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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

39th meeting
Strasbourg, 3-6 December 2019

Possible File

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

- REPORT BY THE NGO -

*Document prepared by
CEE Bankwatch Network, Bulgaria*

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20th November 2019

Document prepared by:

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Possible case file on Recommendation No. 98 (2002) and action requested of the Bern Convention

I. Summary of the NGOs update

In December 2018 the Standing Committee adopted a decision to keep the Kresna Gorge case as *possible* file and to await that the application package for funding the construction of Lot 3.2 of Struma motorway (the Kresna Gorge section) to the European Commission is submitted by the Bulgarian Government, as well as await its evaluation by the European Commission (EC) services taking into account the EU acquis on nature conservation.

In addition the Bureau of the Bern Convention, which took place on 9-10 September notes that "the question why roads are already being built through the Natura 2000 sites, what mitigation and compensation measures are planned and currently implemented due to these various building works, including the illegal ones. The Bureau warned that any construction works on sites of specific conservation value should be handled very carefully and should not deviate from the original planning for which impact assessments are being made".

In September and October 2019 the EC issued two documents **that point to the serious failures in the implementation of the EU acquis on nature conservation in case of Struma Motorway construction through Kresna Gorge**. Commissioner Vella (European Commissioner for Environment) expressed concern¹ that the **E79 intense traffic causes significant mortality of EU protected species and deteriorates the Natura 2000 sites** in response to the NGOs update of the EU law Infringement complaint CHAP (2017)02186 (please see Annex I and Annex II²). On October 15th, 2019, the European Commission issued observations³ on the application form submitted by the Bulgarian government to the European Commission for EU funding for Lot 3.2, and assessed that the Bulgarian Government **has failed to properly implement Article 6.3 of Directive 92/43 when approving the construction of the Struma highway through the Kresna Gorge**. The EC requested that the Bulgarian Government make serious corrections to the decision taken and the Appropriate Assessment (AA)⁴ of the project in terms of NATURA 2000 requirements (please see Annex III⁵). Those two documents are the first official statement of the EC following the NGOs' complaint for infringement of art.6.2 and art.6.3 of Habitats Directive submitted by the NGOs on July 12, 2017 and reflect on the concerns raised by NGOs and experts.

These documents, especially the letter of Oct. 15th, indicate quite clearly that **the Bulgarian government cannot be considered to "strictly comply with and implement the international, EU and national legislation on species and habitats protection, respecting completely the Bern Convention"**⁶ as stated in the Government report to the Standing Committee.

1 Ref Ares(2019)6027843 from 17/09/2019 from Carmenu Vella, Commissioner to Stefanova, Heslop, Blake and Stoyanova on infringement complain CHAP(2017)02186

² <https://drive.google.com/drive/folders/1Hn24rQjTzq2QVvx3p8ZE03WvhgVo97Vk>

³ Ref. Ares(2019)6378788 - 15/10/2019 Observation on the mega project Struma Motorway Lot 3.2 cited by publications in Bulgarian media from 23 October 2019

⁴ Appropriate Assessment of project implication on the NATURA 2000 sites according to Article 6(3) of the Habitats Directive 92/43/EEC.

⁵ <https://drive.google.com/drive/folders/1Hn24rQjTzq2QVvx3p8ZE03WvhgVo97Vk>

⁶ p.6 Conclusions of the Government report on Possible case file Kresna gorge "Bulgaria strictly complies with and implements the international, EU and national legislation on species and habitats protection, respecting

We are also alarmed that there is lack of information about the steps the Bulgarian government plans to take to address the gaps in implementation and make the Struma Motorway construction in line with EU law. The government report to the Standing Committee lacks any detail about the nature of concerns of the EC on the EIA / AA 2017 quality and comprehensiveness although this assessment was requested by the Bureau decision the case file from 9-10 September 2019. There is neither information about the next steps undertaken in order to comply with environmental legislation. The government report in our view only **confirms that the EIA/AA 2017 have not fully assessed the cumulative impact of lot 3.2 construction on Kresna gorge NATURA 2000 site as only part of the sites** where the preparatory construction works were carried are within the scope of assessment of the EIA/AA 2017⁷.

We are confronted by statements of the Bulgarian Prime-Minister threatening that Kresna Gorge part section of the Struma motorway may not be built, leaving the current situation as it is⁸ – all motorway traffic will continue to pass through the Kresna Gorge using the current E-79 road, thus disregarding all EC findings, European legislation and Bern Convention Recommendations.

On November 16th, 2019 the consortium, which would construct the 13.2 km left lane of Lot 3.2.1 of Struma Motorway was selected.⁹ This was one of three open price bids¹⁰ for this section for the The construction of the route, which is not assessed in line with EU law, and certainly not the best solution to avoid the destruction of Kresna Gorge, could start any time now.

Taking into account the above, the Bulgarian NGOs find that in the case of Struma Motorway planning and construction through Kresna Gorge, the following provisions of the Bern Convention have been violated:

- to take appropriate and necessary administrative measures **to ensure the conservation of Kresna Gorge** and avoid or minimise as far as possible any deterioration of such areas (article 4 of the Bern Convention, paragraph 2 of the Resolution No. 1 (1989)
- **to apply Art. 9, para 1 of the Convention regarding derogations**, especially the need to demonstrate “that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:”
- to develop a conservation plan, including **defining specific short and long-term site objectives for the Kresna Gorge as part of EMERALD network** - articles 1, 3(a) and 3(b) of the Recommendation No. 16 (1989) and Resolution No. 3 (1996) and Resolution No. 6 (1998), articles 2.1, 2.3 of the Resolution No. 8 (2012)
- ensure that **the decision on the routing of the motorway is taken on the basis of an in-depth environmental impact assessment, considering not only technical and economic criteria but also environmental ones. “Consider the possibility of abandoning the option of enlarging the current road, since this would substantially increase damage to a unique**

completely the Bern Convention. Also, all considerations of Recommendation 98 (2002) of the Standing Committee to the Bern Convention have been taken into account during the project development.

⁷ Government response to the Bureau questions, p. 3 “The affected area is approximately 2.9 ha. Part of the sites are within the scope of the Lot 3.2 route of Struma Motorway”

⁸ Statement by Bulgarian Prime Minister Borisov during the opening of a new 6.5 km section of Struma motorway on 23th May 2019. “The Prime Minister threatens to stop the construction of Struma motorway. The construction of the road through the Kresna Gorge will be left for the next programming period”

<https://www.mediapool.bg/premierat-plashi-da-spre-stroezha-na-magistrala-struma-news293662.html>

⁹ “The consortium, which will construct 13,2 km of Struma motorway through the Kresna gorge has been selected” Road Infrastructure Agency, 16.11.2019: <http://www.api.bg/index.php/bg/presentar/novini/opredelen-e-izplnitelyat-na-132-km-ot-am-struma-prez-kresnenskoto-defile/>

¹⁰ “Three are the Open Price Bids for the Construction of a Section of "Struma" Motorway through the Kresna Gorge” RIA, 8.11.2019: <http://www.api.bg/index.php/en/presentar/novini/three-are-open-price-bids-construction-section-struma-motorway-through-kresna-gorge/>

site...., and continue studying alternative routes located outside the gorge..” - articles 1, 2, 3, 4 and 6 of the Recommendation No. 98 (2002) of the Standing Committee.

Taking into account all the facts above and urgency of the case our NGOs call for opening of a case file on the case by 39th meeting of the Standing Committee.

The above-mentioned observations of the EC comments to the Bulgarian authorities also clearly recommend the involvement of international expertise both in the project monitoring and at the elaboration and monitoring of conservation measures.

We believe that the Standing Committee should mandate the involvement of independent experts to ensure the best support to the Bulgarian Government implementing the goals of Bern Convention for protection of the European wildlife and natural habitats in Kresna Gorge case.

II. Detailed description of facts and our findings.

This report should be read also in conjunction with the NGOs update on the case file send on 5 September 2019 where we informed the Bern Convention secretariat for the recent conclusion of **the experts analyses about the significant deterioration of the conservation status of the protected species and especially the ones that were key for the designation of the protected area.**

Evaluation of Struma motorway project through the Kresna Gorge made by the European Commission

On August 9th, 2019 the Bulgarian authorities submitted to the European Commission the application form for the „Struma Motorway: Lot 3.2” project (the Kresna Gorge section)¹¹.

On October 15th, 2019, the European Commission (EC) sent the Bulgarian Government its observations on the application form¹² and had the following findings (for more details please see Annex III¹³):

- The EIA/AA decision 3-3/2017¹⁴ of Bulgarian Ministry of Environment on construction of “Struma” motorway in Kresna Gorge section and relevant EIA/AA report doesn’t meet the requirements of the article 6(3) of the Habitats Directive. AA needs to be reworked as required by article 6(3).
- Bulgaria has failed to establish the conservation priorities and measures of SCI Kresna - Ilindentsi under Article 4 (4) and 6 (1) of the Habitats Directive. This absence has led to defects in AA under Art. 6 (3). Specifically, the impact on amphibians and reptiles (global assessment A in the Standard Data Form) dependent and related to habitats at the bottom of the Kresna Gorge is not correctly accounted for. At the same time, the impact on other habitats and species for which SCI Kresna - Ilindentsi is not very important (global assessment "C" in the Standard Data Form) has been evaluated as important as of species with an assessment A. As a result, the assessment and comparison of the impacts of the different alternatives is incorrect.

11 Ref. Ares (2019) 5182399

12 Ref. Ares(2019)6378788 - 15/10/2019 Observation on the mega project Struma Motorway Lot 3.2 cited by publications in Bulgarian media from 23 October 2019:

https://www.capital.bg/politika_i_ikonomika/infrastructure/2019/10/23/3980187_magistrala_struma_ostava_bez_evrofinansirane_zasega/

¹³ <https://drive.google.com/drive/folders/1Hn24rQjTzq2QVvx3p8ZE03WvhgVo97Vk>

14 EIA decision 3-3/2017 of the Ministry of Environment and Waters on the construction of the lot 3.2 of Struma Motorway (adopted as second stage of planning of the Motorway Struma and implementing EIA decision 1-1/2008, but actually contradicting it)

- The impact assessment methodology used in the AA has no legal basis in Article 6 (3) of the Habitats Directive and is not in line with the case law of the Court of Justice on determining adverse impacts on priority habitat types¹⁵.
- The AA from 2017 concludes that the project has been approved under the Government's alternative G10.5 Eastern as having non-adverse impact on NATURA 2000. However, this assessment is based on mitigation measures whose effectiveness is uncertain (not tested on site and rely heavily on ex-post monitoring), and they should be reviewed. The case law requires a degree of certainty that the mitigation measures will prevent damage to the site immediately, not just in the long term¹⁶. In addition, the implementation of these measures on the now existing E79 road is only foreseen after 2023.
- The AA on NATURA 2000 sites did not fully consider and evaluate all components of the project - connecting roads, rehabilitation/modification of the existing E79 road, rehabilitation and widening of the E79 tunnel, construction of highway service and rest areas that will happen/affect the territory of the NATURA 2000 site.
- The project evaluated in the EIA / AA procedure differs significantly from the project submitted for co-financing - there are significant differences in the description of the number and characteristics of tunnels, viaducts, bridges and junctions and interconnections.
- The cumulative effect of upgrading the railway on the other side of the Struma River in Kresna Gorge (parallel to E79) has not been evaluated, and the statement of AA that there are no cumulative impacts is not supported by evidence.

On September 17th, 2019 the European Commissioner for Environment Karmenu Vella¹⁷ sent a letter to Environmental NGOs concerning NGO complaint CHAP(2017)02186 on Kresna Gorge and Struma Motorway. There are several important positions of the EC in that letter (please see Annex I and Annex II¹⁸ for more details):

- It is uncontested that the E79 road constitutes the most important pressure for these Natura 2000 sites, as the intense traffic causes significant mortality of EU protected species and deteriorates the Natura 2000 sites.
- It is critical that the construction of Lot 3.2 (section of Kresna Gorge) of the Struma Motorway avoids any further deterioration or disturbance of the protected habitats and species.
- Mitigating measures such as the establishment and strict enforcement of speed limits, noise reduction, ensuring the effectiveness of the defragmentation measures in place and establishing new ones should take place immediately, irrespective of the option chosen for the Lot 3.2 of the Struma motorway.
- Two ongoing horizontal infringement procedures are relevant for the two NATURA 2000 sites located in the Kresna Gorge – first from July 2018 concerning disregarding cumulative impacts representing major threats to NATURA 2000 sites and second from January 2019 concerning

15 Sweetman C-258/11

16 Moorburg C-142/16

17 Ref' Ares(2019)6027843 from 17/09/2019 from Carmenu Vella, Commissioner to Stefanova, Heslop, Blake and Stoyanova on infringement complain CHAP(2017)02186

¹⁸ <https://drive.google.com/drive/folders/1Hn24rQjTzq2QVvx3p8ZE03WvhgVo97Vk>

lack of final designation of SACs and establishing conservation objectives and measures for those sites.

Reaction of Bulgarian authorities to European Commission observations

The official response of the Bulgarian Government has not been known to NGOs so far. Asked for an opinion from Bulgarian media on October 24, 2019¹⁹, the Road Infrastructure Agency (RIA) replies that they do not see a particular problem and that the EC's observations are part of a routine working process and common practice in the preparation of a major infrastructure project and that the Bulgarian authorities are only asked by the European Commission for further clarifications. According to the cited opinion the RIA does not see any grounds for proceeding with a revision of the EIA and AA decisions and for carrying out the relevant procedures, including the obligatory public consultations.

Moreover, Bulgarian Prime-Minister officials pointed out as a possible solution to not build the Kresna Gorge part section and leaving the current situation as it is – all motorway traffic to pass through the Kresna Gorge using the current E-79 road. In an interview for Bulgarian national television on October 25th, 2019 Bulgarian prime-minister Boyko Borisov²⁰ said that his government **made a commitment to build the motorway on both sides of the Kresna Gorge** (and leave the whole motorway traffic inside the Gorge). He also stated that it is better to relocate the European money for construction of other roads, than to spend billions for an alternative avoiding Kresna Gorge through the mountains²¹. We believe this perspective disregards all EC findings, European legislation and the Bern Convention. The European Commission's recommendations are also not respected by the intention of the Bulgarian Government to replace effective mitigation measures only with subsequent monitoring (after the impact)..

Carrying out this monitoring is essential in itself, but the RIA tries to justify with them the effectiveness of the mitigation measures set out in EIA/AA 3-3/2017 decision. As stated in the EC notes of 15 October 2019, the Bulgarian Government cannot prove through such a monitoring the effectiveness of the mitigation measures, because such monitoring is after the occurrence of the negative impacts and does not in itself lead to any preliminary assurance on their effectiveness.

Meanwhile, on November 8th, 2019 the offers for the construction of the left lane Lot 3.2.1 of Struma Motorway were opened with three main companies competing for the contract.²² The offers are much

19 Article in the newspaper “Sega” from 24 October 2019 (in Bulgarian): <https://www.segabg.com/category-economy/api-ne-vidya-problem-kritikite-na-ek-po-proekta-za-struma>

20 Interview of prime-minister Boyko Borisov for national television “Nova” from 25 October 2019, from 28.40 to 30.15 minutes of the interview (in Bulgarian):

<https://nova.bg/news/view/2019/10/25/266555/%D0%B1%D0%BE%D1%80%D0%B8%D1%81%D0%BE%D0%B2-%D0%BD%D0%B5-%D0%BC%D0%BE%D0%B6%D0%B5-%D0%B4%D0%B0-%D1%81%D0%B5-%D1%80%D0%B0%D0%B7%D1%85%D0%BE%D0%B6%D0%B4%D0%B0%D1%88-%D0%BF%D0%BE-%D0%BE%D1%80%D0%BB%D0%BE%D0%B2-%D0%BC%D0%BE%D1%81%D1%82-%D0%B8-%D0%B4%D0%B0-%D0%B3%D0%BE%D0%B2%D0%BE%D1%80%D0%B8%D1%88-%D0%B7%D0%B0-%D0%B2%D1%8A%D1%80%D1%85%D0%BE%D0%B2%D0%B5%D0%BD%D1%81%D1%82%D0%B2%D0%BE-%D0%BD%D0%B0-%D0%B7%D0%B0%D0%BA%D0%BE%D0%BD%D0%B0>

21 According to the pages 24 to 26 of the Application form for the major project “Struma Motorway, Lot 3.2” submitted by Bulgarian Government in EC on 9 August 2019 the investment cost of two alternatives “G10,5 Eastern”(officially adopted alternative leaving half of the motorway through the Kresna Gorge and violating Recom 98/2002) and “G20 Eastern” (rejected by the Government, environmental friendly full bypass of Kresna Gorge, fulfills Recom 98/2002) are as follows: 414 625 920 Euro and 603 001 629 Euro respectively, or environmentally friendly alternative is more expensive with total amount of 188 375 709 Euro.

22 Three offers for the construction of the Struma motorway in the Kresna gorge section, Road Infrastructure Agency 8.11.2019. Available at: <http://www.api.bg/index.php/bg/presentar/novini/tri-sa-otvorenite-cenovi-oferti-za-izgrazhdaneto-na-uchastk-ot-am-struma-prez-kresnenskoto-defile/>

higher in price than expected with the lowest 250 million euros, and the deadline for the completion of this section has been set to 4 years and 3 months. This proves that despite all comments and recommendations, the Government is going ahead with the plan.

Legal framework and violation of the Bern Convention

Complaining Bulgarian NGOs find that the EC's findings on Kresna Gorge case and violation of Habitats Directive 92/43/EEA indicates respectively the following violations of legal requirements of the Bern Convention by Struma Motorway project as adopted with EIA/AA decision 3-3/2017 of the Bulgarian authorities:

- Article 4 of the convention and paragraph 2 of the Resolution No. 1 (1989) of the Standing Committee, which require that each Contracting Party shall:
 - take appropriate and necessary administrative measures to ensure the conservation (maintenance and, where appropriate, the restoration or improvement of the abiotic and biotic features species' habitat) of the habitats of the wild flora and fauna species and especially those part of their geographical range which are essential for the conservation of those species and referred to as "critical sites". These measures should be undertaken for species specified in Appendices I and II, and species identified by the Standing Committee, on the basis of scientific evidence, as requiring specific habitat conservation measures;
 - the Contracting Parties in their development policies shall have regard to the conservation requirements of such protected areas, so as to avoid or minimise as far as possible any deterioration of such areas.

- Art. 9, para 1 of the Convention, which requires that
 - Each Contracting Party can make **exceptions from the provisions of Articles 4, 5, 6, 7** and from the prohibition of the use of the means mentioned in Article 8 **only if there is no other satisfactory solution** and that <https://www.mediapool.bg/premierat-plashi-da-spre-stroezha-na-magistrala-struma-news293662.html>
 - for the protection of flora and fauna;
 - to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
 - in the interests of public health and safety, air safety or other overriding public interests;
 - for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding;
 - to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.

- Articles 1, 3(a) and 3(b) of the Recommendation No. 16 (1989) and Resolution No. 3 (1996) of the Standing Committee, which require that each Contracting Party shall:
 - take steps to designate areas of special conservation interest (ASCI), which will constitute the EMERALD Network, to ensure that necessary and appropriate conservation measures are taken for each area;
 - take such steps, either by legislation or otherwise, to ensure wherever possible that those ASCIs are the subject of an appropriate regime, designed to achieve the conservation of the factors set out in that paragraph;
 - activities taking place adjacent to such areas or within their vicinity do not adversely affect the factors giving rise to the designation and conservation of those ASCIs.

- Resolution No. 6 (1998) of the Standing Committee listing the species requiring specific habitat conservation measures.
- Articles 2.1, 2.3 of the Resolution No. 8 (2012) of the Standing Committee which adopts the following rules for the national designation of Emerald sites:
 - the national designation of the adopted Emerald sites will ensure that they are protected from external threats and subject to an appropriate regime for achieving a satisfactory conservation status of the species listed in Resolution no. 6 (1998) present on the site, involving appropriate, administrative measures;
 - specific short and long-term site objectives will be drawn up for the management of Emerald sites, in compliance with the national/regional conservation objectives of the country.
- Articles 1, 2, 3, 4 and 6 of the Recommendation No. 98 (2002) of the Standing Committee on the project to build a motorway through the Kresna Gorge (Bulgaria), which recommends that the Bulgarian Government:
 - take account, in the development of this project, of the imperatives of conserving fauna, flora and habitats;
 - ensure that the decision on the routing of the motorway is taken on the basis of an in-depth environmental impact assessment (EIA) supplemented by scientific and mapping data and any other useful source of knowledge on the area concerned by the project, to justify the choice of alternative as recommended in the expert's report;
 - consider the possibility of abandoning the option of enlarging the current road since this would substantially increase damage to a unique site, without possible measures of compensation, and continue studying alternative routes located outside the gorge that would respect the natural constraints as far as possible and provide for the integration of engineering works and compensate for environmental impact;
 - ensure that the choice of alternative is based not only on technical, legal and economic criteria but also on social and ecological criteria;
 - provide for the downscaling and rehabilitation of the existing road, restoring its initial status of a local road used by the farming community and tourists and thus ease current pressure on the site, with suitable planning to revitalise damaged areas and provide user information services.

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6 September 2019

**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

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, Center for Environmental Information and Education, Vlahi Nature School, CEE Bankwatch Network.

The current update covers the latest developments regarding the case file Kresna gorge and presents the NGOs comments on the response of the Bulgarian government to the questions from the Convention Secretariat.

We are deeply concerned that we do not see any action of the Bulgarian government to address **the ongoing violation of Article 4 (1) of the Bern Convention and Article 6 (2) of the Habitats Directive** already reported in the NGOs updates to the 37th and 38th Meetings of the Standing Committee and in the EC Infringement Complaint (CHAP(2017) 02186 – BULGARIA). The NGOs review of the Government's response, the recently submitted EU funds application form of lot 3.2 and further expert reviews of the data from the monitoring of the mortality on the E79 international road point to the following issues that need the attention of the Bureau:

1) The EIA /AA 2017 report is **not adequate in selecting the best alternative for the construction of lot 3.2 of Struma Motorway in the section of the Kresna gorge, as required in art 4 (2) (3) of the Bern Convention and Art 6 (3) of Habitat Directive (namely, the quality of the assessment of impacts and quality of plans assessed)**. In addition to the shortcomings of the quality of EIA / AA assessment reported by NGOs to the 38th Meetings of the Standing Committee, there is mismatch between the motorway route assessed in the EIA report 2017 and the route presented in the Detailed Land Use plan for the Motorway Construction.²³ The government report to the Bureau **confirms that only part of the sites** where the preparatory construction works were carried are within the scope of assessment for lot 3.2 route of Struma Motorway²⁴.

2) The proposed plan for completion of lot 3.2, as presented in the application form, confirms **the intention of the Bulgarian government to further funnel in the next eight years the increasing transit and trans-national traffic through the adversely affected NATURA 2000 site of Kresna gorge**. This confirms their disregard of **the ongoing violation of Article 4 (1) of the Bern Convention and Article 6 (2) of the Habitats Directive as well as of Bern Convention Recommendation 98/2002**.

²³ 28 February 2019. 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. 5 Pp. + 5 Appendices.

²⁴ Government response to the Bureau questions, p. 3 "The affected area is approximately 2.9 ha. Part of the sites are within the scope of the Lot 3.2 route of Struma Motorway"

3) The Government's action on introducing mitigation and compensation measures in relation to the selected alternative for lot 3.2 is not convincing, neither timely, to address the emergency in the NATURA 2000 site in the Kresna gorge section. The traffic in the gorge tripled since the Bern Convention Recommendations were issued. The forthcoming construction of lot 3.2 and completion of lots 3.1 (1st part was completed in July 2019) and lot 3.3 (completed in December 2018) will further worsen the condition of the protected species and could make the negative impact irreversible. We believe that there is enough information about the status of the protected species in the EIA/AA report 2017 and monitoring carried out in previous years to allow for proper planning and implementation of mitigation and compensation measures for **the current impact on the NATURA 2000 site**.

We would also like to reiterate that the EIA/AA 2007 conclusions are that the most important mitigation measure for the Kresna gorge is the construction of alternative route for lot 3.2 **outside of the gorge**. The data from the application form about construction costs of the so called full eastern route (G20) are comparative with the costs of the currently selected alternative by the government, which demonstrate that there is no economic ground for construction of one lane of the motorway within the gorge. It is evident **that better assessment of the alternatives for Lot 3.2 is needed urgently**. We would also like to remind you that the local community and more than [210 000 EU citizen](#) demand conservation of the Kresna gorge and construction of the Motorway outside the gorge.

Therefore, we would like to ask the Bureau to consider:

- **issuing recommendations to the Bulgarian government about the need for urgent mitigation and compensation measures to address the ongoing violation of the Article 4 (1) of the Bern Convention and Article 6(2) of the Habitats Directive;**
- **requesting from the EC to provide information to the Standing Committee about the evaluation of the EIA / AA 2017 quality and comprehensiveness in terms of planed road constructions of lot. 3.2, together with evaluation of the multi-criteria assessment of all alternatives assessed in the EIA/AA 2017 procedure.**

Below we provide more details about the main concerns summarized above:

I. Recent developments regarding possible case file on Recommendation No. 98 (2002):

I.1. Mismatch between the G10.5 route assessed in the EIA/ AA 2017 report and the route presented in construction permitting documents and application for EU funds.

The NGOs update from February 2019 informed the Bureau of the Convention about our concerns regarding the mismatch between the motorway route assessed in the EIA/AA report 2017 and the route presented in the Detailed Land Use plan.²⁵ Currently, there is a conciliation procedure at place in the local municipalities about the Detailed Land Use plan, which allow us to compare the two routes. The Detailed Land Use Plan is a basis for the land purchases and construction permits and should be identical with the route assessed and approved in the EIA decision from 2017.²⁶ However, the route in the Detailed Land Use Plan has significant

²⁵ 28 February 2019. 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. 5 Pp. + 5 Appendices.

²⁶ EIA decision 3-3/2017 of the Ministry of Environment and Waters on the construction of the lot 3.2 of Struma Motorway (adopted as second stage of planning of the Motorway Struma and implementing EIA decision 1-1/2008, but actually contradicting it).

deviations from the one reviewed in the EIA/ AA report 2017 and those deviations affect the NATURA 2000 site. We have prepared detailed maps showing those differences. We are particularly concerned about the planned additional rehabilitation along the current E79 road that envisage straightening and widening of the current road as the maps show.

The government response to the Bureau questions also demonstrate that the preparatory construction works were carried partially outside of the route assessed in the EIA/ AA 2017 report. These construction works were carried by the company that was involved in the construction of lots 2 and 4 of the Struma Motorway, as well as in the preliminary design of the Lot. 3.2. Although the company was charged about illegal offences it is obvious that the construction works were with the intention to advance the construction of lot 3.2 and was carried out following the route that is considered for lot 3.2 (which deviates from the one assessed in the EIA/AA 2017 report).

I.2 Lot 3.2 Application form for EU funding submitted on August 9th, 2019

We are concerned that the application form submitted to the European Commission contains the same deviations and that the EC is not informed by the Bulgarian government that those are not in line with the EIA 2017 decision, neither that there is no appropriate assessment on the new route (AA).²⁷

Secondly, the application form foresees construction of the Lot 3.2 to happen in three phases. In phase 1 (period 2021- 2023) - 44% financial implementation of Lot 3.2.1 and 39% of Lot 3.2.2 will be completed²⁸. Phase 2 (period 2024-2027) – construction of the remaining parts of Lot 3.2.1 and Lot 3.2.2 is planned . Phase 3 - the rehabilitation works on the current international E-79 road within the Kresna gorge planned to serve the traffic the Motorway traffic in direction Sofia-Thessaloniki (the left lane of the motorway) is planned for 2026-2027. The application from request EC approval of construction of for phase 1 and suggest that phase 2 and 3 could be covered by the national budget or by future applications for EU funds.

The suggested phases for construction of Lot 3.2 represent significant risks for the NATURA 2000 site. The estimated completion of Lot 3.2 in 2027 would mean that in the next eight years the constantly growing motorway traffic will be funneled through the Kresna gorge NATURA 2000 site. As described in the following section, the site is already adversely affected by the Motorway construction and urgent measures for mitigation of the impacts and restoration of habitats are needed.

I.3. Additional information for the infringement of art. 6.2 of the Habitat Directive as part of the NGO complaint to the European Commission.²⁹

On 1st of August 2019 NGOs submitted addition to the Infringement complaint (CHAP(2017)02186 – BULGARIA) reporting the failure by Bulgaria to comply with its obligation to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species in breach of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (“Habitats Directive”). The letter was prepared jointly by Client Earth, CEE Bankwatch

²⁷ Appendix 5 of the application form (see reference 1)

²⁸ Application form for Lot 3.2 of Struma Motorway

²⁹ NGO complaint Registration number CHAP(2017)02186 – BULGARIA from July 2017

Network, Friends of the Earth and Environmental Association Za Zemiata – Friends of the Earth Bulgaria.³⁰

The addition of the complaint could be summarized as following:

Article 6(2) of the Habitats Directive requires Member States to take two types of preventive action, that is, to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species.

In Kresna Gorge only very limited initiatives, such as building small barriers between the road and the nature sites have taken place, with limited impact. Meanwhile, the traffic continuously contributes to deterioration of the habitats through air pollution, noise, dust, and water runoff. Moreover, there is a serious problem with a rapid increase of road killings connected to the increase in road traffic – which has eliminated, disturbed, and affected the populations of species for which these areas have been designated. The monitoring activities already in 2003-2004 showed adverse impact on protected species caused by daily traffic (4,500 vehicles/day). In the years following, due especially due to the construction of the other sections of the Struma Motorway, the traffic in the Gorge has doubled (8500 vehicles/day a day in 2013). Monitoring carried out in 2013-2014 showed a significant decrease of the species killed on the road: this is explained by significant deterioration or abandonment of key habitats along the bottom of the valley where the road is situated. The overall impact is significant deterioration of the conservation status of the protected species and especially the ones that were key for the designation of the protected area.

In light of the above, we consider that, by failing systematically **to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated as required by 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Bulgaria is in breach of its obligations under Article 6(2) and Article 12 of the Habitats Directive.**

Please find enclosed the the entire letter of NGOs on the Complaint (CHAP(2017)02186 – BULGARIA) and information about the experts review on the mortality rates and status of the habitats and protected species.

With regard to the question of the Bureau about the appropriate mitigation and compensation measures in **relation to the selected route for lot 3.2 we would like to ask for your attention to Annex 2 of the letter.** It is an analysis of the opportunities for building of functional and efficient under-passes for smaller species of animals in the Kresna gorge as a result of a detailed description of the relief of the gorge along the road constructed during the time of the monitoring of killed species run over by vehicles in 2003-2004.³¹ The main conclusion is that along 78% of the road it is impossible to build efficient under-passes due to the steep relief and

³⁰ 1 August 2019. NGO follow up to the complaint CHAP(2017)02186 – BULGARIA. Bankwatch Network, ClientEarth, Friends of the Earth – Europe, Za Zemiata (Friends of the Earth – Bulgaria). 6 Pp. + 2 Appendices (attached as Appendix to this letter).

³¹ 24 August 2017. Processed data from monitoring of verbates killed on the road 2003-2004. Appendix 1 to the Position paper of National Museum of Natural History (NMNH) at the Bulgarian Academy of Sciences, Appropriate Assessment Report (AAR) on IP “Improvement of the route of Lot 3.2 of Struma Motorway on BG0000366 „Kresna–Ilindentsi” and BG0002003 „Kresna”. Adopted by the scientific council of the NMHNH. 13 Pp.

the impossibility to make enough sloping and permeable for the animals' entrances and exits for those underpasses, as well as due the necessity to build such underpasses very frequently in order to be possible to rehabilitate the functioning of the species' habitats, which have daily or constant placements in the vicinity of the road.

I.4. Decision by the Bulgarian government for using national budget funding for the construction of Struma motorway through the Kresna gorge.

On August 7th, 2019, the Council of Ministers of Bulgaria made a decision to assign 379 million euros from the national budget to construct Struma motorway in the Kresna gorge section. The remaining 277³² million euros needed for the construction will be secured through the application form to the EC. The phases suggested in the application form (see section I.2) and also the willingness of the Bulgarian government to finance the E79 rehabilitation works raise concern about the intention of avoiding EC review on the construction of the entire Lot 3.2 and its impacts on the NATURA 2000 site. The deviation between the route assessed in the EIA and Detailed Land Use plan reported in I.1 also create concerns about the lack of transparency about all the constructions planed in the current NATURA 2000 site which prevent any cumulative assessment of the impacts and would require close monitoring of the construction works.

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³²

According to the application form submitted to the EC in August 2019.

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28th February 2019

**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

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, Centre for Environmental Information and Education, Vlahi Nature School, CEE Bankwatch Network.

Possible case file on Recommendation No. 98 (2002).

On December 2018 the Standing Committee has adopted a decision to keep the case as possible file and to await that the application package to the European Commission is submitted and its the evaluation by the European Commission services taking into account the EU acquis on nature conservation. The update provides information about the recent development on the Struma Motorway construction in relation to the Kresna gorge Area and also the communication with the EC on the infringement of the EU law in the case.

We would like to urge the Bern Convention secretariat to closely monitor the action of the Bulgarian government and EC to ensure implementation of the Bern Convention Recommendations. Despite international attention to the case we are still witnessing illicit actions and circumvention of the law requirements by the Bulgarian government. We hope that the EC will take timely action to ensure Kresna gorge protection and implementation of the EU and Bern Convention Requirements, however we extremely concerned that due to the time pressure with the completion of the Motorway by 2023 compromises with the protection requirements will be made (see Annex 1).

Recent developments:

1. The construction of a motorway Struma in the Kresna Gorge NATURA 2000 site (lot 3.2) has started illegally³³.

In our update from November 20, 2018, we provided information that in the area of Kresna Gorge, the construction of Lot 3.2 of the Struma Motorway was unlawfully started. These concerns were objected by the Governmental delegation in plenary. Between 11 and 13 February 2019, the Bulgarian television bTV presented an independent investigation about the illegal construction of 7km of access roads and 13 exploratory drillings involved several months of work with heavy machinery in a NATURA 2000 site "Kresna – Ilindenci"³⁴. The documented preparatory works alongside the potential route of lot. 3.2 were implemented **without permissions, assessment of impacts and before** the procurement procedure for the same works has been even launched in August 2018. In other words, a private company carried out construction work anticipating the outcomes of the public procurement,

³³ Attachments to the update – map of access roads from 2018 and 2019 and motorway rights of way and route

³⁴ <https://btvnovinite.bg/predavania/tazi-sutrin/razsledvane-na-btv-rabotjat-po-uchastak-ot-am-struma-predida-e-izbranizpalnitel.html>

<https://btvnovinite.bg/bulgaria/razsledvane-na-btv.html>

https://btvnovinite.bg/predavania/tazi-sutrin/firmata-izgotvila-idejnija-proekt-za-otsechka-ot-struma-e-pravila-vremennipatishta-i-sondazhi.html?fbclid=IwAR26aA6PIq_Oo2OUR62st_G0DeQszg31zX4sa4YQzVfdDEbtjhRTIPpfyfs

<https://btvnovinite.bg/bulgaria/proverka-na-gorskoto-stopanstvo-potvardi-razkritijata-na-btv-za-badeshtata-otsechka-otstruma.html>

which provide the company with information that is not accessible to other candidates in the tender. The interviews with the head of the construction company also shows this case was not isolated practice and similar “preparatory works” were carried out by the same company also in October 2016 in relation to another tender, namely the tender for the preliminary design of Lot 3.2 that was won afterwards by the same company in April 2017. The same private company is also participating in the construction of lot 1, lots 2 and 3.3 of Struma Motorway.

So far only the Ministry of Agriculture and Forestry (South-West Bulgaria Agency) issued an administrative act about the illegal construction works and drillings. A fine of EUR 7500 was imposed to the private company “Putproject 2000”³⁵ and the director of Forestry Agency Kresna was dismissed.

Oddly the Regional Inspectorate of the Ministry of Environment and Water so far refused to take any measures against this violation³⁶. In begging of February 2019 the NGO BALKANI Wildlife Society sent a signal for illegal construction of access road to the Regional Inspectorate (Blagoevgrad)³⁷. The signal also pointed out that this access roads were built outside the approved right of way on the road and were not assessed in the latest EIA decision of November 2017³⁸, and thus violate it. The signal also pointed out that during the construction are destroyed protected by NATURA 2000 site natural habitats and habitats of species (habitats with NATURA 2000 codes 9560, 91AA, 6220 and habitats of species *Testudo graeca*, *Eurotestudo hermanni*, *Elaphe quatorlineata*, *Elaphe situla*). With their letter from 18th February the Regional Inspectorate refused to take any measure to investigate and sanction the violation signaled by our the complain as required by Bulgarian Biodiversity Law and to take measures to restore damaged protected habitats as required by the Bulgarian Law on Environmental Liability³⁹.

2. Cumulative impact of the Eastern 10.5 alternative was not assessed in the 2017 EIA/ AA report as the upgrade of the existing E79 road to high-speed road was not consider. Applying salami approach the Bulgarian Road Agency requested between August and November various permissions for different works and Land-use Plans that are new respects to the routes and works assessed in the scope of the EIA.

*2.1 In violation of the EIA the Road Executive Agency (REA) is planning enlargement of the current road passing through the Kresna Gorge – adopted by government as western motorway lane of G10,5 alternative and thus breaching also paragraph 3 of the Recommendation 98/2002*⁴⁰

On 28th August 2018 and 4th September 2018 the REA requested start of substantial rehabilitation work on the existing road E-79. The request are formulate as rehabilitation work that does not require EIA/AA assessment according to the Bulgarian law. The construction works described in the request involve upgrade of the existing road to high-speed road that involve additional junctions, new rest areas, rebuilding of number of tunnels and bridges in NATURA 2000 site that were not subjects of AA assessment.

³⁵

<http://www.uzdp.bg/bg/news/new/854/%D0%A1%D0%AA%D0%9E%D0%91%D0%A9%D0%95%D0%9D%D0%98%D0%95-%D0%94%D0%9E%D0%9C%D0%95%D0%94%D0%98%D0%98%D0%A2%D0%95.html>

³⁶ Letter of the Regional Inspectorate – Blagoevgrad of the Ministry of Environment and Waters to BALKANI Wildlife Society with the outcoming number 38-5/04.02.2019

³⁷ Letter of BALKANI Wildlife Society with the incoming number from the Regional Inspectorate – Blagoevgrad of the Ministry of Environment and Waters 38-5/1/18.02.2019

³⁸ EIA decision 3-3/2017 of the Ministry of Environment and Waters on the construction of the lot 3.2 of Struma Motorway (adopted as second stage of planning of the Motorway Struma and implementing EIA decision 1-1/2008, but actually contradicting it)

³⁹ Letter of the Regional Inspectorate – Blagoevgrad of the Ministry of Environment and Waters to BALKANI Wildlife Society with the outcoming number 38-5/04.02.2019

⁴⁰ Attachments to the update– map of motorway rights of way and route according to the EIA decision 3-3/2017 and according to the Land use Plans from November 2018

On 2 November 2018 REA⁴¹ submitted in the Ministry of Environment and Waters the documentation for screening the need of EIA and AA of Detailed Land use Plan for rehabilitation of the right (western) lane of Struma Motorway.

According to this documentation REA is planning intensive construction works along the current road in the Kresna Gorge which also includes right of way on the additional territories in NATURA 2000 site. Such construction works and rights on way of NATURA 2000 territories have not been assessed and described in the latest EIA decision of November 2017⁴² and are a significant violation of it, but also violate the EIA decision from 2008⁴³ and Recommendation 98/2002 requiring abandoning the option of enlarging the current road since this would significantly increase damage to a unique site, without possible measures of compensation.

The submitted Land use Plan for Right Lane was withdrawn from REA in about a month without explanation, and the Ministry of Environment and Water has not taken a decision on it. However, the same LP is currently available on the REA page.

2.2 The Road Executive Agency (REA) is planning the left (eastern) Struma Motorway lane in violation of the EIA decision 3-3/2017⁴⁴

On 13 November 2018 REA⁴⁵ submitted in the Ministry of Environment and Waters the documentation for screening the need of EIA and AA of Detailed Land use Plan of construction of the left (eastern) lane of Struma Motorway. According to this documentation REA is planning the rout and its rights of way on left (eastern) Struma Motorway lane of lot 3.2. in different locations that the route and its rights of way adopted by the EIA decision 3-3/2017. Thus the impacts of this Land use Plan on Natura 2000 sites Kresna – Ilindentci BG0000366 are not assessed and such construction would violate the latest EIA decision of November 2017⁴⁶.

The Land use Plan for Left lane was also withdrawn from REA in several weeks without explanation, and the Ministry of Environment and Water has not taken a decision on it. And the same MP is currently available on the REA page.

3. Actions from the EC on the Infringement Complaint CHAP(2017)02186 of 10 July 2017 against Bulgaria – still unclear

The first response from the EC about the status of the complaint CHAP(2017)02186 from 10 July 2017 was received only on 30 November 2018⁴⁷. The EC inform us that the complaint was on hold due to ongoing litigation in national court and pending application for EU funds.

In our response from February 6th 2019 we reiterate that the complaint CHAP(2017)02186 and the update submitted in November 2017 covers two breaches of Habitat Directive – namely 1) breach of art.6.2 with the construction of the entire Struma Motorway and 2) breach of art.6.3 with the approval of the construction of lot.3.2 through Kresna gorge NATURA 2000 site. While we understand that the DG Env will have a role in the review and approval the EU funds Application for the Lot.3.2 of Struma

⁴¹ Letter of REA with the incoming number from the Ministry of Environment and Waters HC3II-603/2.11.2018

⁴² EIA decision 3-3/2017 of the Ministry of Environment and Waters on the construction of the lot 3.2 of Struma Motorway (adopted as second stage of planning of the Motorway Struma and implementing EIA decision 1-1/2008, but actually contradicting it)

⁴³ EIA decision 1-1/2008 of the Ministry of Environment and Waters on construction of all sections of Struma Motorway

⁴⁴ Appendix 2 – map of motorway rights of way and rout according to the EIA decision 3-3/2017 and according to the land use Plans from November 2018

⁴⁵ Letter of REA with the incoming number from the Ministry of Environment and Waters 12-00-1176/13.11.2018

⁴⁶ EIA decision 3-3/2017 of the Ministry of Environment and Waters on the construction of the lot 3.2 of Struma Motorway (adopted as second stage of planning of the Motorway Struma and implementing EIA decision 1-1/2008, but actually contradicting it)

⁴⁷ Letter of Mrs.Boudi, DG Environment Ref. Ares(2018)6141890 – 30/11/2018

Motorway we are deeply concerned that blending the appraisal of the complaint with the approval of the Application for EU funds would not allow to bring the infringement to the end as required by the Treaty. The breaches of the EU law described in the complain and subsequent updates are such that irreversible damage on protected habitats and species might be caused everyday.

Therefore we **urge** DG Environment to **prioritize** our complain and take **immediate actions** in order to guarantee the implementation of the Habitats Directive' provisions for the protection of Kresna gorge.

Action requested of the Bern Convention

The Kresna gorge NATURA 2000 site (Kresna-Ilindentzi BG0000366 SCI) is an example of systematic deficiencies of the Bulgarian government regarding the protected area designation, management plans and appropriate conservation objectives and measures in view of achieving or maintaining favorable conservation status of the protected species and natural habitats types.

The started construction of the Struma Motorway in section lot 3.2, in violation of the procurement rules and without having finally adopted Land use Plans, makes the threat about the irreversible damage on Kresna Gorge Area very imminent.

The application for EU funds to the European Commission will be submitted by the Bulgarian Authorities at stage when most of adverse impacts will be already made and it will be not possible even to mitigate or compensate them. The main principle of the European environmental policy – the principle for prevention of potential impacts – would be disregarded. The passive approach of the Environmental authorities, from our perspective, creates additional risks for the protected areas in Kresna Gorge.

Therefore we continue to ask the Bern Convention Secretariat for constant monitoring of the case and consider the case as open 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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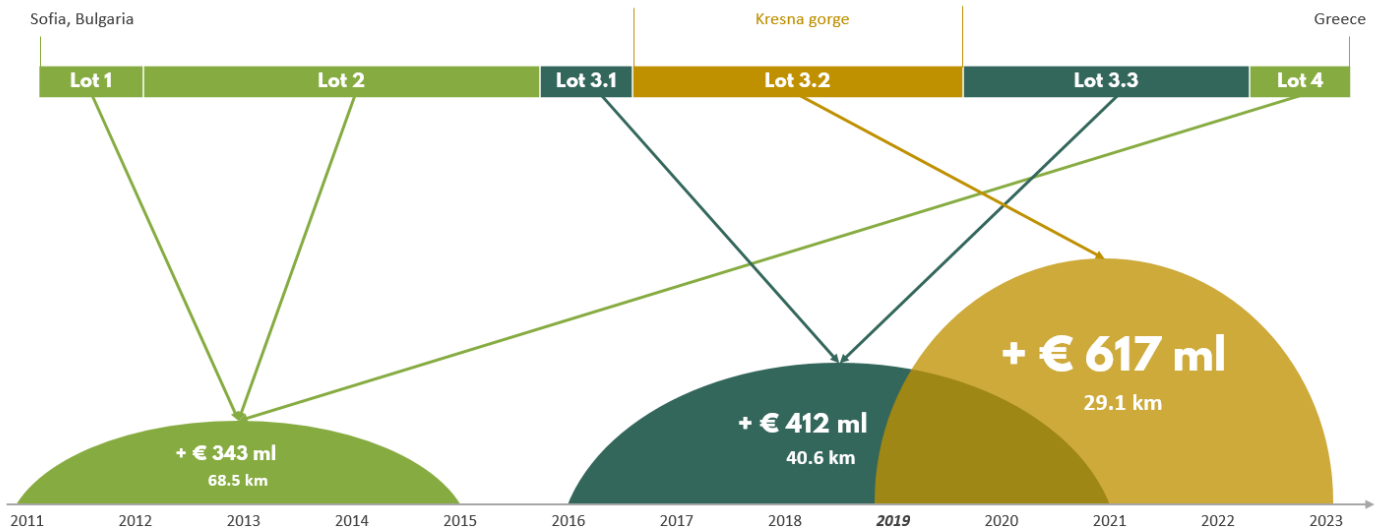
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Appendix 1

Construction time-line of the Struma Motorway

STRUMA MOTORWAY (TEN-T COORIDOR IV)

A € 1.4 billion project largely funded through the EU budget



* for the lots 3.1 and 3.2 the construction dates are indicative

