts and appropriate fencing, in order to minimise mortality of protected species and maximise connectivity in the gorge. Bulgaria should also take immediate

action to ensure the safe operation of the existing road E79, such as the enforcement of the existing speed limitations (poles, speed cameras) plus the renovation of 6 emergency resting areas.

The agreed way forward includes conditions meant to ensure compliance with Article 6(3) of the Habitats Directive. In particular, the construction of the remaining lane going from Sofia to Kulata should only start after the assessment of the impacts is performed, and having ascertained that the chosen alternative will not adversely affect the integrity of the Natura 2000 site concerned. An option for this lane to be built outside of the gorge will be studied. If the Bulgarian authorities decide that the Sofia to Kulata lane of the Struma Motorway Lot 3.2 should be implemented on the existing E79 road, the implementation will be preceded by an impact assessment in view of the site-specific conservation objectives (SSCOs), fully considering the “improvement” SSCOs and fully addressing the concerns expressed since October 2019 by the Commission. As regards the study for a new road outside the Kresna gorge, that you mention in the update of February 2024, I would like to stress that the feasibility study for the new road complementing Struma Motorway should also study an option of the new route outside the gorge to act as a traffic lane from Sofia to Kulata of the Struma Motorway. The feasibility study should include reasonable alternatives, which will be subject to an EIA/AA procedure.

As regards the impact of the on-going structural infringement procedures, I cannot agree with your opinion that these do not lead to results. On the contrary, the infringement procedure on the lack of conservation objectives and measures (INFR(2018)2352, currently pending before the CJEU) has led to the adoption of sitespecific conservation objectives, including for the two sites affected by Lot 3.2 of the Struma Motorway.

As a result of the infringement procedure for systemic breach of Article 6(3) of the Habitats Directive (INFR(2008)4461), the number of authorisations issued across the country without properly assessing possible impacts on Natura 2000 sites is significantly reduced. Thanks to the infringement, the authorities have amended national legislation on appropriate assessment, organised trainings for the administration and introduced online tools to ensure that relevant and up to date information is available to the authorities, especially when examining the possible cumulative effects of investment proposals. Furthermore, according to the information available to the Commission at this stage (examination not yet completed), after the reasoned opinion in this case was issued, authorisations in breach of Article 6(3) of the Habitats Directive seem rather isolated and do not constitute a general practice.

The abovementioned infringement procedures are still ongoing. They facilitate a close monitoring of Bulgaria’s compliance with the requirements of the Habitats Directive related 1) to the establishment of site-specific conservation objectives/measures for all Natura 2000 sites and 2) to the authorisation of plans and projects.

I therefore wish to inform you that it is intended to close this individual case. However, should you have any new information that might be relevant for the re-assessment of your case, I invite you to contact us within four weeks of this letter, after which date the case might be closed.

I also invite you to inform all the signatories of this complaint on the outcome of our examination.

Yours faithfully,

Paul Speight
Acting Director

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 Electronically signed on 06/03/2024 14:13 (UTC+01) in accordance with Article 11 of Commission Decision (EU) 2021/2121

Appendix 6: Answer from the NGOs to pre-closure letter 20 April 2024

To Mr. Paul Speight

ENV.E.3/ARK

Directorate E - Compliance, management
and support to Member States

Directorate General of Environment

European Commission

Date: April 20, 2024

From:

Andrey Kovatchev, expert and volunteer in
BALKANI Wildlife Society

Petko Tsvetkov, Chairman of the Board of
BALKANI Wildlife Society

Petko Kovachev, *Green Policy Institute*

Dimitar Vasilev, NGO "*Nature School -
Vlahi village, Kresna municipality*", local
initiative citizen committee

Zornitsa Stratieva, expert and volunteer at
the *Parks Association*

Daniela Bojinova, personally for herself

Simeon Arangelov, *Parks Association*

Toma Belev, *Parks Association*

Borislav Sandov, personally for himself

Vasil Todev, *Baikaria Association*

Re: complaint CPLT(2023)02047 of 1 August 2023 and NGO response to EC letter
Ref.Ares(2024)1768151-07/03/2024

Dear Mr. Speight,

In your letter of March 7, 2024, you indicate that there is an agreed so-called "way forward" including the terms and plan for the implementation of the project. It is not clear which parties agreed on this "way forward". But it is clear that this is the main motive to close our appeal and that this "way forward" guarantees compliance with Art. 6, par. 3 of Directive 92/43/EEC. Furthermore, based on information released by the Bulgarian government, we see that this

"way forward" reflects a letter from the Commission to the Bulgarian government with the number Ref.Ares(2024)1562893-29/02/2024 and specifically the results of a meeting held between the services of the EC and the Bulgarian government on February 8, 2024. For this reason, we will also analyze this document together with your letter of March 7.

1. In essence, the "way forward" thus scheduled is an executive decision, an act of choosing/adoption an alternative:

- An alternative to build one direction of traffic on the so-called "motorway" is indicated (see below our comments on the compliance of a project with TEN-T) and approval is given to start construction on this direction of traffic.
- Provides measures for further planning and evaluation of the other lane of traffic.
- It is indicated that all these decisions are motivated by the implementation of Art. 6, par. 3 of Directive 92/43

This act immediately gave rise to a subsequent act and the "way forward" was officially approved by the Council of Ministers of the Republic of Bulgaria with decision No. 146 of February 29, 2024.

Article 6, par. 3 of Directive 92/43/EEC gives nowhere competence and right to the European Commission to issue acts and take decisions on the implementation of this article. According to the Treaty on the Functioning of the EU, the Commission's services have only the duty to control the legality of such an act, through the Court of the European Union. Article 6, par. 3 of Directive 92/43/EEC is explicit - obligation and right to issue an act/decision under Art. 6, par. 3 of Directive 92/43/EEC is solely for the responsible authorities in the member country. The opposite leads to a serious conflict of interests - if the European Commission starts making decisions in the sense of Art. 6, par. 3 of Directive 92/43/EEC – it cannot be the controlling authority of these decisions at the same time. According to the Bulgarian laws - the national Biodiversity Act - decisions on the implementation of Art. 6, par. 3 of Directive 92/43/EEC (Articles 31-33 of the law) are entirely in the competence of the Minister of Environment and Water. The Council of Ministers of the Republic of Bulgaria does not have any competences.

In conclusion, the "way forward" is a completely null document that should not lead to any legal consequences and any decisions. Instead, it is applied as a decision and replaces the execution of legal procedures pursuant to Art. 6, par. 3 of Directive 92/43/EEC, creating the appearance of compliance with this article and completely depriving the public of all its legal rights to participate in and judicial review of these decisions.

2. Secondly, we would like to remind you of the undisputed fact that in 2019 the EC services found a number of violations of Art. 6, par. 3 of Directive 92/43/2017 in the EIA decision of 2017 (decision of the Minister of Environment and Water No. 3-3/2017 which approved the alternative "D10.5 Eastern" dividing the traffic into 2 - the directions - to the east along a completely new route and to the west along the existing road through the Kresna Gorge). In essence, each of these violations was in itself significant and could lead to damage to the integrity of the NATURA 2000 sites during the implementation of the project. This finding of the EC services was recognized in the decision of the Minister of the Environment and Waters on the SEA for the Operational Program *Transport*

Connectivity No 4-3/2021, which clearly indicated the need for a further assessment of the motorway alternatives, reflecting and implementing 2019 EC findings.

We want to briefly outline again all the violations found in 2019 by the EC:

- There is no assessment based on the objectives (pursuant to Article 4, par. 4 of Directive 92/43/EEC) of sites from NATURA 2000;
- The impact % assessment method has no legal relevance;
- The assessment of the significance of the impacts is not objective and the impacts on some habitats are enhanced at the expense of the impacts on the habitats of reptiles in Kresna Gorge;
- The measures to mitigate the impacts of the approved alternative are of unproven effectiveness (this finding is general and concerns the entire project alternative);
- The cumulative impacts have not been assessed, including in relation to the development of the railway project in the gorge (here we should add that according to the TEN-T Bulgaria is obliged to ensure an upgrade of the railway track in this section of the transport corridor and to provide an integrated transport solution given the presence of a bottleneck in this section of the corridor);
- The changes to the project between 2017 and 2019 when it moved from the pre-design study phase in 2017 to the conceptual design in 2019 were not assessed, indicating a number of changes to the route and facilities of the eastern new route (the same is foreseen in "way forward" to start construction immediately without any additional assessments);
- Impacts on all species and habitats have not been assessed and not all impacts have been assessed.

Based on these facts, we would like to make the following findings:

- 2.1. "Way forward" gives permission to immediately start construction of the eastern lane and direction of traffic - based on the EIA decision of 2017. Which without dispute according to the findings of the EC of 2019 and according to the decision of SEA No. 4-3/2021 – was taken in violation of Art. 6, par. 3 of Directive 92/43/2017. Starting construction based on such a decision is a flagrant violation of Art. 6, par. 3 of Directive 92/43/2017.
- 2.2. We do not see a "way forward" to address in any way the violations of Art. 6, par. 3 of Directive 92/43/2017 established by the EC in 2019. Literally every one of these violations is completely forgotten in the "way forward".
- 2.3. In essence, the "way forward" leads to non-implementation of the decision of the Minister of the Environment and Waters on SEA for Operational Program Transport Connectivity No.

4-3/2021.

2.4. The way forward completely excludes the evaluation of fundamentally different alternatives (e.g. tunnel options) from the already selected option in 2017, which is a significant problem for the application of Art. 6, par. 3 of Directive 92/43/2017

2.5. In essence, the "way forward" results in the non-implementation of the EC's letter of July 2022 (quoted in your letter) insisting in order to comply with Art. 6, par. 3 of Directive 92/43/2017 and in light of the violations established by the EC in 2019, the Bulgarian authorities should prepare a revision of the EIA/AA including all reasonable alternatives. There should also be noted the difference in principle between the EC letter of 2022 and the "way forward" of 2024. In the letter of 2022, the EC acts fully in its powers as a supervisory authority for the implementation of European directives and states the legal requirements of these directives. In the "way forward" from 2024, the EC offices make decisions to build alternatives - and take away the powers of the Bulgarian authorities and at the same time bully their own obligations.

2.6. The "way forward" envisages the immediate start of construction of the eastern route, which directly affects permanent habitats of the priority species **Ursus arctos* and **Canis lupus*, as well as independently and parallel to that of a biological corridor for the 2 species. All findings from 2019 regarding the lack of a relevant and objective assessment of the impacts on these species based on the objectives and priorities of the NATURA 2000 site (according to the best available information) – are fully valid. In particular, the effectiveness of the mitigation measures taken is questionable -

- the presence of extra-large road embankments and large-scale direct damage;
- the lack of sufficient defragmentation measures to prevent habitat damage;
- the lack of measures for adequate management of the defragmentation facilities after construction of the route;
- the lack of adequate construction of fences suitable for the 2 types. Practice for this has been accumulated, for example, in the "Via Egnatia" project in Greece - but none of the accumulated scientific information and practice was implemented in 2017.

In essence, the immediate start of construction of the eastern route directly threatens to damage the habitats of **Ursus arctos* and **Canis lupus*, to violate Art. 6, par. 2 of Directive 92/43/EEC and to damage the integrity of the area and its objectives and priorities (according to the best available scientific information).

2.7. The "way forward" envisages the possibility that one direction of traffic on the so-called motorway (see below comments in relation to TEN-T) will remain on the current road - if this turns out to be the only option. This poses a real risk of creating a fully effective barrier to the migrations of **Ursus arctos* and **Canis lupus* through the gorge, as well as making it impossible to restore the populations and habitats of the reptiles *Testudo graeca*, *Testudo hermanni*, *Elaphe situla*, *Elaphe quatorlineata*. There is a real risk that effective mitigation measures are not possible for these impacts.

2.8. "The way forward" envisages a new planning of some new lanes taking the other direction of traffic and bypassing the Kresna Gorge. In 2017, the "G20 Eastern" alternative was evaluated (the

same principle route as the eastern direction of traffic in the "G10.5 Eastern" alternative), which includes exactly the two directions of traffic in one common route. If the "way forward" plans to re-plan the same alternative again - this is bullying the entire process of planning such a route.

Lanes for traffic in the other direction on a route other than the route of G10.5 East/G20 East is impossible without a significant increase in all impacts, including direct damages.

Including in the "way forward" yet planning any new lanes outside Kresna Gorge is a programmed failure of this task and creating the appearance that a solution is sought outside Kresna Gorge. The only possible option for the construction of a motorway outside Kresna Gorge with two directions of traffic east of Kresna Gorge is an option along the route of G10.5 East/G20 East, with combined lanes in both directions in one route and the maximum possible mitigation measures (reducing the area of the embankments, defragmentation facilities) - such are missing in the 2017 EIA decision.

2.9. "The way forward" leads to the absence and avoidance of an evaluation of all alternatives and a lawful evaluation of these alternatives according to Art. 6, par. 3 of Directive 92/43/EEC, dividing the project into parts and passing only parts through evaluation - all this is a "salami" approach.

3. The existence of a "way forward" clearly shows that the EC is not taking the necessary measures and actions to comply with Art. 6, par. 3 of Directive 92/43/EEC during the construction of the Struma motorway (the section in the area of the Kresna Gorge is part of the entire transport corridor and the entire motorway in the sense of TEN-T). And that the closure of our complaint and the lack of initiation of infringement procedure is inadmissible before the commission has ensured compliance with Art. 6, par. 3 of Directive 92/43/EEC.

4. In your letter you refer to the existence of an overriding public interest citing the priority of the project under the TEN-T, as well as with a view for provision of support links in connection with the Ukraine war. These arguments are completely irrelevant to the actions taken for non-compliance with Art. 6, par. 3 of Directive 92/43/EEC in the "way forward" - such derogations are absent in Directive 92/43/EEC. The cases of, conditions and procedures in case of prevailing public interest are explicitly listed in Art. 6, par. 4 of Directive 92/43/EEC, and its implementation is entirely the responsibility of the Bulgarian authorities. This article has never been applied to this project!

5. In your letter, you clearly state that Lot 3.2 in the Kresna Gorge area contributes to the fulfillment of the objectives of TEN-T. This cannot be true insofar as the project does not directly fulfill the requirements of Art. 4, par. b i), par. d ii), Art. 17, par 2a), Art. 34, Art. 36, Art. 38, par 3, Art. 42, Art. 43 and Annex 1, Part 1 of Regulation 1315/2013 on TEN-T. These outstanding obligations of the TEN-T Regulation 1315/2013 include:

- The objectives of TEN-T according to Art. 4, par. b i) state that the main purpose of the transport network is to eliminate bottlenecks in transport corridors
- According to Art. 4, par. d ii) and Art. 34 main goal and task of TEN-T is to ensure safety and security standards for passenger and freight transport;

- According to Appendix 1, Part 1, Bulgaria is obliged to build a motorway in the corridor from the city of Sofia to the Greek border.
- According to Art. 17, par 2a) a motorway is a road which does not serve roadside areas and which does not intersect at the same level with other roads.
- According to Art. 42 and Art. 43 corridors of the main network are multimodal, of at least 3 types of transport, ensuring coordinated development and integration of different types of transport. For this corridor, Annex 1, Part 1 of the regulation foresees, in addition to the highway, the modernization of the railway line.
- According to Art. 38, par 3 of Regulation 1315/2013 Bulgaria should take appropriate measures for the construction of the motorway from Sofia to the Greek border and in parallel, as an integrated decision to modernize the existing railway line - by December 31, 2030 at the latest. To achieve this purpose, the government has so far received co-financing from the EC in the amount of 559,269,991.81 EURO.

All of these provisions are violated in both the alternative approved in 2017 and the "way forward":

5.1. The option approved in 2017 including the use of the road through the Kresna Gorge as one direction of traffic, which is also allowed as a possibility in the "way forward" - completely does not meet the requirements for a motorway of Art. 17, par 2a) of Regulation 1315/2013. In essence, it is a second-class road that, with no other possible alternative to it, intensively serves the territory. This time there are:

- one asphalt junction on one level to serve 2 settlements (Oshtava and Stara Kresna villages);
- there are 12 local forest and agricultural roads coming out directly from it on one level serving groups of buildings, agricultural lands, roadside establishments;
- the road is used intensively for the movement of pedestrians, tourists, rafting practitioners, fishermen, local people - as it is the only place for pedestrians to cross along the gorge;
- herds of domestic animals regularly cross the road, as pastures and breeding places are right next to the road;
- the road is crossed by wild animals.

This road does not meet any motorway standards and is in direct conflict with the motorway requirements of the regulation - yet it is the main approved alternative in 2017 and a fully permissible option according to the 'way forward'. It should be noted that in 2017 there are at least two feasible alternatives that are included and described in the application form of the project in 2019 as feasible - which to a much greater extent meet the requirements of the regulation. These are "G20 East" and "Full Tunnel" - both alternatives have not been approved, but the alternative directly not fulfilling the regulation has been approved.

5.2. In 2017, the Bulgarian government did not conduct the procedure under Art. 3 of Directive 2008/96/EC, the purpose of which is the analysis and comparison of alternatives in terms of their road safety. Such assessment is completely absent. The alternative chosen in 2017 poses serious risks, especially on the current road through the gorge, which has severely degraded road conditions suitable only for a local slow road - two narrow lanes, sharp turns, no banquettes and direct entry into steep slopes and rocks, tall trees, lack of visibility. This, together with the fact that the road is used intensively by people, animals and serves the territory, make it highly dangerous for all users - if it is used both as a local road (for which there is no other alternative) and as a transit part of a motorway. In December 2019 citizens of Bulgaria filed a complaint to DG Transport against the non-application of Art. 3 of Directive 2008/96/EC. In May 2023 after an opinion from Jaspers, DG Transport closed the complaint on the grounds that the lack of such a procedure and the choice of an alternative dangerous for travelers have no relation to European legislation! In addition to the fact that DG Transport refused to be the defender of Directive 2008/96/EC - the goals and provisions of TEN-T are violated according to Art. 4, par. d ii) and Art. 34 of Regulation 1315/2013 indicating that the main goal and task of the transport network is to ensure safety and security standards for passenger and freight transport.

5.3. The alternatives included in the EIA 2017 are planned with the available traffic of 9,000 vehicles per day and the estimated traffic for 2030 of 11,000 vehicles per day. These predictions turned out to be completely unrealistic and grossly underestimated. In 2023, the traffic has actually increased to 14,600 vehicles per day according to the data of the road agency. Traffic is expected to quickly increase to over 20,000 vehicles after entering Schengen. According to the publication "Express roads in Europe Research in the framework of the European research project SAFESTAR, Workpackages 3.2 & 3.J", a traffic of more than 15,000 vehicles requires the construction of a full motorway and the construction of an expressway is not a valid option. According to the same publication, expressways should be built for traffic between 5,000 and 10,000 vehicles per day and exceptionally up to 15,000 per day.

The eastern bypass approved in 2017 (carrying freeway and local traffic in one direction), slated for immediate construction (in "way forward"), is just a first-class road – it does not meet the requirements for either an expressway or a motorway. And it is intended only for one direction of movement. And in 2017, with an estimated traffic of 11,000 vehicles for 2030, it does not meet the requirements of TEN-T – it does not solve the problem of the bottleneck in the Kresna Gorge area, and its parameters do not meet the requirements at least for an expressway. The significantly increased traffic already in 2023 makes this violation even more serious - the eastern bypass is a clear failure to fulfill the obligations to eliminate the bottleneck and build an infrastructure that allows high quality and safe road traffic. However, these facts are completely ignored in the "way forward" - the opposite "way forward" envisages accelerated construction of such a route clearly violating TEN-T. Which makes even more absurd the use of TEN-T and the priority of the project under this regulation, as a reason for derogations from Art. 6, par. 3 of Directive 92/43/EEC.

5.4. According to Regulation 1315/2013, the area of Kresna Gorge is a part of the TEN-T transport corridor Sofia - Thessaloniki - Athens/Piraeus in the Orient/Eastern Mediterranean region. According to Art. 42 and Art. 43 of Regulation 1315/2013, the corridors of the main

network are multimodal, of at least 3 types of transport, ensuring coordinated development and integration of different types of transport. For this corridor, Annex 1, Part 1 of the regulation foresees, in addition to the motorway, the modernization of the railway line. Bulgaria completely ignored these obligations and by choosing the motorway alternative from 2017 did not make any assessment for the integrated development of a modernized railway line in the narrow place of Kresna Gorge. Not only that - the "non-motorway " alternative planned in 2017 blocks the possibility of modernization of the railway line in this section. That is, in addition to the bottleneck on the motorway, a bottleneck also created on the railway line in this corridor.

5.5. According to Art. 36 of Regulation 1315/2013, the environmental assessment of the highway project in Kresnenski Prolom should meet the requirements of Directive 92/43/EEC. As we clearly indicated above in point 1 and 2 - it is an indisputable fact that the EIA decision No 3-3/2017 does not meet the requirements of Directive 92/43/EEC.

In conclusion: if the EC services do not guarantee to carry out a new revised EIA/AA of all meaningful alternatives (including tunnel ones, including those exploring an integrated transport solution with high-speed rail) and revise the EIA/AA decision, leave in force "road forward" and in the meantime close this procedure - NGOs will seek legal assistance and will look for all possible ways to seek their rights in court..

With respect,
Andrey Kovachev (on behalf of the senders)

Appendix 7: Description of litigations in the national court

The 3 pending litigations in the national court related to the Kresna case

a) Two citizens (Mr. Dimitar Vasilev and Mr. Andrey Kovachev – both complainants to the Bern Convention) are appealing the validity period of the EIA decision from 2017, claiming that the decision has expired after October 2022 due to the 5-year statute of limitations of the decision. The arguments of the applicants are related both to the national procedural rules and to the principle of up-to-date information in the EIA according to the practice of the European Court of Justice. There will be a court hearing on the merits in the last instance court - Supreme Administrative Court. Taking this into account, a number of statements made by representatives of the Bulgarian regional ministry, that this matter has already been resolved and is not subject to discussion, sound strange and predetermined.

b) BALKANI Wildlife Society and Mr. Dimitar Vasilev are appealing the lack of any legally meaningful environmental procedure (SEA/EIA/AA) for approval of the construction of the road junction which started in May 2023. The case is also to be heard on the merits of the last instance in the Supreme Administrative Court.

c) Four NGOs - BALKANI Wildlife Society, For the Earth/Za Zemiata, Bulgarian Biodiversity Foundation and the Parks Association are appealing the decision from June 2024 to approve the amended project of 2017 without EIA procedure. The first hearing is expected.

27th February 2024

NGOs FOLLOW UP TO THE CASE

This Report reflects the latest developments in the Kresna case after November 2023.

1. In Appendix 1, we give the NGO update sent to the European Commission regarding the complaint for violation of Art. 6, par. 3 of Directive 92/43. In this update, there are several important developments in the case also from the perspective of the Bern Convention, which we will list here very briefly (for a more detailed description, see Appendix 1):

1.1. The Bulgarian government intends to start construction of the Struma motorway in April 2024 – without a new revised EIA of the motorway and a new assessment of meaningful alternatives and mitigation measures.

This was unequivocally stated on 17 January 2024 by the Minister of Regional Development and Public Works of Bulgaria, Mr. Andrey Tzekov, in his speech at the Committee of Regional Development, Public Works and Local Self-governance in the Bulgarian Parliament¹⁴. The Minister said that the "Document of Compliance" was sent for approval to the Commission in July 2023. The Minister pointed out to the Bulgarian MPs that after that a letter was received from DG Environment demanding a new EIA procedure. A questionnaire was quoted in statements by the Government, which was sent by the European Commission. According to statements by Minister Tzekov, they are waiting for approval from the EC offices for the quick start of construction of the Struma Motorway in April 2024 without the need of a new EIA.

These actions by the government show a disregard for the recommendations and decisions of the Convention's Standing Committee of the recent years and unfortunately may render meaningless the recommendations of the Kresna Technical Workshop on “Challenges & Opportunities for the conservation of reptiles and large carnivores during linear infrastructure development in south-east Europe” in line with Recommendation 212 (2021) being organized by the Convention in April 2024.

1.2. The government has launched amendments to the motorway project, which already include construction activities inside the Kresna gorge - with the clear intention that they will not be subject to an EIA.

In December 2023, the Ministry of the Environment and Water (MoEW) announced that new information about the investment intention from April 2023 (reported in our previous reports in 2023) had been submitted to the Ministry and a procedure to assess the need for an EIA had begun in December. This project has two components:

- There are changes to the routes and facilities of the motorway in the eastern new lane, which bypasses the Kresna gorge - the approval of these changes by the MoEW is mandatory in order for construction to begin.
- There is also the planned new construction of road facilities and road widenings in the Kresna gorge - which were not subject to any assessment and completely missing in the EIA 2017.

¹⁴ see video recording, after 3 hours, in Bulgarian <https://www.parliament.bg/bg/parliamentarycommittees/3205>

Judging by the statements of the Minister of Regional Development that construction will begin in April (if the European Commission approves such a decision) - this means that these significant changes to the project are going to be approved without an EIA by the MoEW in March 2024.

1.3. Top government officials continue to make statements¹⁵ that a 2nd alignment of the motorway will be designed and built to accommodate north-south traffic - but there is no documentary evidence or facts for such an action.

In their 2023 reports, the NGOs pointed out that the Bulgarian government had prepared Terms of Reference for the design of a north-south road - but that these ToR only defined the possible scope of a 2nd lane of the motorway. In essence, the ToR do not contain a design of the new road and is not connected in any way to the motorway project through official documents or procedures. It is unclear where this new road will pass and why it should be done and not moving the whole motorway outside the gorge. **Despite statements from top government officials, we are not aware of any facts that this assignment was changed to actually include the design of a 2nd lane of a north-south motorway.**

1.4. In 2024, the non-public contacts between the government and the European Commission (EC) continued, in which the Bulgarian government is trying to get permission from the EC to quickly start construction of the highway according to the 2017 EIA decision and without providing a new revised EIA.

The Bulgarian public understands about these contacts only from the already quoted statements of senior government officials. Judging by the statements of these officials, the European Commission is about to approve 'as soon as possible' the start of such construction despite the violations of Art. 6, par 2. and on Art. 6, par. 3 of Directive 92/43 in the EIA of 2017 (established in 2019 by the Commission's services) and the Recommendations of the Bern Convention.

If that becomes a fact, the European Commission was misled by the Bulgarian government and would take decisions in violation of its duty to be "guardian of the EU law" and Contracting Party to the Bern Convention.

2. In January and February 2024, two important decisions were issued by the Bulgarian Supreme Administrative Court regarding the Kresna case.

2.1. In the first decision of January 15, 2024, the court returned to the Administrative Court of Sofia for consideration of the first instance the case with which the NGOs contested the decision on the approval by the Ministry of Environment and Waters (MoEW) the construction of a road junction part of lot 3.2, which took place in May 2023. The disputed decision of the MoEW is an informal letter stating that there is no need to conduct a Strategic Environmental Assessment of the detailed plan for the construction of this motorway section (the SEA of detailed plans in this case replace the EIA procedures according the Bulgarian law). The NGOs appealed precisely because the letter was informal and did not constitute a legal decision. On the basis that informal letters cannot be appealed, the Administrative Court of Sofia quashed the appeal and refused to accept the fact that the letter should have been formal under a formal SEA screening procedure. The Supreme Court did not accept the arguments of the first instance court and ruled that since it is mandatory to have an SEA act and it is appealable in the court - this letter should be considered as such and its legality should be determined by the first instance court.

¹⁵ Public statement of the Prime Minister of February 20, 2024. <https://www.investor.bg/a/523-transport-i-infrastruktura/389651-denkov-predlozhili-sme-reshenie-za-doizgrazhdane-na-am-struma-sled-simitli>

Dismissal of this letter would mean that all construction in May 2023 was illegal and that the 5 year validity period of the 2017 EIA decision has undeniably expired.

2.2. The second case also addressed the expiration of the 2017 EIA decision. In it, two citizens (complainants in the Bern Convention case) argued that the 2017 EIA decision expired as early as November 2022, while the government claims that the deadline expires in May 2023 and that with the construction of the road junction in May 2023 - it was implemented on time. First, the first-instance Administrative Court of Sofia refused to consider the arguments of the NGO on the merits. With a decision of February 8, 2024, the Supreme Court did not accept these arguments here, and returned the case to the first instance with the request that all arguments be examined on the merits.

The issue of the validity of the 2017 EIA decision from the point of view of its duration has not been resolved and is yet to be decided in court. This does not prevent the Bulgarian government from basing all its decisions on the 2017 EIA and asserting that the EIA deadline issue has been resolved and the 2017 EIA is valid and effective.

NGOs consider and ask:

- That the Secretariat of the Bern Convention re-informs the Bulgarian authorities that a revised EIA decision needs to be prepared and all reasonable alternatives reevaluated.
- That the Bulgarian government takes into account the outcomes of the Workshop in April 2024 when preparing the revised EIA.
- And that before this is implemented, no construction of the motorway section 3.2 should start.

We further would like to ask the Secretariat, that it notifies the European Commission (EC) services of these recommendations and that it is important to get a feedback from the EC what the Commission has done to ensure compliance with all the Recommendations of the Bern Convention before construction begins (taking into account serious flaws in EIA decision from 2017 later confirmed and recognised by the Commission in 2019).

On behalf of the complainants:

On behalf of BALKANI Wildlife Society:

Mr. Petko Tzvetkov – chairmen of the management board

Mr. Andrey Kovatchev - representative of the society in the case

On behalf of Za Zemiata/For the Earth:

Ms. Desislava Stoyanova – representative of the society in the case

On behalf of CEE Bankwatch Network:

Mr. Andrey Ralev - biodiversity campaigner

[Appendix](#)