

Strasbourg, 20 November 2018
[files17e_2018.docx]

T-PVS/Files(2018)17

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

38th meeting
Strasbourg, 27-30 November 2018

Possible file

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

- REPORT BY THE NGOS -

*Document prepared by
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- November 2018 -

**POSSIBLE CASE FILE ON RECOMMENDATION NO. 98 (2002) ON THE PROJECT TO BUILD A
MOTORWAY THROUGH THE KRESNA GORGE
(BULGARIA)**

NGOs UPDATE TO THE CASE

(This report update should be read together with previous NGO reports, specifically that of 12 March (PVS / Files (2018) 17 [files17e_2018.docx]) and September 2018

Document prepared by:

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POSSIBLE CASE FILE ON RECOMMENDATION NO. 98 (2002).

The undersigned Bulgarian NGOs appeal to the Standing Committee **to reopen the case file** on construction of Struma motorway through the Kresna Gorge (NATURA 2000 site – Site of Community Importance “Kresna-Ilindentzi BG000366). More than 140 000 citizens across Europe signed a petition calling that European laws for the protection of nature are respected and the pristine valley of Kresna Gorge in Bulgaria is saved from destruction.

We appeal to the Standing Committee to conduct an in-depth review of the latest environmental impact assessment (EIA 2017), taking into account the previous Bern Convention Recommendations 98/2002 conclusions and the EIA decision of 2008 [1], and we invite the Standing Committee to conduct a site visit of Kresna Gorge to examine the impact of the Bulgarian government’s road plan.

The Kresna gorge case has been of long-standing interest to the Bern Convention Standing Committee. However, since 2015, when it has returned to the attention of the Bern Convention Committee, and despite numerous efforts and contributions from NGOs, the Bulgarian authorities have resisted every concern, and the threat of irrevocable damage to Kresna gorge has steadily grown closer.

Any construction work in, or expansion of the current small road in the Kresna gorge risks exacerbating and making irreversible existing observed damage to the protected habitats and species of the Gorge. Several protected species populations are already severely degraded by the build up of traffic through the Gorge, with all mitigation efforts ineffective. The planned expansion of the road to a one-way motorway will intensify the damage beyond repair. However, the assumptions of the new EIA which permit this expansion are seriously flawed and directly contradict the robust findings of the EIA 2008, yielding false results.

Civil society in Bulgaria has now exhausted all possible legal means on national level to challenge the Bulgarian government decision to construct part of the Struma Motorway through the gorge. The Court of First Instance reached its verdict without considering evidence of the flaws in the new EIA 2017, and without considering the Bern Convention and its Recommendation 98/2002, either. [2] Any further NGOs efforts for appealing the court decision were declined as Struma Motorway is considered under a special “fast-track approval” procedure approved by the Bulgarian government in 2017 [3].

We would like to reiterate to the Standing Committee that at least one alternative for bypassing the Kresna gorge exists that would allow full compliance with the Bern Convention Recommendations 98/2002.

RECENT DEVELOPMENTS:

1. No action from the side of the European Commission to assess infringement of Habitats Directive.

- The NGOs Complaint CHAP (2017)02186 - BULGARIA for infringement submitted over a year ago has not received any response as of today;
- The position of the EC expressed in a letter of Commissioner Vella on August 15, 2018 is that the EC will be able to assess “project compliance with EU legislation on receipt of an official application” for Struma Motorway Lot 3.2. As of today no application for Cohesion funds support was submitted, although the tender and preparation of constructions works are on-going. For this reason, the EU is not taking any action. However,

2. Tendering and preparation of the construction works in Kresna gorge are on-going

- Tender procedures for construction of Lot 3.2 were launched on 30th August 2018. The contracts are expected to be signed in the first half of 2019.
- The permission for the start of substantial rehabilitation work on the existing road E-79 was requested on 4th September 2018.
- Preparatory construction works are on-going on the territory of NATURA 2000 site. (see below images from access roads construction in Melo Landscape protected area part of NATURA 2000 site)



Access road 1 in Melo area - part of NATURA 2000 site



Access road 2 in Melo area - part of NATURA 2000 site

3. Financial support from the EU Cohesion Funds and the European Investment Bank without requirement for compliance with EU Habitat Directive and Bern Convention requirements

- On 28th September 2018 the European Investment Bank approved EUR 57 Million for the construction of the lot 3.1 and lot 3.3 of Struma Motorway adding to the EUR 330 million approved by the EU Cohesion funds. Lot 3.3 will be open for operation in December 2018, showing that the request for external financial support are generally towards the end of the construction works and have little or no impact on the quality of the project.
- The application form for Lot 3.2 for financial support from the Cohesion funds is not submitted as of today.
- EC is raising concerns [4] about the need for additional project and investments for the high-speed road along the existing road in the Kresna gorge. The EC does not, however, raise concern that the EIA 2017 did not assessed impact of the construction works in the gorge and thus the EIA 2017 report was not in line with cumulative impact requirements of the EIA Directive.

ACTION REQUESTED OF THE BERN CONVENTION

We welcome the conclusions of the Bern convention's decision from 10-11 September, 2018 to commission an external review of the EIA and its Recommendations.

The EIA process for the Struma Motorway lot 3.2 shows a now familiar unwillingness on the part of the Bulgarian government to apply European environmental law and Bern Convention recommendations. The EIA failed to assess all alternatives on an equal basis; and unduly disregarded those that would bypass the Gorge. The comments of NGOs as well as concerns of local people, presented during the EIA process, were never taken into account by the Bulgarian Ministry of Environment, nor by the Court of First Instance.

We therefore come to the clear conclusion that **international review of the quality of the EIA 2017 and the robustness of its conclusions (in compliance with the EIA 2008 and Bern Convention Recommendations 98/2002), and a field visit to observe an already degrading site, would be of key importance for the Kresna Gorge nature.** These can help to thoroughly assess the impacts and risks associated with the selected alternative in comparison with the rejected ones.

GROUND FOR THE STANDING COMMITTEE TO INTERVENE TO EXAMINE REVIEW THE EIA 2018 AND CONDUCT A SITE VISIT

- The Bulgarian Government claims that the G10.5 Eastern Alternative fulfils the Recommendations 98/2002 of the Bern Convention. However, whilst the Bern Convention recommended complete removal of motorway traffic through the Gorge, this chosen alternative nevertheless directs half the motorway traffic through the Gorge enlarging the existing road, and does NOT bypass the Kresna gorge. Directing the route through the Kresna gorge, even if the traffic is in one direction, undoubtedly contradicts the recommendations:
 - Increased quantity and speed of international traffic through the Gorge would greatly exacerbate the continuing deterioration of habitats and species populations in the gorge, likely irreversibly. The existing road where the speed limit is between 50-60 km/h will be turned into a high-speed international road with projected speed of 80 km/h.
 - This will create a bottleneck for the Bulgarian and European vehicles for the operational period of the project which is usually above 30 years. Struma motorway is part of TEN-T transport corridor “Orient-East Mediterranean”. As such, the Bulgarian state has certain clear obligations and, fulfilling these, receives EU funds support. One of the main pillars and requirements for the TEN-T corridors is to ensure the removal of bottlenecks along the network.
 - Although upgrading along the current road is not mentioned in the scope of the selected alternative, during the EIA consultations government representatives spoke about straightening and widening the existing road to meet the needs of high-speed drivers. The impacts of this were not considered in the EIA 2017 – but would likely cause further damage.
 - There is no guarantee provided by the Bulgarian Government or Road authorities that additional works will not be carried out in order to turn the current E-79 route into a road compatible with motorway high-speeds - currently, some turns can only be made at a speed of up to 60 km/h.
 - In violation of the Recommendation 98 half of the motorway traffic will be left in Kresna Gorge along the existing road and the effectiveness of the proposed mitigation measures for the increased traffic was not assessed in EIA 2017. According to Recommendations 98/2002 and EIA 2008 the construction of an alternative avoiding fully the Kresna Gorge is the only possible effective measure.
 - Local road users will not be able to use the road for access to and from Kresna town, also in contradiction to the Recommendation 98.
- The undersigned NGOs question the quality and robustness of the 2017 Environmental Impact Assessment conclusions that reject the G20 Eastern Alternative – which is a viable alternative that would remove motorway traffic in both directions from the Kresna Gorge, helping to protect its wildlife, whilst causing relatively much smaller and mitigable impacts elsewhere. We have documented our critique of these conclusions in several NGO comments to the Appropriate Assessment (Birdlife Bulgaria and Balkani Wildlife Society).

THE GROUNDS FOR OUR APPEAL TO THE STANDING COMMITTEE ARE AS FOLLOWS:

- On 31st October 2018 the Bulgarian Supreme Administrative Court (SAC) adopted decision № 13201[1] confirming its first instance decision № 6834 from 23rd May 2018. [5] Thus, the EIA decision No 3-3 / 2017 of 19 October 2017 of the Minister of Environment and Waters (EIA decision 2017) is no longer subject to further judicial control in Bulgaria and can be fully implemented.

- The final EIA decision 2017 violates Article 4 of the Convention and violates Recommendation 98 (2002) of the Standing Committee taken to implement the Art. 4. As detailed in previous reports to the Convention from 2017 [6] and 2018 [7].
- At least one viable alternative in compliance with the Bern Convention Recommendations 98/2002 is available.

It should be noted that the Supreme Administrative Court decision repeats the very formal arguments submitted by Ministry of Environment and Waters (MoEW) and Road Infrastructure Agency (RIA) and does not take into account or answer any of the presented concerns regarding the deficient quality of the EIA report.

Thus the Bulgarian Government and the Supreme Administrative Court [decisions № 6834 from 23 May 2018] has failed to undertake the appropriate and necessary measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats. The court decisions № 6834 from 23 May 2018 and № 13201 from 31 October 2018 do not regard and consider at all any possible violations of Recommendation 98 (2002) and Article 4 of the Bern Convention. [2]

TAKING INTO ACCOUNT THE URGENCY OF THE SITUATION AND ALL THE FACTS POINTED OUT IN OUR REPORT OF 12 MARCH 2018 (PVS / FILES (2018) 17 [FILES17E_2018.DOCX]) AND IN THIS REPORT OUR NGOS CALL FOR:

- **urgent opening of a case file.**
- **Commissioning an independent assessment of the EIA in order to check if all options have been assessed in the same method and quality**
- **An on-the spot appraisal to enable a common understanding of the situation, and come to a decision that is in conformity with the requirements of the Berne Convention.**

There is an immediate threat that Recommendation 98 (2002) will be permanently violated without the possibility to restore in the future the conservation status of the adversely affected NATURA 2000 site in Kresna Gorge or to mitigate and compensate the adverse impacts.

REFERENCES:

The screenshot shows a web browser window displaying a petition on the Wemove.eu platform. The URL is <https://act.wemove.eu/campaigns/Save-the-Kresna-Gorge>. The page features a header with 'ENGLISH' and a search bar. Below the header is a large image of a mountain valley with a river and yellow flowers. The main heading is 'Save the Kresna Gorge'. Below this, it lists the petitioners: Commissioner Kamenu Vella (Commissioner Environment, Maritime Affairs and Fisheries), Commissioner Corina Crețu (Commissioner Regional Policy) and European Commission. The petition text reads: 'We call upon you to ensure that European laws for the protection of nature are respected and the pristine valley of Kresna Gorge in Bulgaria is saved from destruction. In particular, we demand that the European Commission refuses to release any subsidies for the construction of a major motorway, which would cut through the precious Natura 2000 site protected under European and Bulgarian law. We demand that the Commission ensures that all but local traffic is removed from the gorge, and the motorway is built fully outside of it.' To the right of the text is a sign-up form with the name 'Anelia Stefanova' and a 'Sign the petition' button. Below the form, it shows '140,996 of 175,000 signatures' and a 'Recent comments' section with a comment from Benjamin.

[1] EIA/AA decision 1-1/2008 of the Minister of Environment and Waters from 15.01.2008.

[2] The only reference to the Bern Convention and Recommendation 98 (2002) is found in one

paragraph of court decision № 6834 from 23 May 2018 and says the following wrong statement: "Various alternatives have been discussed and as a result of the consultations with the specialized agencies and the interested public, the ToR have been updated / extended - besides the options "Long tunnel variant", "G20-blue" and "G20-red" are included in the assignment also "East option D 10.50", and "Eastern variant G20" and these five alternatives being proposed by the contracting authority, taking into account: MOEW decision No 1-1 / 2008, Recommendation 98 (2002) of the Standing Committee of the Bern Convention....."

- [3] The official text of decision № 13201 (in Bulgarian): <http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/5e7fa159deb66b28c225832100429add?OpenDocument> –
- [4] 30 May,18, page 16 Official Minutes of the Monitoring Committee for Operational Program Transport
- [5] The official text of decision № 6834 (in Bulgarian): <http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/998d5f555becd42bc2258294001b4918?OpenDocument>
- And English translation of the decision № 6834 can be found in the Government Report - T-PVS/Files(2018)15: <https://rm.coe.int/possible-file-follow-up-of-recommendation-no-98-2002-on-the-project-to/1680790aaa>
- [6] Strasbourg, 30 October 2017, T-PVS/Files (2017) 33 [files33e_2017.docx]. Follow-up of Recommendation No. 98 (2002) on the project to build a motorway through the Kresna Gorge (Bulgaria) - REPORT BY THE NGOS: <https://rm.coe.int/possible-file-follow-up-of-recommendation-no-98-2002-on-the-project-to/1680745542>
- and Annex 1 to the report (NGOs opinion on the EIA procedure): <https://rm.coe.int/possible-file-follow-up-of-recommendation-no-98-2002-on-the-project-to/1680762575>
- [7] Strasbourg, 4 September 2018, T-PVS/Files (2018) 17 [files17e_2018.docx]. Follow-up of Recommendation No. 98 (2002) on the project to build a motorway through the Kresna Gorge (Bulgaria) - REPORT BY THE NGOS: <https://rm.coe.int/possible-file-follow-up-of-recommendation-no-98-2002-on-the-project-to/168079256e>

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- September 2018 -

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

NGOs UPDATE TO THE CASE

(THIS REPORT UPDATES SHOULD BE READ TOGETHER WITH PREVIOUS NGO REPORTS, SPECIFICALLY THAT OF 12 MARCH 2018 (T-PVS/FILES(2018)17 [FILES17E_2018.DOCX])

Document prepared by:

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POSSIBLE CASE FILE ON RECOMMENDATION NO. 98 (2002)¹.

The undersigned Bulgarian NGOs appeal to the Bureau of the Bern Convention to recommend to the Standing Committee **the reopening of a case file** on construction of Struma motorway through the Kresna Gorge (NATURA 2000 site – Site of Community Importance “Kresna-Ilindentzi BG000366).

As of today, the risks of irreversible damage to the biologically important hotspot for 92 EU-protected species and 35 specially protected EU habitats, is greater than ever. The provisions for conservation of the Kresna gorge that motivated the closure of the case file in 2010 are currently fully neglected both as a result of:

- a. the recent decision taken by the Bulgarian government allowing for the southbound corridor of the Struma motorway to go through the Kresna Gorge (the EIA decision 3-3 / 2017 on selection alternative called "G10,5 Eastern") thus undermining the Recommendation No. 98 (2002) on abandoning the enlargement of the existing road (p. 3), local road use for local use and tourism (p. 6) and in-depth environmental impact assessment (EIA) considering imperatives of nature and local people (p.1,p.2 and p.4).
- b. the ongoing deterioration of the conservation status of the gorge as a result of increased traffic and the ongoing construction of the other sections on both sides of the gorge. The increased traffic already led to severe negative impacts on population abundance, such as the decrease in the population of protected bats by 92%, in protected tortoises and snakes by 60% and in all vertebrates by 84%.

Therefore, additionally to Recommendation 98/2002, the Article 4 of the Bern Convention has also been violated. The article requires the contracting parties to take appropriate and necessary legislative and administrative measures to ensure the conservation of habitats of wild flora and fauna species and the conservation of endangered natural habitats, as well as to respect in their planning and development policies the conservation requirements of the protected areas under the article.

While the Bulgarian authorities claim that the selected alternative routing will not have any significant impacts on the Kresna gorge and is in line with the Rec 98., there is evidence that the impacts are not entirely assessed. Funneling 50% of the traffic through the gorge, combined with

¹ Recommendation No. 98 (2002) on the project to build a motorway through the Kresna Gorge (Bulgaria), adopted by the Standing Committee on 5 December 2002 <https://rm.coe.int/1680746b0e>

construction works to straighten the road to turn it into a high-speed road, will inevitably cause defragmentation and additional destruction of habitats. These facts are not assessed in the new EIA decision.

Recent developments:

- We recall that the 29th Standing Committee (2010) of the Bern Convention decided to close the case file welcoming the 2008 EIA decision and commitment of the Bulgarian government to bypass the Gorge with the construction of a long tunnel, including measures to mitigate the negative impacts in Natura 2000 sites.
- In 2014 the Bulgaria government announced that the EIA decision 1-1 / 2008 (taken in compliance with the Rec 98) will not be implemented and started a new process of design and review of alternatives for the Kresna gorge section of the motorway (LOT 3.2).
- In 2017 the Bulgarian government adopted decision 3-3/2017, which selected routing for construction of Struma Motorway through the Kresna gorge in violation with Recommendation No. 98 (2002) of the Standing Committee.
- On 23rd May 2018, the Supreme Administrative Court (SAC) took a final decision No 6834² on the Kresna gorge court case. All motives submitted by NGOs³ and other complainants against the EIA decision 3-3 / 2017⁴ were rejected. Thus, the EIA decision 3-3 / 2017 was finally approved without any amendments, foreseeing the construction of the southbound corridor of the Struma motorway inside of the Kresna gorge. The approved alternative routing called "G10,5 Eastern" envisages straightening and widening of the existing road, which currently passes through the gorge for the use of the motorway traffic in the direction to Greece. This decision leaves the town of Kresna without a local road.
- The construction works are planned to start in 2019 and should be finalized by end of 2023. On the 27th August 2018, the Bulgarian road authorities announced the tender procedures for constructors of the motorway.⁵

Taking into account the urgency of the situation and all the facts pointed out in our report of 12 March 2018 (PVS / Files (2018) 17 [files17e_2018.docx]) and in this report our NGOs call for urgent opening of a case file.

There is an immediate threat that Recommendation 98 (2002) will be permanently violated without the possibility to restore in the future the conservation status of the adversely affected NATURA 2000 site in Kresna Gorge or to mitigate and compensate the adverse impacts.

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2 The official text of the decision No 6834 of SAC (in Bulgarian)
<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/998d5f555becd42bc2258294001b4918?OpenDocument>

3 "Za Zemjata (For the Earth) - access to justice" NGO's complaint to the Supreme Administrative Court against EIA decision 3-3 / 2017, submitted in the Ministry of Environment and Waters on 6.11.2017 and official additional written notes of the NGO attorney from 14.5.2018 (in Bulgarian, available upon request).

4 EIA decision No 3-3 / 2017 of 19.10.2017 of the Ministry of Environment and Waters approving the project "Improving the route of the Lot 3.2 of STRUMA motorway by Eastern G10.5 alternative" (in Bulgarian)
<https://www.moew.government.bg/bg/reshenie-po-ovos-3-3-2017-g-na-ministura-na-okolnata-sreda-i-vodite-za-odobryavane-na-investicionno-predlojenie-podobryavane-na-traseto-na-lot-3-2-na-avtomagistrala-struma-po-iztochen-variant-g-10-50/>

5 Public Procurement Agency: http://rop3-app1.aop.bg:7778/portal/page?_pageid=93.758251&dad=portal&schema=PORTAL&ca_id=2896&menu_id=1

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Annex 1

Detailed information on the substance of the court case in Bulgaria and the complaint to the European Commission from July 2017:

Complaint and decision of the Supreme Administrative Court:

The violations are clearly evident from the main motives raised by NGOs and other complainant before the Supreme Administrative Court and they are as follows:

- 1. The main motive of the NGO's appeal was that the 2008 EIA decision - EIA decision 1-1/2008⁶ for adopting the construction of the whole Struma motorway - is in force, stable and unammended and that the new EIA decision 3-3 / 2017 contradicts it.**

The EIA decision 1-1 / 2008 foresaw for the Kresna gorge section an obligatory mitigation measures (point I.3.2 of the decision) that the Struma motorway should be built entirely outside the Kresna gorge through a full (western) tunnel or by the Eastern bypass via viaducts and tunnels. The 2008 decision also provided for the possibility of selecting the two possible conceptual alternatives to be further designed to improve them. According to EIA decision 1-1 / 2008, all alternatives crossing the Kresna Gorge, including the using and upgrading the existing road to a motorway, lead to significant damage to species and habitats without the possibility to undertake effective mitigation measures.

In 2009 and 2010, the Standing Committee decided to close a case file on Rec 98 on the basis of the adopted EIA decision 1-1 / 2008 and based on the assurances of the Bulgarian Government that it will implement it in its entirety for the Struma motorway section (Lot 3.2) through the Kresna Gorge.

The NGO's argued for the illegality of the new EIA decision 3-3 / 2017, stating that it completely ignored all findings and mitigation measures described by the EIA decision 1-1 / 2008 and also rejected the two approved alternatives – full (western) tunnel and the eastern bypass through viaducts and tunnels. The current alternative approved by the EIA decision 3-3 / 2017 was rejected by the EIA decision 1-1 / 2008 and its EIA report⁷ (particularly the alternative for upgrading and using the existing two-lane road through the gorge as part of the motorway). The current 2017 decision provides for mitigation measures, which were assessed as ineffective by EIA decision 1-1 / 2008.

The arguments of the NGOs for the failure to comply with EIA decision 1-1 / 2008 are evidenced by the fact that nowhere the new EIA decision 3-3 / 2017 and the EIA report prepared for it in July 2017 (shortly referred as “new EIA report”) there is any reference to the EIA decision 1-1/2008 and its EIA report from 2007. Moreover, the new EIA procedure initiated in 2015 by the Ministry of the Environment and Waters⁸ was with the official motive that the EIA decision 1-1/2008 was a stable act and that there was mitigation measures in the EIA decision 1-1/2008 decision (point I.3.2 of the

6 EIA decision No 1-1/ 2017 of the Ministry of Environment and Waters approving the project “Construction of Struma Motorway (Dolna Dynania – Kulata)” (in Bulgarian)

<https://www.mrrb.bg/static/media/ups/articles/attachments/0e934039bce7a22435d1e52f968b0a4f.pdf>

7 EIA report (2 parts and appendices) and as Annex Appropriate Assessment Report (2 parts and appendices) from July 2017 on project “Improving the rout of LOT 3.2 of the STRUMA motorway” developed by the Road Infrastructure Agency (RIA) (in Bulgarian, official links to the reports of RIA and Ministry of Environment and Waters)

<http://www.api.bg/index.php/bg/normativna-baza/dokumenti/doklad-po-ovos-na-lot-32-ot-am-struma/>

<https://www.moew.government.bg/bg/arhiv-obstestven-dostup-do-dokladi-po-ovos-2016-2017-g/>

8 Letter No EIA-85 / 13.05.2015 of MOEW initiating the EIA procedure finalized with EIA decision 3-3 / 2017. The letter was part of EIA report – presented as Appendix 1 (in Bulgarian) to EIA and Appropriate Assessment part of the report (in Bulgarian, official links to the reports of RIA and Ministry of Environment and Waters)

<http://www.api.bg/index.php/bg/normativna-baza/dokumenti/doklad-po-ovos-na-lot-32-ot-am-struma/>

<https://www.moew.government.bg/bg/arhiv-obstestven-dostup-do-dokladi-po-ovos-2016-2017-g/>

decision) prescribing further development and improvement of adopted alternatives for Kresna Gorge section. Thus, the new EIA should be regarded as implementation of this measure.

SAC's decision No. 6834 rejected this main motive of the complaining NGOs, accepting that the EIA legislation allowed projects to be modified - during construction, as this was in the case of the Struma motorway. SAC has accepted that the new EIA procedure and decision of the modified project may completely disregard the provisions of the initially issued EIA decision. This decision was taken without any relevant motivation and without following the established specific procedural rules. According to the court decision, with this modification of the project, the new EIA can completely and without arguments, abolish the implementation of the mandatory measures for the protection of NATURA 2000 sites from adverse effects provided in the first EIA decision, which is still valid. Instead of implementing and improving the design of approved alternatives and relevant mitigation measures provided in the initial EIA decision, the court decision helped approve an alternative assessed in the initial EIA as leading to an adverse effect on NATURA 2000 (in this case using the existing road crossing the Kresna Gorge and upgrading it as part of the motorway).

Thus, after SAC decision No. 6834, the new and second EIA decision 3-3 / 2017 violates both Recommendation No. 98 (2002) and Art. 4 of the Berne Convention and Art. 6 (3) of Directive 92/43 and leads to legal uncertainty. Furthermore, the SAC decision violates the provisions of Bulgarian administrative law requiring amendments to existing administrative acts to be carried out under special administrative rules and only applied under specific conditions and motivation - none of these circumstances are available in the new EIA procedure⁹.

2. The second important motive of the NGO's appeal was the lack of equivalent and full assessment of all alternatives in the new EIA and thus adoption of an alternative which would damage the site conditions of the Kresna Gorge and Natura 2000 site "Kresna – Ilindentzi" (the alternative „G10,5 Eastern” – leaving 50% of the motorway traffic on the existing road).

A large number of NGO statements¹⁰ to the public discussion of the new EIA report and rejected by the Bulgarian Government were submitted to the court case as evidence supporting the claims of the NGOs. In these statements it was revealed that the government in advance (by the end of 2016 - before the EIA report was prepared, selected the G10,5 Eastern alternative entirely using technical and economic criteria and that the new EIA report lacks adequate and equivalent assessment of the impacts of the different alternatives and of the measures to reduce and mitigate their impacts and as a result the G10.5 Eastern alternative will lead to adverse impact for the protected species and habitats in the Kresna Gorge was adopted.

SAC decision No. 6834 rejected this motive of NGOs with purely formal arguments. The SAC completely refused to examine the merits of the NGOs motivation, as well as the evidence submitted to the case and in particular the large number of NGO statements. The SAC states formal compliance of the procedure for approving of EIA decision 3-3 / 2017 with the formal legal format of the EIA procedure and the required formal content of the EIA reports and the EIA decision. Also the SAC simply reiterated the conclusions of the official AA reports, without challenging them according to the appeal submitted by NGOs.

⁹ According to Art. 99-106 of the Bulgarian Administrative Procedure Code (APC) a valid administrative act may be amended following a special procedure, and according to Art. 99, point 2 of the APC, the reason for such an amendment should be the discovery of new circumstances or new written evidence essential to the issuance of the act. In the discussed here specific case, when issuing EIA decision 3-3 / 2017: the APC procedure was not applied in any way; no new relevant scientific data relating to the conservation of NATURA 2000 and indicating the need to amend EIA decision 1-1 / 2008 were shown; no new alternatives and only slightly modified options to old alternatives were included in the new EIA report; the only truly new "Eastern tunnel" alternative is completely excluded from the scope of the EIA (see point I.3).

¹⁰ An official report and minutes of RIA from 21 September 2017 after public hearings on the new EIA report held in September 2017, containing the submitted written statements from NGOs and the comments of the RIA experts to them (link to official site of RIA, in Bulgarian) <http://www.api.bg/files/7815/0701/7219/Stanoviste.pdf>

In addition, the SAC accepts as evidence and as part of the EIA procedure an expert report on the herpeto fauna developed by the private company ENVECO S.A. This expert report however has never been part of the formal EIA procedure - the EIA report and the official consultations and public discussions on the EIA. It was published on the site of Road Infrastructure Agency (RIA)¹¹, but was not part of the official EIA report submitted in the Ministry of Environment and Waters (MOEW) and consulted with the public. In addition, this company, ENVECO S.A, is known to have produced expert reports on the same topic - the impact of the Struma motorway on the Herpetofauna in the Kresna Gorge - being hired for that task by the Bulgarian Construction Chamber¹². The construction companies running this Chamber are also building lots 1, 2, 3.1, 3.3 of the Struma motorway. Thus, the Supreme Court upheld a clear conflict of interest and the involvement and impact of private companies, potential contractors of the project, on the design process and approval of the motorway.

3. An important motive of the NGO's appeal was the failure to assess and even comment in the new EIA report and EIA decision 3-3/2017 the "Eastern tunnel" alternative proposed during public consultations of the EIA scope.

The Road Infrastructure Agency (RIA) elaborated the finalized scoping requirements for the new EIA report in June 2017 following a letter from the MOEW from 13.01.2016¹³. The submitted public proposals for new alternatives to this scoping of June 2017 do not include an Eastern tunnel alternative and the government completely ignores such an alternative. Subsequently, this alternative was not included in the new EIA report and in the EIA decision 3-3 / 2017.

The "Eastern tunnel" alternative is included in the official documentation of the new EIA procedure only in the RIA's comments to the public discussion of the new EIA report from 26 September 2017¹⁴ - at a late stage of the public consultation with an EIA report already finalized. In these comments, the RIA motivated its decision not to consider the "Eastern tunnel" alternative for purely formal and administrative reasons. The arguments of RIA had no bearing on nature conservation legislation and the Berne Convention. Firstly, the RIA stated that the "Eastern tunnel" alternative was not designed by the representatives of the public with the necessary detail to be assessed in the EIA - although the design and construction of the national roads in Bulgaria is the responsibility of the RIA. Thus RIA simply justifies non-inclusion in the EIA and lack of evaluation of this alternative with its lack of willingness to fulfill its own responsibility to make a design of this alternative. And secondly, the RIA states that this alternative involves the joint construction of the railway and motorway and this differs from the already approved alternative for 2016 construction of a railway line through the Kresna Gorge.

The "Eastern" tunnel alternative is proposed by independent road engineers in July 2016¹⁵ - 11 months before finalizing the scoping requirements of the EIA report. This alternative is in line with

11 Link to expert report of ENVECO S.A "Assessment and reduction of the negative impact on reptiles and amphibians in the Kresna Gorge on alternatives for the Struma motorway (Lot 3.2)" from May 2017 (link to official site of RIA, in Bulgarian) http://www.api.bg/index.php/download_file/10965/18195/

12 Links to official information on the web page of Bulgarian Construction Chamber and the web page of the official newspaper of the Chamber about expert meeting held on 29.05.2015 and 4.02.2016 (information about common activities of Chamber and ENVECO S.A, in Bulgarian) http://ksb.bg/index.php?option=com_content&view=article&id=2066:ekspertniyat-savet-kam-ksb-dalgiyat-tunel-prez-kresnenskoto-defile-e-netzelesaobrazen-spezialistite-preporachvat-alternativniya-variant-na-preminavane-s-kasi-tuneli-estakadi-i-nazemen-pat&catid=8&Itemid=286
http://vestnikstroitel.bg/ksb/123170_ksb-apelira-za-brzo-reshenie-za-izgrazhdane-na-lot-3-2-ot-am-struma/

13 See Page 1, chapter "Introduction", Volume 1 of the new EIA report from July 2017 and Appendix 2 to the report containing copy of letter No OVOS(EIA)-85 / 13.01.2017 of the Ministry of Environment) (in Bulgarian, official links to the reports of RIA and Ministry of Environment and Waters)

<http://www.api.bg/index.php/bg/normativna-baza/dokumenti/doklad-po-ovos-na-lot-32-ot-am-struma/>
<https://www.moew.government.bg/bg/arhiv-obstestven-dostup-do-dokladi-po-ovos-2016-2017-g/>

14 See pages 325-329 from report and minutes of RIA from 21 September 2017 after public hearings on the new EIA report held in September 2017 – here is attached letter of RIA 53-00-7479/26.9.2017 (link to official site of RIA, in Bulgarian) <http://www.api.bg/files/7815/0701/7219/Stanoviste.pdf>

15 See copies of 5 letters of citizens to the Ministry of Regional Development, RIA and/or to Ministry of Environment and Waters from 12.07.2016, 26.07.2016, 23.02.2017, 07.03.2017 (in Bulgarian)

EIA decision 1-1 / 2008 and its providing to build the motorway via improved tunnel option. Furthermore, this is an entirely new alternative that was not assessed in EIA decision 1-1 / 2017. And last but not least, it has potential great advantages over all other alternatives - it offers a viable solution for the highway through a system of small tunnels across the gorge and their construction by using the existing railway line with practically negligible direct damage to the surface and habitats in the gorge. At the same time, it is the only available alternative finding integrated solution for construction of the transport corridor in the area of Kresna Gorge – proposing a common solution for the construction of a highway and a speed railway - thus integrating and mitigating all cumulative impacts on the habitats and species in the Kresna Gorge. It is also the only proposed alternative corresponding to the WHITE PAPER on transport of the EU¹⁶

This NGO motive was also rejected with purely formal arguments in SAC's decision No. 6834. According to the decision, all the necessary alternatives are considered, taking into account the opinion of the Implementing Authority (RIA) and the Ministry of Environment and Waters and the consultations held with the European Commission. There is no evidence that the Bulgarian Government has included the "Eastern" tunnel alternative in the the consultations with the Commission¹⁷.

4. An important motive of the NGO's appeal was the lack of assessment of the cumulative effects of the construction of the motorway, based on all above pointed arguments that the assessment covered only the section of the motorway in the Kresna Gorge and disregarded the cumulative impacts arising from the construction of the whole motorway.

This NGO motive was based on the fact that the new EIA report and EIA decision 3-3 / 2017 completely ignore the impacts arising and resulting from the construction of other sections of the Struma motorway - these are lots 1.2, 3.1, 3.3 and 4. As already mentioned in point 1 the new EIA report and EIA decision 3-3 / 2017 completely bypass EIA decision 1-1 / 2008. Please note that all the other sections of the motorway have been built in line with the 2008 EIA decision. The new EIA report and EIA decision 3-3 / 2017 consider the Lot 3.2 (section through the Kresna Gorge) of the Struma motorway as a completely separate project having no links with the construction of the other sections and disregarding the EIA decision 1-1 / 2008. Therefore the government and the court applied the typical "salami approach".

This motive of the NGOs was also rejected by SAC decision No. 6834 with purely formal arguments. The court merely states that such an assessment is made by referring back to the content of the official EIA report from July 2017 without any other justification. And completely refuses to consider the essence of the NGO's motives.

Finally, it should be concluded that the SAC judgment No. 6834 disregards the objectives, principles and provisions of the nature conservation legislation and the Berne Convention particularly.

II. On July 12th 2017, a complaint was submitted to the European Commission under ref. number CHAP number (2017) 02186 - BULGARIA for violation of Art. 6 (3) and (2) of Directive 92/43 / EEC¹⁸

The complaint alleges breach of EIA decision 1-1 / 2008 during the construction of the Struma motorway because of non-compliance with the obligatory mitigation measures in this decision, and, as a result of the cumulative effects of the construction of the motorway in other sections and increased traffic, created adverse impact on NATURA 2000 site in the Kresna Gorge. The risk of accumulating new violations with the forthcoming new EIA decision is also pointed out. Until 12 July 2018 and until the date of this report, the European Commission has not sent any formal written response to NGO complainants in respect of this complaint. The deadline for such an answer under the EC rules

16 COM/2011/0144 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011DC0144>

17 NGOs do not have any documents related to the consultation the alternatives for the Struma Motorway in Kresna Gorge held between EC and Bulgarian Government - such documents were not presented as evidence in court proceedings. For this reason, it can be argued that in this part Decision SAC No. 6834 is entirely unmotivated.

18 https://www.foeeurope.org/sites/default/files/biodiversity/2017/summary_of_complaint_for_press_final.pdf

expired 12 months after the complaint was lodged, on July 12, 2018¹⁹. Meanwhile in a number of informal communications²⁰ the EC has given unofficial response (not part of the procedure) that the EC will not consider the complaint prior the submission of an application form for financing the section 3.2 by Bulgarian Government.

As we pointed out in our report to the Bern Convention from March 2018²¹, despite the complaint lodged, on 13 November 2017 (4 months after the submission of the complaint) the EC approved the financing of the construction of motorway sections (lots 3.1 and 3.3) immediately adjacent from south and north to the Kresna Gorge.

All actions of the EC after 2014 allowed the Bulgarian government to apply a clear "salami approach" in the construction of the Struma Motorway, to disregard cumulative impacts of the motorway and to violate Art. 6 (3) of Directive 92/43. It also allows violation of the EIA Decision 1-1 / 2008, thus affecting adversely the conservation status of the Kresna Gorge NATURA 2000 site and thus the European funds are used in breach of the EU nature conservation Directives.

19 https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/how-make-complaint-eu-level/submit-complaint_en

20 Letter of international NGOs to EC <https://eeb.org/publications/55/nature-agriculture/92507/letter-to-commission-with-call-to-save-kresna-gorge-bulgaria.pdf>

21 NGO report to Bern Convention from 12 March 2018 (T-PVS/Files(2018)17 [files17e_2018.docx]), page 3, point 5 and footnote reference 6 of the report

Sofia, 9th March 2018

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

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

UPDATE TO THE CASE

Document prepared by:

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

POSSIBLE CASE FILE ON RECOMMENDATION NO. 98 (2002)

Bulgarian NGOs appeal on the Kresna Gorge case to keep it as a **possible file** or **to open a case file** for the following reasons:

1. Regarding the NGOs and citizens appeal against decision 3-3/2017 EIA of the Ministry of Environment, which selects alternative G10,5 for the Kresna gorge section and crosses the gorge through an upgrade of the existing E 79 road into a southbound motorway (direction Sofia – Thessaloniki), **there is still no decision of the Bulgarian Supreme Administrative Court**. The first hearing of the Supreme Administrative Court in Bulgaria was held on the 19th February 2018, which will be followed by a second hearing on the 2nd April 2018.
- We would like to reiterate that the selected route in decision 3-3/2017 EIA is in violation of Recommendation No. 98 (2002) of the Standing Committee.
2. The Supreme Administrative Court has taken a final decision²² about the so called "preliminary implementation" of the 3-3/2017 EIA decision, laid in the decision itself, thus approving that the clause of "preliminary implementation" can enter into force and the 3-3/2017 EIA decision can be implemented immediately, despite the ongoing court proceedings on it.
3. The Bulgarian Government continues to actively plan activities related to the preparation of a detailed territorial plan for the Kresna Gorge section where the selected G10,5 alternative would pass²³, the preparation of construction permits and tender procedures for the construction of this

²² Order No 1776, Sofia 02.08.2018 of the Supreme Administrative Court of the Republic of Bulgaria - five-member panel - II college in closed session

²³ On the 3rd January 2018, the Road Infrastructure Agency announced that the Ministry of Regional Development tasks them with the development of the detailed management plan of the Struma motorway route through the Kresna gorge, referring to the selected G10,5 alternative (half way through the gorge, half way outside). Full text in Bulgarian available on the website of Road Infrastructure Agency: <http://www.api.bg/index.php/bg/presentation/novini/mrrb-vzlozhi-izgotvyaneto-na-proekt-za-podroben-ustrojstven-plan-za-lot-32-na-am-struma/>

alternative²⁴, and the preparation of an application form for seeking further EU financing²⁵ for the final construction of Struma motorway (via G10,5 alternative, which passes through the Kresna Gorge).

According to official statements of the Ministry of Regional Development in Bulgaria, it is expected that final construction permit for G10,5 alternative will be issued in April 2018 and construction tenders will be launched in April 2018 when they expect the final court decision on the case.

All those administrative steps are possible due to the fact that the national Supreme Administrative Court took a decision that the EIA decision could be implemented with the condition of the above described "preliminary implementation" clause.

4. In reality, the Bulgarian government is not much dependant on funding from EU funds for the construction of the last remaining lot to be built - lot 3.2 – the Kresna gorge section, as most of the EU funds are confirmed to be exhausted for the other sections of the motorway and the majority of the funding for the gorge section are expected to be allocated from national budget (see footnote 4).
5. Real construction on the ground is likely to start prior to the adoption of the application form for EU financing and prior to any EU reaction on the case, as proven from previous practices. This was the case with lots 3.1. and 3.3. - the two sections on both sides of the Kresna gorge. Their construction started in 2016²⁶ with 100% national financing, only then followed by an application form to the EU, and the EU co-financing was officially approved in November 2017.²⁷

Taking all of the above into consideration and also the urgency of the situation and the need of preventive measures to protect the valuable site of the Kresna Gorge, taking further into account Recommendation 98/2002 of the Standing Committee, Save the Kresna gorge NGO coalition calls on the Standing Committee **to open a case file** on the Kresna gorge case to allow the Committee to closely monitor the case in this crucial moment when the motorway is on both sides of the gorge.

We believe that the decision of DG Regional policy of the EC to finance the construction of Lot 3.1 and 3.3 contravene to the basic principle of nature protection - namely the "precautionary principle" defined in Art. 191 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”. It is further detailed in the EC **Communication**

²⁴ On the 24th January 2017, the Ministry of Regional Development announced that Struma motorway is a priority and the ministry is planning to have ready complete tender documentation for the selection of the contractors for detailed design, construction and construction supervision and all the related documents to be ready by end of March, start of public call for tenders - 30th April, and if there is no complaint on the tenders - end of August to have the selected contractor. Full text in Bulgarian available at the Ministry of Regional Development website: <http://www.mrrb.government.bg/bg/hemus-i-struma-ste-budat-prioritet-na-mrrb-i-prez-2018-g/>

²⁵ Official memo N 21 from the meeting of the Supervision Committee for Construction of the Struma Motorway (SCCSM) from 29.01.2018, page 4, 3th par: “Iveta Koleva (Road Infrastructure Agency) explained with regard to the first question that there is a shortage of European co-financing because the total budget on the axis is about 740 million Euros and what remains for Lot 3.2 of Struma AM is a small part of them. However, there is a need to prepare an application form and determine the funding of Lot 3.2, which will be included in the project's financial analysis. The financial analysis will include costs not only for construction, but also for construction supervision, audits, expropriations, archeology and other unforeseen costs. Koleva added that he can not commit himself to exact figures, but in any case European funding is insufficient and will not be as at present - 15% national and 85% European co-financing.”

²⁶ <http://www.api.bg/index.php/bg/proekti/opt/am-struma-lot-31/am-struma-lot-31/> Lot 3.1 Start Date of Design - 10.02.2016; <http://www.api.bg/index.php/bg/proekti/opt/am-struma-lot-31/am-struma-lot-33/> Lot 3.3 Start date of construction - 30.08.2016

²⁷ http://europa.eu/rapid/press-release_MEX-17-4603_en.htm European Commission - Daily News, Brussels, 13 November 2017, “Cohesion Policy invests in faster, smoother connectivity in Bulgaria”

(COM(2000) 1final) on the precautionary principle where (it) “*aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk*” and continues “*The decision-making procedure should be transparent and should involve as early as possible and to the extent reasonably possible all interested parties.*”

The Bulgarian Government failed to assess on equal basis and disregarded in the 2017 EIA and AA report **all alternatives**, thus failing to comply with Recommendation 98/2002 specifically in the sections where the Standing Committee recommended completely avoiding the Kresna Gorge and downscaling the existing road to local and by-passing the motorway road. **Alternatives outside of the Kresna gorge are possible and listed below²⁸:**

1. “G20 East alternative” proposed by the Government in the end of 2016. Disregarded in the 2017 EIA and AA report due to the lack of any reliable mitigation measures during the construction and exploitation the motorway, artificially exaggerating the expected impacts of the motorway.
2. “Full tunnel alternative”. Disregarded in the 2017 EIA and AA report. Assessed in the 2007 EIA and AA report and selected in the 2008 EIA decision as having smaller impact compared to all other alternatives.
3. NGO’s Eastern by-pass proposed in 2002. Excluded and not assessed at all in 2017 EIA and AA report. Assessed in the 2007 EIA and AA report as implementable after compensation measures for 1 species (article 6.4 of the Habitats Directive).
4. “Eastern” tunnel alternative proposed by independent road engineers in July 2016. Not included and not assessed at all in 2017 EIA and AA report.

We hope that the above-listed considerations would be taken into account in this crucial moment of the case development and remain at your disposal for any further questions or clarifications.

Sincerely,

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²⁸ see our report from to the Bern Convention from 27 October 2017

Annex 1

Translation of a publication on the Road Infrastructure Agency's website of 20.04.2017, last visited on 15.06.2017 (after filing a complaint to the EC in July 2017 the announcement was deleted from the Agency's website)

Address of publication: <http://www.api.bg/index.php/en/prescentar/novini/predlozhenieto-na-ptproekt-2000-ood-e-klasirano-na-prvo-myasto-v-konkursa-za-isobutanone-na-razshiren-ideen-prokt-na-am-strum>



The proposal of "Putproekt 2000" Ltd. is ranked first in the competition for the elaboration of an extended conceptual design of Struma AM in the area Krupnik – Kresna 20.04.2017 14:31

The proposal of "Putproekt 2000" Ltd. is ranked first in the competition for the elaboration of an extended conceptual design of the Struma motorway in the Krupnik - Kresna section. Today at the Road Infrastructure Agency at a public hearing, the jury announced the results of the evaluation and ranking of the competition projects and opened the envelope with the list and the numbers of the participants in the competition, which until now were anonymous.

Two participants have submitted documents in the competition for "Making of an extended conceptual design with a plot plan for Struma", lot 3.2, Krupnik - Kresna section, a left side with approximate length of 23.8 km and a bypass of Kresna - part of a right side with approximate length of 5.45 km ". The offer of "Putproekt 2000" OOD came first and received 93,278 points and the proposal of Putproekt EOOD came second with 89,859 points. The project value proposed by Putproekt 2000 Ltd. for the construction of the lot is 732 109 652,44 BGN without VAT and for Putproekt EOOD 729 241 729,60 BGN without VAT. The company that offered a higher price has included in its project improvements to the existing cross-connections between the two sides of the future route, explained the chairman of the jury arch. Petar Dikov, representative of the Bulgarian Transport Infrastructure Forum. The jury chairman stressed that both conceptual projects were developed at a highly professional level and the next stage - the technical project - could be the prepared on the basis of these.

The received projects have been evaluated according to a previously announced methodology for determining the complex assessment. It includes quantitative indicators, one of which is the design value of the construction. The project that offers the most safe and sustainable design solution is rated the highest. The geological analysis of the terrain through which the route will pass is an extremely important component in the preparation and implementation of a complex infrastructure project, such as Lot 3.2 of the Struma Motorway. The purpose of the competition is to acquire an advanced conceptual design with detailed geodetic surveying and engineering geological study and plot plan for this section of the motorway, which will subsequently be awarded the design of a technical project and construction phase of 23.8 km of the left side of Struma Motorway in the section between Krupnik and Kresna and the 5.45 km bypass of Kresna - part of the right side.

As an innovative solution, the jury highlighted the proposal of Putproekt 2000 Ltd for the construction of a viaduct at km 394 + 151.90, on the left side, through a cantilever installation with a central opening of 302 meters. Such facilities are unique, explained the jury member eng. Pavel Dikovski, representative of the Bulgarian Sectoral Chamber for Roads.

Both teams have tried to minimize the number of facilities that need to be built as they raise the cost of the construction of the route and the volume of investment, but tunnels and viaducts are unavoidable due to the complexity of the terrain through the Kresna Gorge, summarised Dikov. The proposal includes a total of 7 tunnels - five on the left side of the track and two at the by-passing of Kresna.

The competition is conducted by awarding prizes to participants. The prize pool is BGN 2 500 000 for 3 awards - 85%, for the second - 10% and for the third - 5%. The prize pool entitles the developer to use the project.