

Complaint about maladministration

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European Ombudsman

First name: Desislava
Surname: Stoyanova
On behalf of (if applicable): CEE Bankwatch Network
Address line 1: Heřmanova 1088/8
Address line 2:
Town/City: Prague
County/State/Province:
Postcode: 170 00
Country: Czech Republic
Tel.:
Fax:
E-mail address: desislava@zazemiata.org

Against which European Union (EU) institution or body do you wish to complain?

European Commission

What is the decision or matter about which you complain? When did you become aware of it? Add annexes if necessary.

The matter of concern is the use of EU Cohesion funds for deterioration of the conservation and integrity of habitats and species in Kresna gorge (Bulgaria) protected by EU law and International Conventions. The EC did not prevent and ensure that the Struma Motorway construction, financed with the EU cohesion funds, is planned and implemented in line with the EU Treaty requirements and requirements of the Regulations relevant to the Cohesion funds (specifically p.14 (Preamble) [1]and art.6[2]of Regulation No 1303/2013). Specific decisions taken by the EC, DG Regio in that regards are:

1. The approval of the final payment for Operational Program Transport by DG Regio, including major project “Construction of Struma Motorway Lot 1, 2, 4 and preparation of Lot 3” in absence of the implementation of the requirements raised by the EC services during the appraisal of the Major project. The EU supported the construction of Lots 1, 2 and 4 and preparation of the Lot 3 of the Struma Motorway under the 2007-2013 EU Budget Framework, with €291 million from the Cohesion fund. The motorway connects the South-West part of Bulgaria to the Greek border, as part of the Trans-European Transport Network (TEN-T (http://ec.europa.eu/transport/infrastructure/tentec/tentec-portal/site/index_en.htm)).
2. The approval of EUR €330 million from the Cohesion Fund (<https://cohesiondata.ec.europa.eu/funds/cf>) for major project “Struma Motorway – lot.3.1, 3.3 and tunnel Zheleznitsa[3]” by DG Regio without considering the arguments raised in complaint CHAP(2017)2186, Bulgaria. The complaint points out the ongoing violation of the Habitat and Bird Directives during the planning and construction of Struma Motorway. This also violates Art. 101, 102 and 103 regarding the approval of a Major project and Art. 125 (3)(iii) regarding the obligations of the Managing authority from Cohesion Funds Regulation No 1303/2013. The EC approval of the project does not contain any requirements for cumulative impact assessment, neither for the completion of the last remaining section (lot 3.2) of Struma Motorway to be in time and in line with EU legislation. Thus, the EC failed to ensure sustainability of the entire Struma Motorway and to prevent creation of bottlenecks on TEN-T corridors. Lot 3.2 section of Struma Motorway is a 20km-section through NATURA 2000 site Kresna gorge and it is the last remaining section of the 173.8 km - long Struma Motorway, part of TEN-T Corridor N4.

We learned about the first decision (point 1) from the press release of the Bulgarian Government issued on 18 July 2018.[4]For the second decision (point 2)[5]we received information from the press release of the European Commission from 13 November 2017. [6]

[1] Regulation No 1303/2013, para 14) of the preamble “The objectives of the ESI Funds should be pursued in the framework of sustainable development and the Union's promotion of the aim of preserving, protecting and improving the quality of the environment as set out in Articles 11 and 191(1) TFEU, taking into account the polluter pays principle.”

[2] Regulation No 1303/2013 Art.6 Operations supported by the ESI Funds shall comply with applicable Union law and the national law relating to its application ('applicable law').

[3] Major project CCI 2015BG16CFMP001

[4] <https://www.eufunds.bg/index.php/bg/novini/item/18692-ek-odobri-finalnoto-plashtane-po-op-rchr-2007-2013> (<https://www.eufunds.bg/index.php/bg/novini/item/18692-ek-odobri-finalnoto-plashtane-po-op-rchr-2007-2013>)

[5] C(2017) 7117 final from 24/10/2017

[6] http://europa.eu/rapid/press-release_MEX-17-4603_en.htm (http://europa.eu/rapid/press-release_MEX-17-4603_en.htm)

What do you consider that the EU institution or body has done wrong?

Struma motorway project, as a major project (art.100 of the Common Provision regulation No 1303/2013) was from the beginning fully monitored by EC services as part of the Bulgarian Operational Programme Transport. The project was also appraised and approved by the EC as a major one as its budget is above EUR 50 million so the final decision lays in the hands of the Commission. We consider that EC handling of this case has signs of maladministration as the poor or inadequate administration of the project led to the violation of the Habitats Directive, the EIA Directive and requirement of International Conventions. The EC failed to act upon deterioration of Natura 2000 site, non-conformity with Bern Convention Recommendation 98 (2002)[1]and breach of the decision of the Bulgarian Ministry of Environment allowing construction of the Struma Motorway (AA/EIA decision I-1/2008).

Violation 1

European Commission (EC) failed to ensure that Struma Motorway construction, financed with EU Cohesion funds is in compliance with article 6(3) of the Habitats Directive 92/43 (shortly further referred as HD). The Ministry of Environment issued in 2008 Environmental Impact Assessment and Appropriate Assessment decision[2](below referred as “EIA/AA decision 1-1/2008”), in compliance with article 6(3), that prescribes following obligatory mitigation measures 1) the Kresna Gorge section (lot.3.2) of the Struma Motorway is the first to be constructed and 2) Kresna gorge is bypassed by an alternative removing the motorway traffic outside the Gorge. Those obligatory mitigation measures are aiming to avoid any adverse effects to the integrity of the BG0000366 “Kresna-Ilindentzi” Natura 2000 site and thus harmed achieving the general aims of the Habitats Directive and provisions of second sentence of article 6(3) HD (see number of ECJ rulings: C-127/02 Waddenvereniging and Vogelbeschermingsvereniging, paragraph 49 and 55-57; C-308/08 Commission v Spain, paragraph 21; C-404/09 Commission v Spain, paragraph 99 and 163; C-182/10 Solvay and Others, paragraph 67; C-258/11 Sweetman and Others, paragraph 30; C-521/12 Briels and Others, paragraphs 30 and 38-39).

The decision of the European Commission C(2013)1045 from 27.02.2013 to provide community financing for lots 1, 2, 4 and preparation of Lot 3 undermined the first requirement of the EIA/AA decision 1-1/2008 with the argument that the Lot 3 is not feasible to be implemented in the budget period 2007-2014. During the project appraisal process the EC, however, required guarantees from the Bulgarian government for implementation of the second mandatory mitigation measure and condition funding of the two of the lots (lot 2 and lot 4) with the implementation of this provisions.

Between 2014-2016 several CSOs letters raised concern about the lack of the implementation of the EC requirements for preparation of the lot 3 in the EIA/AA decision 1-1/2008 and also warning EC that the EU funds are used for studies and analyses that undermine the mandatory mitigation measures of the EIA/AA decision 1-1/2008 thus creating legal uncertainty.

Violation 2

European Commission (EC) failed to implement article 6(2) HB - financing Struma motorway and non-implementation of obligatory mitigation measures of EIA/AA decision 1-1/2008 and thus caused significant disturbance of the species protected in BG0000366 “Kresna-Ilindentzi”Natura 2000 site (see relevant ECJ rulings: C-304/05 Commission v Italy, paragraphs 94 –97; C-

Violation 3

By consistent financing of 5 sections of the Struma motorway outside the Kresna Gorge and leaving the section in the Kresna Gorge (section 3.2) as last one in violation of prescribed obligatory mitigation measures for the whole project of Struma motorway in EIA/AA decision 1-1/2008, EC applied “salami-slicing approach” and failed to take into account the cumulative impacts raising from the construction of all motorway sections on the Kresna Gorge area and section. This is a violation of the first sentence of article 6(3) HD requiring assessment of all cumulative impacts arising from a project. It is also violation of article 2(1) of the Directive 2011/92/EU on EIA (see relevant ECJ rulings: C-392/96 Commission v. Ireland, paragraphs 76, 82; C-142/07 Ecologistas en Acción-CODA, paragraph 44; C 2/07 Abraham and Others, paragraph 27; C-205/08 Umweltanwalt von Kärnten, paragraph 53; C-560/08 Commission v Spain, paragraphs 109-110 and 133,134; C-275/09 Brussels Hoofdstedelijk Gewest and Others, paragraph 36).

Violation 4

EC violated Art. 11 and Article 191(1 and 2) of the Treaty of the Functioning of the European Union. According these the Community policy on the environment shall preserve, protect and improve environment based on the precautionary principle and on the principles that preventive action should be taken.

Violation 5

On July 17 2017 a NGO complaint CHAP (2017) 02186 - BULGARIA for violation of Art. 6.2 and 6.3 of the Habitats Directive and violation of EIA/AA decision 1-1/2008 during the construction of Struma motorway was submitted to the EC. At the end of July 2018, within the required one year administrative period, complainers have no any official written answer from the EC regarding the submitted complaint. Meanwhile the EC continued to approve financing the Struma motorway in violation of EIA/AA decision 1-1/2008 –the decision for financing the lot 3.1 is dated 13 November 2017. Thus EC disregarded point 8 of the Annex of the Communication from the Commission “EU law: Better results through better application” C/2016/8600, requiring Commission to decide on submitted complaints in 1 years period and write about its decision to complainers or if this time limit is exceeded to inform the complainant in writing.

Violation 6

The EIA/AA decision 1-1/2008 was also in compliance with the Bern Convention Standing Committee Recommendations 98 from 2002. The 29th Standing Committee (2010) of the Bern Convention decided to close the case file welcoming the 2008 EIA decision of the Bulgarian government to avoid the construction of Struma Motorway in the Gorge, including measures to mitigate the negative impacts in Natura 2000 sites. Recommendation 98/2002 of the Standing Committee of the Bern Convention recommends that the Bulgarian Government 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. It also recommends 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. The EIA/AA decision 1-1/2008 strictly implemented this recommendation – it decided that using the existing road and all alternatives in the Kresna Gorge would adversely affect NATURA 2000, without possibilities for mitigation and compensation and provided construction to be applied by an alternative outside the Kresna Gorge - as first priority section for construction in order to avoid adverse impacts of motorway traffic on protected species. The decision of the EC to release the financing of Struma motorway in violation of EIA/AA decision 1-1/2008 thus disregards the Recommendation 98/2002.

Violation 7

The approval of Lot 3.1 and 3.3 financing by EC is not in line with the requirements of Common Provisions Regulation (Regulation (EU) No 1303/2013) set in Art. 101, 102 and 103 regarding the approval of a Major project and Art. 125 (3) regarding the obligations of the Managing authority as necessary information on Lot 3.2 was not available when the decision on Lot 3.1 and 3.3 was taken.

What, in your view, should the institution or body do to put things right?

Our view is that the EC, as a guardian of the European Treaty, must stop funding for Struma motorway on the basis of the fact that a number of conditions, including legislative, are not fulfilled, thus creating a risk for misuse of European taxpayer money. The EC should examine thoroughly and fully the Legal Complaint (CHAP(2017)02186-Bulgaria) about possible violation of Habitat Directive as a result of the construction of Struma motorway submitted by us on 12th July 2017 and should consider the result of the Complaint for any further decisions on Struma motorway and the Bulgarian OP Transport.

The decisions already taken by the EC in the last years, which we believe have a serious signs of maladministration, are listed below:

1. The EC should not have accepted the decision of the Bulgarian Government to postpone the construction of Lot 3 for the 2014-2020 period as the AA/EIA decision 1-1/2008 requires "to put priority at the design of Lot 3.2 in order to prevent the situation where other parts (Lots) of the motorway are constructed and operational while Lot 3.2 stays at "zero option"". This is what we witness now and which led to increased traffic accidents and loss of biodiversity.

The EC should have exercised better control on the studies, project design and decision-making regarding the long tunnel or full eastern by-pass avoiding Kresna Gorge as only those options have been approved by the AA/EIA decision 1-1/2008 in line with the Bern Convention Recommendation 98 (2002);

2. The EC should have undertaken the necessary measures and actions to ensure prevention of any negative impact of the EU funds on Natura 2000 site in accordance with the requirements of the Art.6 on compliance with EU law and Art. 8 and [1](d) on Sustainable development of the Common Provisions Regulation (Regulation (EU) No 1303/2013).

3. The EC should have examined thoroughly and fully the Legal Complaint (CHAP(2017)02186-Bulgaria) about possible violation of Habitat Directive as a result of the construction of Struma motorway submitted by us on 12 July 2017 and considered the results at the Decision for financing 3.1 and 3.3 approved on 13 November 2017;

4. The EC should not have approved the last financing for lot 3.1 and 3.3 as all deficiencies stated above have been communicated timely and duly to the EC services (particularly DG Regio and DG Environment, but also to Commissioners directly) during the last three years after the decision of the Bulgarian authorities to abandon the routing option avoiding construction of the motorway through the Kresna Gorge.

Our position is that the approval of Lot 3.1 and 3.3 is not in line with the requirements of Common Provisions Regulation (Regulation (EU) No 1303/2013) set in Art. 101, 102 and 103 regarding the approval of a Major project and Art. 125 (3) regarding the obligations of the Managing authority as necessary information on Lot 3.2 was not available when the decision on Lot 3.1 and 3.3 was taken.

5. The EC should not have approved the final payment for OP Transport 2007-2014 due to use of EU funds in violation of the rules Art.6 on compliance with EU law and Art. 8 of Regulation (EU) No 1303/2013.

Have you already contacted the EU institution or body concerned in order to obtain redress?

Yes (please specify and submit copies of the relevant correspondence)

Yes. The Bulgarian NGO Coalition "Save Kresna Gorge" and international NGO's have undertaken numerous actions to duly inform the EC services and prevent decisions leading to a breach of the Environmental legislation for Kresna Natura 2000 site, EIA legislation and EU funds rules. We have proposed also alternative options for the motorway construction which satisfies the regulations listed above.[1]

Unfortunately, the EC passive approach to wait for the Bulgarian governmental decisions, actions and results of the actions, breaches the basic principle of nature protection - namely the "precautionary principle" defined at 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" **and detailed at EC Communication (COM(2000) 1final) on the precautionary principle (<http://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:52000DC0001>)** where "aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk" and "The decision-making procedure should be transparent and should involve as early as possible and to the extent reasonably possible all interested parties."

[1] Annex 3 – Detailed description of the communication with EC services

If the complaint concerns work relationships with the EU institutions and bodies: have you used all the possibilities for internal administrative requests and complaints provided for in the Staff Regulations? If so, have the time limits for replies by the institutions already expired?

Not applicable

Has the object of your complaint already been settled by a court or is it pending before a court?

A plea against the EIA decision 3-3/2017 was submitted to the Bulgarian Administrative Court on 06.11.2017 by NGO's of Save Kresna Gorge coalition and other affected parties.

On 23.05.2018, the Bulgarian Supreme Administrative Court (SAC) took a final decision No 6834[1] on the Kresna gorge court case. All motives submitted by NGOs[2] and other applicants against EIA decision 3-3 / 2017[3] were rejected. Thus the EIA decision 3-3 / 2017 is finally approved without any amendments and it provides for crossing of the Struma motorway through the Kresna Gorge. The approved alternative is "G10,5 Eastern", where 50% of the motorway and its traffic to Greece will pass through the existing road via the Kresna gorge, and the motorway and the town of Kresna will be left without a local road.

The EIA decision 3-3 / 2017 violates Recommendation No. 98 (2002) and the main provisions of this document:

- Abandon the option of enlarging the existing road as part of the motorway route and provide for its downscaling and rehabilitation to a status of a local road used by the farming community and tourists.
- take the decision on the routing of the motorway on the basis of an in-depth environmental impact assessment (EIA) taking into account, in the development of this project, of the imperatives of conserving fauna, flora and habitats as well as the concerns of the local communities in the municipalities concerned and ensure that the choice of alternative is based not only on technical, legal and economic criteria but also on social and ecological criteria.

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

[2] "Za Zemiata (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)

[3] 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/> (<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/>)

Please confirm that you have read the information below

You have read the information note on data processing and confidentiality

Do you agree that your complaint may be passed on to another institution or body (European or national), if the European Ombudsman decides that he is not entitled to deal with it?

No

Attachments:

Name	Size
Annex 3.7 - Letter to DG Regiofinal.pdf	96.8 KB
Annex 3 - detailed description of the communication.pdf	425.1 KB
Annex 3.4.pdf	2.55 MB

Annex 3.10. Complaint final.pdf	1.99 MB
Annex 3.3.pdf	26.3 KB
Annex 3.5.pdf	164.37 KB
Annex 2 - detailed description of Kresna case.pdf	81.21 KB
Annex 3.11. Summary of Complaint for press _fin.pdf	152.04 KB
Annex 3.9.pdf	1.03 MB
Annex 3.2.pdf	153.25 KB
Annex 3.1-compressed.pdf	2.31 MB
Annex 3.8.pdf	892.99 KB
Annex 3.6 - IP-Kresna-11-03-2015.pdf	101.51 KB

1, avenue du Président Robert Schuman
CS 30403
F - 67001 Strasbourg Cedex

T. +33 (0)3 88 17 23 13
F. +33 (0)3 88 17 90 62

www.ombudsman.europa.eu