



STOLEN RIVERS FOR TRADE

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FOREWORD

This is the story of the "sustainable" hydropower development in Bulgaria from the beginning of the 21st Century to this day. During the accession process in the EU Bulgaria suffered a boom in small hydro investments to meet the European targets for the RES part in the overall electricity production mix, preceding the enforcement of the relevant European nature protection directives, such as the EU WFD, the Habitats Directive, the SEA & EIA directives etc.

The impact caused on the river ecosystems in the country is devastating. Some of the reasons to explain the damage are:

- The reduced /or usually absent/ river flow during low water conditions and the water quality degradation
- The blocked sediment downriver transportation
- The river fragmentation disrupting bio corridors for fish and other aquatic species' migration.

In the last eight years local fishermen's Association Balkanka has set up /with the substantial help of *WWF-Bulgaria*/ an internet HPP monitoring platform¹ where all the information in regards to the commissioning, design, construction and operation of HPP is uploaded, including hundreds of pictures and video clips to prove the damage.

The HPP monitoring platform reveals the full beauty of hydropower in Bulgaria, having in mind that at least 75% of the water catchments visited and displayed are located within the boundaries of Natura 2000 Habitats and/or Birds directive sites.

However, this document will not be focused mainly on the environmental impact, which in Bulgaria is a very well known and documented fact to the extent that nowadays everyone knows what small hydropower actually means. Still, the proven devastating impact is very important to explain why small hydropower has become a dirty word across the country, suffering the troubles described hereafter.

The main focus will be concentrated on the huge violations of the legal framework during the authorization of nearly all new small hydropower undertakings. These violations were committed in the construction permits issued under the Spatial Planning and the State Property Acts. They became possible due to the fact that all developers were very powerful, politically connected individuals, even Members of

¹ <https://dams.reki.bg/Dams/Map>

the Parliament and party leaders, hurrying up to catch the wave of the incentives small hydropower was rewarded with by their own political decisions.

The necessary documents according to the mentioned state Acts required a lot of time to be obtained and some fees had to be paid as well, therefore no competent state official dared to require them from the powerful but hasty developers, otherwise he would have been fired right away, someone else would have taken his place and he wouldn't bother much to follow any law...

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1. The legal problem

1.1 SHORT history till 2017

According to art.11 of the Water Act the riverbeds in Bulgaria are considered Public State Property. To build anything on Public State Property, like an intake for the run-off-river HPPs or the water catchments of the diversion type HPPs, a special Decision issued by the Council of Ministers under the Bulgarian State Property Act is required. Until the year of 2010 under art.16 and art.16a of the same State Property Act the only possible way for someone to use public state property was concession. Since 2010 an amendment of the Energy act required a building right for the construction on the property to be issued by the Council of Ministers.

According to article 161 of the Spatial Planning Act:

Developer is the owner of the property, the party to whom the right to build in someone else's property has been established, or the party who has the right to build in someone else's property by virtue of law.

So, if you don't have a building right to build something in public state property, you are anything but a legal developer by definition, can't be treated as such by the municipal authorities and are not entitled to receive construction permit at all.

Still, none of the investors possessed such documents with only three exceptions, which means that apart from the exceptions, the other investors didn't comply with the legal definition for developers, but the construction was allowed by the municipality administrations nonetheless. The exceptions mentioned are the operational Kadievo HPP and Tsarevets HPP, together with the future Tevani 2 HPP, which is in a project stage for the time being.

The problem has obviously come to the knowledge of former minister of environment and waters Nona Karadjova in 2010. She informed the minister of regional development at the time for the problem in an official notification on the matter².

Of course nothing positive happened after the notification - investors continued to bypass the law right in front of the wide opened eyes of the municipal authorities. The situation clearly represents one of the Symbols of Corruption in the most corrupt EU Member State according to Transparency International.

Back in 2010 an amendment of the Energy Act took place as well. In art.62 it was required that when the construction of hydropower units is carried out on state property, the competent state authorities should establish remunerative right in favor of the party - candidate to build and operate the energy unit on public state property - without tender or competition, of course...

Yet nobody followed that either, thus no fees were paid by the investors to the state and huge financial losses to the budget were inflicted.

And there is another side of the coin worth mentioning in the light of the compliance with the general legal framework:

- According to article 60 of the Water Act:

(3) When the request is for issuance of a permit for water abstraction from surface waters, to the application under para.1, the following documents shall also be attached:

.....

4. documents, certifying the consent of the owners of properties, which will be affected by the flooding and the construction of the facilities, when the facilities are new;

An official answer from the Council of Ministers' administration received under the Public Information Access Act states that the Council of Ministers has never issued such documents certifying the consent of the state, other than the three Building rights, which can obviously serve for the purpose.

- According to article 79 of the Water Act:

Art. 79. (1) (Amended, SG No. 65/2006, effective 11.08.2006, amended, SG No. 61/2010) The validity of the issued water permit shall be terminated upon expiration of its deadline or by decision of the state authority under Art. 52, para.1 in case of:

² https://dams.reki.bg/uploads/Docs/Files/Doc2_MOEW_LETTER_CONCESSIONS.pdf

1. (amended, SG No. 65/2006, effective 11.08.2006) **termination of the water user's right of ownership or usage of the property where the activity is carried out or the water intake facility is located, or in case of explicitly stated waiver of the right to use the water body;**

This article /if followed/ must have led to immediate termination of all actual water permits for all new sHPPs on surface waters in the country immediately after the letter of minister Karadjova in 2010, when the infringement officially became public. Surprisingly or not, the law was not followed again, but it can be applied in any moment now or in the future.

- According to the Additional Provisions of the Environmental Protection Act:

§ 1. For the purposes of this law:

20. (Amended, SG No. 77/2005) "**Developer of an investment proposal**" shall be a public body, physical or legal party, which by virtue of a special law, normative or administrative act has the right to initiate or to apply for the approval of an investment proposal.

Since an investment proposal for a small hydropower plant always includes construction of the intakes in the riverbeds, in the light of the definition laid down in article 161 of the Spatial Planning Act cited above, the developers couldn't have been treated as such by the environmental authorities and all EIA and AA procedures must have been terminated right away, but this didn't happen either, much to the satisfaction of all interested parties.

The importance of these violations of the Water and the Environmental Protection Acts will be discussed here in the section where the future legal interventions are addressed.

In the end of this section it must be underlined that the described violations of the relevant legal acts are so huge that all the individual administrative acts issued by the competent authorities, namely the EIA and AA Decisions, the Water Permits and the Construction Permits can be defined as "null and void", because the violations are inconsistent with the general legal order in the country, breaching the "Rule of Law" principle and because they constitute a threat to mere existence of the state as well. In normal states nobody can build anything on someone else's property without the consent of the owner of the property - it is that simple! Let alone to be rewarded with any kind of incentives afterwards!

So, nobody paid attention to the letter of formal notice by former minister of environment and waters Nona Karadjova to the Ministry of regional development in 2010 and everybody lived happily ever after... until the autumn of 2017.

1.2. UPDATE on key developments in the period 2017 - 2020.

In the autumn of 2017 a NOVA TV report³ highlighted the problem again and it became public. In the TV report the popular investigating journalist Genka Shikerova received two identical answers from the deputy minister of regional development Valentin Yovev and from the professor in judicial sciences Ognyan Gerdjikov, stating that anything built without a building right in someone else's property is illegal.

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<https://nova.bg/news/view/2017/11/12/198360/%D1%80%D0%B0%D0%B7%D1%81%D0%BB%D0%B5%D0%B4%D0%B2%D0%B0%D0%BD%D0%B5-%D0%B2-%D1%82%D0%B5%D0%BC%D0%B0%D1%82%D0%B0-%D0%BD%D0%B0-nova-%D0%B2-%D0%BC%D1%8A%D1%82%D0%BD%D0%B8-%D0%B2%D0%BE%D0%B4%D0%B8>

Commitment for an inter ministerial commission formed to address the issue was promised by the deputy minister of regional development as well.

The commission was formed in the beginning of 2018 with official representatives participating on behalf of the Ministry of Energy, the Ministry of Regional Development and the Ministry of Environment and Water. Only two meetings of the commission were held and nothing came out of that - the funny protocols display the eagerness of all participants to find a way out of the mess and the legal obstacles to their good intentions. A uniform consent was reached that any possible solutions require amendments of the legal framework with retroactive action. As such an approach is not acceptable the case was swept under the carpet once again.

In November 2017 Balkanka Association conveyed to the General Prosecutor's Office an official notification on the discovered violations of the law, based on the NOVA TV report. The official answer from 08.05.2018 stated that as far as the inter ministerial commission is working on the matter, the prosecutor's office finds no grounds to take any further action for the moment, while at the same time the commission has already stopped working in despair...

However, the case might have been swept under the carpet by the best efforts of the state authorities involved, but the public was already aware and that was the Turning Point to the whole process, additionally fueled by regular media reports on the small hydropower devastating impacts in the following years, keeping the public discontent vigorous and growing.

The most important incident happened in the end of 2020, when a draft project for a new *Ordinance on the utilization of the surface water bodies* was published by the Ministry of environment and water for public consultation⁴.

Balkanka Association took active part in the consultations, with a proposal concerning the issuance of Water Permits. The proposed amendments required for the issuance of new and for the extension and/or modification of existing Water Permits documents proving the building right for the construction of the intakes in the riverbeds to be submitted by the investors.

The grounds for the proposal were based on article 60 of the Water Act cited above, namely that investors should prove the existence of documents, certifying the consent of the owner of riverbeds, which will be affected by the flooding and the construction of the facilities in public state property.

Additional reason for the proposed amendment was the fact that if the facilities were illegal within the meaning of the Spatial Planning Act at the time when they were built /as they clearly were and everybody knew it/, it is not possible to issue new or to extend or modify expiring water permits under the Water Act legally, for the same facilities which are heavily breaching another law.

The proposal was approved and subsequently included in the Ordinance. This means that it has passed a review and approval by the Legal Department of the Ministry of Environment and a thorough review during the inter ministerial consultations, which included the Ministry of Energy and the Ministry of Regional Development. The proposal was published on time and no one protested against it during the ongoing consultation, even the hydropower owners and associations.

⁴ <https://www.moew.government.bg/bg/proekt-na-postanovlenie-na-ministerskiya-suvet-za-priemane-na-naredba-za-polzvaneto-na-povurhnostnite-vodi/>

2. Major news in 2021

The new *Ordinance on the utilization of the surface water bodies* was approved by the Council of Ministers and was published officially in the State Gazette on 28 March 2021. At first nothing happened and nobody paid attention. The interest among the small hydropower individual operators and associations was nonexistent due to their belief that the problem will stay under the carpet forever, because all of them are so powerful to believe they are untouchable by any law.

In the midsummer of 2021 however, under the governance of a temporary Government between two parliament elections, the problem exploded in the media, mainly because some of the owners of the first new hydropower plants /HPPs/ built in the country since 2000, discovered that their expiring by the end of the year Water Permits cannot be extended anymore, because they didn't have the necessary papers.

Of course, the new temporary minister of environment, who is a well known old timer from the dark times of the hydropower boom in Bulgaria when he was Director of the Water Management Directorate at the Ministry, took the side of the poor investors and immediately released a new amendment of the *Ordinance on the utilization of the surface water bodies* for public consultation, in which the requirement for the owners to submit documents, certifying that they have the building rights for the construction in the riverbeds was deleted.

In the meantime several symptomatic Law suits were finalized in the Supreme Administrative Court and in the Administrative Court in Smolyan District, overruling the individual administrative acts issued by the municipal authorities on the construction of the intakes of three existing HPPs.

It turned out to be a very hot summer for all interested parties - the state officials, the judicial system, the hydropower operators and their associations, the banks and the environmental NGOs. And it looks like the heat will stay around the corner for at least the next year or two. Here are the reasons why, explained by the actions taken by all parties involved:

- The Supreme Administrative Court /SAC/

In 2019 the Supreme Administrative Court came up with a Decision No 7405/20.05.2019⁵, stating that the Construction Permit for the brand new and ready to operate *Baba Tsveta* HPP, issued by the municipal authorities, is illegal due to the fact that the developer doesn't have the necessary building right for the construction of the intakes in the riverbeds of two small rivers - *Gradevska* and *Strujka*. The decision is final and cannot be appealed any further, anywhere.

The law suit started because an inspection carried out by the Regional Construction Control Directorate in the District of Blagoevgrad upon a signal of Balkanka Association in 2018 discovered that there is no building right for this particular hydro unit and the approval process was blocked. In June 2018 the intake was ready to operate as an inspection of Balkanka⁶ shows.

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<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/133e3d96d459b065c22583f3002c9c23?OpenDocument>

⁶ <https://dams.reki.bg/0499-dam/2018-06-09>

Here is a short quotation of the most important part of the motives of the Court for the decision:

"The waters of the rivers and the lands belonging to them are public state property - art. 11, para. 1, Water Act. In this case, two of the subprojects, subject to the construction permit, fall into water bodies - public state property. According to art.182, para.1 of the Spatial Planning Act, construction in someone else's regulated land property is permitted to the parties in whose favor the building right for the construction has been established. It is not claimed in the case and it is not proven that the owner of the property in which the construction will be carried out has established a building right in favor of Mile Engineering Ltd /the investor/ under the State Property Act."

This statement of the Court comes to confirm the legal requirements described here in section 1. *The Legal Problem*. Of course, after the decision of the court the illegal facilities had to be demolished by the perpetrator and this has already happened somewhere in 2020 as another report⁷ by Balkanka shows.

- The Administrative Court in Smolyan district /ACSD/

In the beginning of 2021 three separate law suits were initiated in ACSD by the Regional Prosecutor's Office. A local media⁸ reports that this was an independent action taken without any interference from anyone in the actions of the Prosecutor's Office. Two of these law suits have already been decided in favor of the prosecutors and the Construction Permits have been announced null and void:

a) The Leseto HPP case - set into operation in 2003

The court decision can be found in the old website "case reports" - **case №68** from **2021** on the link⁹

b) The Zaburdo HPP case - set into operation in 2018

The court decision can be found in the old website "case reports" - **case №71** from **2021** on the same link

In both cases two separate and independent judges have taken their decisions with the exactly the same motives like the motives of the Supreme Administrative Court in the *Baba Tsveta* HPP case.

These three court decisions are really symptomatic as they cover a long period of time - from 2003 till 2019, in which a lot of amendments in the relevant legal framework took place, but no political party dared to mess with the Basic Legal Principle that if someone intends to build something in someone else's property, the developer has to get a building right from the owner of the property.

The decisions are also symptomatic, because one of the units was ready to start operation and the other two pieces were under operation, one of them for 18 years.

Finally, the cases are symbolic also because different representatives of the Construction Control Directorate, the prosecutor's office and the judicial system have found the cases illegal independently from one another.

Of course, the decisions of ACSD will be appealed by the hydro operators in the Supreme Administrative Court but, judging from the practice of the Supreme Court and the magnitude of the infringements, the hydro units stand no chance to survive if the law is followed.

⁷ <https://dams.reki.bg/0499-dam/2021-02-21>

⁸ <https://www.marica.bg/region/smolqn/prokuraturata-poiska-da-spre-tri-mini-veca-v-smolqnsko>

⁹ <https://smolyan-adms.justice.bg/>

- The General Prosecutor's Office

As it was described already, in November 2017 following the NOVA TV report Balkanka Association submitted a Notification on the topic to the General Prosecutor's Office. Back then the reaction was close to zero, based on the expectations that the inter ministerial working group of experts will find some way out of the mess.

Nothing happened afterwards, therefore on 07.05.2021 Balkanka Association submitted another Notification to the General Prosecutor's Office pointing out that their expectations proved to be vain and the problem is staying under the carpet way too long, especially when the hydro operators keep paying nothing to the state for the usage of the public state property...

This time the reaction to the signal was in line with the relevant legal framework, as it should have been from the very beginning. In an official answer¹⁰ Balkanka was informed that a thorough review of the papers has found the described deficiencies for **155** new small hydropower plants, but the problem has to be dealt with case by case, therefore the legal inquiry based on the signal of Balkanka is cancelled, but it is transformed into 155 new individual cases to be proceeded by the regional prosecutor's offices all over the country. The inquiry covered all hydro units the intakes of which were built on surface water bodies in the riverbeds. The problem is not applicable only to the hydro units built on irrigation channels and on old dams, because the property issues there are not the same.

Currently, relevant actions from the regional prosecutor's offices are expected, always having in mind that very powerful, politically connected owners of the hydro units are involved. Therefore it was not a surprise when in an official letter to Balkanka¹¹, the Regional Prosecutor's Office in Sofia refused to proceed the first case any further - of Svrajen HPP on the Iskar River. Of course, Balkanka immediately conveyed an appeal to the Appellate Prosecutor, pointing out the court practice already available and the actions by the prosecutors in Smolyan district, which are quite opposite to the decision of the Prosecutor's Office in Sofia. As the legal case is crystal clear, the only possible explanation for the mishap in Sofia district is corruption, but the final decision¹² of the Appellate Prosecutor was predictable and the refusal of the Prosecutor's Office in Sofia was overruled on the grounds described here insofar. Now the case of Svrajen HPP has to be thoroughly examined and consequently proceeded to the Court where it will have the same fate as the three previous court cases described here. It is also symptomatic that the appellate prosecutor took the decision not only on Balkanka Association's objection, but on an independent official notification from the Supreme Administrative Prosecutor as well. This means that the Supreme Administrative Prosecutor is closely watching the development of all these illegal cases.

- The Ministry of Environment and Water /MOEW/

As mentioned before, MOEW released the new *Ordinance on the utilization of the surface water bodies* for public consultation in the end of 2020. The *Ordinance* was approved by the Council of Ministers and was set into force on 28 March 2021. Prior to its enforcement the *Ordinance* has been approved by the

¹⁰ https://dams.reki.bg/uploads/Docs/Files/PROKUROR_ANSWER_2021.pdf

¹¹ https://dams.reki.bg/uploads/Docs/Files/PROKUROR_SVRAJEN.pdf

¹² https://dams.reki.bg/uploads/Docs/Files/PROSECUTOR_APELATE_SVRAJEN_2021.pdf

Legal Directorate with MOEW and by all ministries and state agencies in the country, including the Ministry of Energy and the Ministry of Regional Development.

In the beginning of August 2021, under the governance of a new, temporary minister of environment and water, the same ministry released for public consultations new amendment of the brand new *Ordinance* in which the requirements for the investors to prove they have the necessary building rights to apply for new water permits, or for extension/modification of expiring water permits, have been deleted. These new amendments were checked and approved by the same "experts" in the Legal Directorate at MOEW, who have approved just the opposite in the original *Ordinance* only five months earlier the same year.

Meanwhile, several individual operators and hydro associations appealed the original *Ordinance* without the new amendments in the Supreme Administrative Court and the minister himself applied to be constituted as an interested party in the court case against the decision of his own Council of Ministers he is member of. This could have been ridiculous if it wasn't so sad... Thankfully, the Supreme Court rejected the application of the poor minister and he wasn't constituted as an interested party in the case.

Currently, the public consultations on the proposed new amendments of the *Ordinance* have taken place and letters of support were submitted by all hydro operators, while official objections were also lodged by all environmental NGO's in the country. So far there are no further steps in the administrative procedure for the official adoption of the amendments, mainly due to the negative public reactions in the media.

Meanwhile, the requirements in the new Ordinance were totally ignored by the director of the East Aegean River Basin Directorate in two cases so far - for the extension of the Water Permits of Leseto HPP and Buynovska HPP, expiring by the end of June 2021. The "competent" director had to take a decision to reject the applications and cancel the permits within a 20 day timeline, but six months later there is no answer and these two hydro units are still working undisturbed... Currently, based on a recent signal of Balkanka Association, there is an investigation of the Prosecutor's office in the town of Plovdiv going on, for a crime committed by the director of the basin Directorate under article 282 of the Penal Code for refusal to perform his official duties in favor of third party, which by definition means corruption.

- The Ministry of Energy /ME/

During the communication with all "competent" state authorities involved in the *Baba Tsveta* HPP case Balkanka Association received a symptomatic letter from the Ministry of Energy¹³, dated 19.03.2021. In this letter ME confirms 100% the legal regulations as they are described heretofore.

In the end of the letter, the Ministry of Energy is so kind to share its vision on the "sustainable" development of small hydropower in the country:

In section 5.2 of the Integrated Plan Energy and Climate /IPEC/, where an assessment of the policies and measures in the field of hydro energy is carried out, it is stated that: The uncertainties, related to the levels and quantities of the water and the climate change hinder any further hydropower development till 2030. In the same chapter of IPEC findings have also been made on the risks to biodiversity and habitat degradation in result of the change in the hydro morphological regime and the runoff irregularity in the water bodies.

¹³ https://dams.reki.bg/uploads/Docs/Files/ME_Statement_ME.pdf

It is obvious that nobody, including ME, is happy with the mere existence the numerous small hydro units in the country. Apart from their devastating environmental impact, they are only causing troubles to the balancing facilities of the energy system. As 75% of the annual runoff in Bulgaria is running through the rivers in April, May and June and during the rest nine months the operators must release the E-flow equal to 10% of the average annual runoff, it is clear that the small hydro units can work only in the spring, when the consumption is the smallest. During the cold winter and in the hot summer months when the energy is most needed, small hydropower should not be working at all due to the lack of water. And these problems will only grow with the advent of climate change, when small hydropower will become less and less reliable energy source.

- The small hydropower associations.

In the midsummer of 2021, when they finally discovered that their members are in trouble, these associations came up with a public outcry in the media, full of sorrow for the "innocent" victims of the legal regulations, claiming that all hydro undertakings are absolutely legal. Surprisingly, this time the media took their side and a lot of pressure was applied to all state authorities "competent" on the matter. There was not a TV network, radio station, newspaper or internet media that didn't cover the issue only from the hydro operators' point of view. Immediately the temporary minister of environment took steps to repeal the unfavorable to the poor operators provisions in the *Ordinance on the utilization of the surface water bodies*, but currently it looks like he has given up on this idea, mainly because of the vast public disapproval that followed the proposed amendments.

Currently, there are two major threats the hydro operators are facing:

1. The requirements of the *Ordinance* for each operator to submit documents proving their initial right to build the intakes in the riverbeds when they apply for extensions of the Water Permits. This is an emergency situation as some of the water permits will expire by the end of 2021.
2. The forthcoming legal actions of the regional prosecutor's offices in the administrative courts for the announcement of the construction permits null and void.

The first threat stands some chances to be blocked under the appeal of the hydro operators in the Supreme Administrative Court, where the requirements in the *Ordinance* may be rejected.

The second threat will take a lot of time to become fact in the next few years, but it is inevitable and unavoidable if the law is followed, especially in the light of the existing legal practice described here. Currently there is no certainty as to how the problem will be dealt with by the prosecutor's offices, but the heat will always be there, due to the growing public discontent with the legal violations and the environmental damage caused.

This uncertainty forced the hydro associations to put additional pressure on high ranked state officials to search for a solution in their favor, including on the Ministry of Regional Development and even on the president of the republic...

- The Ministry of Regional Development /MRD/

Currently it seems that the minister of environment has lost the momentum and gave up on the amendments in the legal framework. Possibly, someone has told him that for illegal under the Spatial Planning Act undertakings Water Permits cannot be issued or extended legally. So the problem was transferred to the MRD to be solved.

The temporary minister of Regional Development published an official announcement¹⁴ that there are some ideas on the possible legalization of the nearly "legal" theretofore hydropower plants, but these ideas will be applied only to those units which can prove they are not environmentally harmful... This happened at a meeting with the Association of the RES producers/ARESP/ where a representative of Balkanka was also invited to attend.

ARESP and the minister happily reached an agreement, shaking hands that each operator will produce his own analysis on his environmental footprint and the eventual mitigation measures applicable to improve his performance - only when it's found unfavorable to the environment, of course.

The representative of Balkanka timidly came up with an objection, pointing out to the minister that potential perpetrators cannot genuinely report themselves for any damage and that she is not competent on environmental issues on one hand. On the other - the hydro units should not be assessed individually, piece by piece but, rather, they should be assessed in the light of the possible cumulative effects and, finally, that the legal framework must be followed and must be applicable equally to all perpetrators. For example - when the illegal houses of the gypsy minority are demolished, the same approach should be applied to all illegal structures in the country. Of course, the other two parties in the meeting didn't pay attention, but the minister refused to bring further clarity on the way out of the mess - will it be achieved by a new ordinance or by an amendment of the law with retroactive action, which law exactly - the Spatial Planning Act and/or the State Property Act, or what?

The question is interesting because a majority of MPs for amendments of the legal framework will not be easy to be formed in Parliament due to the breach of the Constitution, while any other attempt - in an Ordinance issued by the Council of Ministers for example - will be appealed in the Supreme Administrative Court.

3. The new government's ambitions: Unlawful state aid?

At first it should be noted here that the mere existence of the problem can be qualified as unlawful state aid - every other business undertaking in the country can use public state property only via concession within a given timeframe, including an expiry date. When a given concession contract expires, either the state is supposed to become owner of the undertaking, or the business is closed and its environmental impacts are re-cultivated. The exception in the Energy Act allowing the riverbeds to be used for hydropower facilities with a remunerative building right unlimited in time is another example of unlawful state aid. For example - in the neighboring North Macedonia and Serbia only concession is used for the hydro units /for 23 years in North Macedonia/.

¹⁴ <https://www.mrrb.bg/bg/za-rabota-v-dialog-i-otstranyavane-na-naneseni-steti-vurhu-prirodata-se-dogovorih-ministur-komitova-i-predstaviteli-na-sobstvenici-na-malki-vec-ove/>

And that is if the law was followed! The described here situation when the facilities are illegal by definition and the developers pay nothing to the state is not unlawful state aid! It is a crime, committed with the explicit complicity of the "competent" state authorities in the last 20 years.

After the elections held on 14 November, Bulgaria was hoping for a new regular cabinet. The cabinet was approved and voted on by the parliament on Monday - 13 December 2021. During the negotiations the four parties involved agreed on the future development of small hydropower in the country, which is not a surprise when the former communist party took part in the negotiations - the hydropower boom has happened under their governance in the period 2005-2009 and connected with this party people are among the majority of proud investors.

Reviving some very old and irrational projects from the dead, such as the two big hydro units on the Danube, the Yadenitsa dam and the Gorna Arda Cascade, is another part of the political deal for the formation of the new cabinet. These projects were abandoned during the good old Socialism for many reasons, mainly economical and social. The environmental impacts were of least importance at the time. Currently, with the relevant EU Directives enforced, these projects stand no chance to be implemented, but they were still included in the program nevertheless.

The reason for the future hydro development was explained with the EU Green New Deal targets, but all the parties involved forgot about another major target of restoring 25000 kilometers in Europe to their natural status, which is another important part of the Deal...

The new cabinet program already adopted also includes a thorough review of the permits for small hydropower plants, but it is somewhat unclear which of the permits the parties have in mind - under the Water Act, the Environmental Protection Act, the Spatial Planning Act, or under all of them together. Either way, no matter the law, 155 operational hydro units stand no chance if the review is carried out properly, which will hardly happen.

Another intention of the new cabinet announced in the media¹⁵ is the following good idea: *The National Construction Control Directorate /NCCD/ must inspect all sites that potentially fall within the boundaries of protected territories or in the Black Sea territory, and determine whether there are any violations in the construction documents. If there are such, the NCCD should take legal action...*

This very good idea is applicable to four hydro units in the Iskar Gorge - Lakatnik, Svrajen, Opletnya and Cherepish, which are partially flooding territories included in the protected territory of Vrachanski Balkan Natural Park.

Judging from all the above, the intentions of the new cabinet are contradictory to one another, and they don't take into consideration the negative public attitude, based on the devastating environmental impact, as well as the reactions of DG Environment of the European Commission, based on the numerous complaints lodged by Balkanka Association in the last six years. This is one major reason for the author of

¹⁵https://www.actualno.com/politics/pregovorite-prikluchiha-kakvo-se-razbraha-partiite-news_1677886.html?fbclid=IwAR2EgBAesL7C7-kq4d9GdvCg2buIZq6LVFkgH-jakHzzBw4lD4w6CK4MRNQ

this document to decline an invitation to become deputy minister of environment, responsible for the water management in the new cabinet.

4. The European Commission

The communication between Balkanka Association and DG ENV on the small hydropower issues has a long history. It started with the first Complaint¹⁶, lodged on 30 June 2015, and continued with more than 10 additional supplements in the next years, all of them based on the huge violations of the EU Water Framework Directive, the Habitats Directive and the SEA and EIA directives. Another reason was the extremely poor quality of all EIA and AA Reports and the fact that in at least 75% of the cases the screening decisions of the competent environmental authorities decided that EIA and AA are not necessary, even when the affected Natura 2000 Habitats Directive sites hosted priority habitat types and priority species within the meaning of the Directive.

Finally, this year after long series of warnings, DG ENV has brought the infringements of the Habitats Directive to the Court of Justice of the European Union¹⁷. Here is a short citation from the announcement:

The lack of conservation objectives corresponding to the legal standard of the Habitats Directive leads to flaws in the appropriate assessments of projects affecting the Natura 2000 network, which covers nearly 35% of the territory of the country.

It is unquestionable that a great part of the reasons for the court case is based on the complaints on the hydropower devastating impact, as Balkanka was assured in a letter¹⁸ of DG ENV. As for the violations of the EU WFD, in the same letter it is stated that these violations are already addressed in a new, structural EU Pilot investigation, which is part of a horizontal action of DG ENV against several EU Member States.

The outcome of these infringement procedures is inevitable - Bulgaria will have to pay penalties for the violations of the European legal framework and, most probably, many of the most harmful undertakings will have to be decommissioned.

Another interesting detail is that in 2017 Balkanka has lodged another complaint with DG Competition based on the unlawful state aid, but this particular Directorate refused to open a case file - due to the lack of legal interest of Balkanka they said, which couldn't be considered an affected party/enterprise/ by DG Competition, regardless of the proven fact that OUR rivers have been stolen from us... Yet again, the unlawful state aid is a fact, regardless of the lame reaction of DG Competition.

5. The European Banks.

¹⁶ https://dams.reki.bg/uploads/Docs/Files/EU_COMPLAINT.pdf

¹⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5351

¹⁸ https://dams.reki.bg/uploads/Docs/Files/DG_ENV_EUP20179183%20-%20Balkanka%20closure%20corrigendum.docx.pdf

It is a well known fact that the EBRD and the EIB have financed a lot of small hydropower plants in Bulgaria, mostly through financial intermediaries/FIs/. The exact number is unknown as official data for the support through FIs is not available on both banks' internet sites, regardless of the declarations for transparency. A study¹⁹ by CEE Bankwatch Network reveals some of the cases, but there is no guarantee that all the banks' hydro investments in Bulgaria through FIs have been revealed.

In the light of the issues addressed here, for the hydro enterprises in Bulgaria supported by both banks and already proven to be illegal beyond a reasonable doubt, by several court decisions on the matter too, it is obvious that there are some constant flaws in both banks due diligence procedures and the environmental and social policy standards of both banks were largely disregarded and neglected through the years - they have financed illegal projects after all.

Furthermore, the EBRD was officially informed on the issues raised here immediately after the NOVA TV report back in November 2017. In an official answer²⁰ dated February 2018, top managers of the bank discussed the problem, sharing the bank's point of view:

*"According to our Bulgarian legal counsel, there is a lack of clarity as to the applicability of the concession regime for hydropower plants in Bulgaria and this is currently being assessed by the relevant Bulgarian authorities. **The Bank will take this information into account in any future projects we consider...**"*

Well, *the relevant Bulgarian authorities* have given up assessing the applicability in the early spring of 2018, but the problem still remained unsolved. Moreover, in the light of the court decisions cited above, both banks should cross their fingers now for these three illegal hydropower plants not to be among their investments through FIs. And most importantly - the hopes should be extended to cover all the rest of their small hydro investments, as the possibility for all of them to be announced illegal in the nearest future is inevitably on its way. Actually, the only get away chance for the moment is if the prosecutors' offices refuse to fulfill their legal obligations. Should any of the cases reach the regional courts, they stand no chance to escape decommissioning.

And how about taking *this information into account in any future projects* the EBRD was about to consider after February 2018?

There is proven data for only one direct hydro investment of the EBRD in Bulgaria - the Sreden Iskar Cascade. About a year ago Balkanka Association and CEE Bankwatch Network had another fruitful communication with the EBRD management on their intentions to support the acquisition of the operational WEZ Svoge project by Akuo Energy. It was underlined again by both NGOs in the correspondence not only that the problem still remains unsolved, but if the law has to be followed this totally illegal project has to be decommissioned. Still the acquisition was finalized in March 2021²¹ with the direct financial support of the bank. So much about *taking into account the information...*

¹⁹ <https://bankwatch.org/publication/financing-for-hydropower-in-protected-areas-of-southeast-europe-update>

²⁰ https://dams.reki.bg/uploads/Docs/Files/EBRD_ANSWER_2018.pdf

²¹ <https://www.investor.bg/energetika/472/a/frenskata-akuo-energy-finalizira-sdelkata-za-vec-svoge-325125/>

Currently the environmental performance of the project is assessed by... the Ministry of Regional Development... much to anyone's surprise. On the other hand, three of the hydro units fall within the boundaries of a protected territory and the intentions of the future cabinet towards such projects, built without the necessary papers, are crystal clear, yet unfavorable to the perpetrators.

Another sustainable and relatively big hydro project in Bulgaria financed by the EBRD through FIs is the **Blagoevgradska Bistritsa cascade**. Built on the drinking water pipeline for the city of Blagoevgrad this cascade doesn't face exactly the same risk, because most of the intakes belong to the water supplier for the city - the state owned company WiK Blagoevgrad. Built in socialist times, the intakes are very old and the owner is expected to possess all necessary papers, let alone the fact that the requirement for the investors to prove the building right in the riverbeds for extensions of their water permits is applicable to the intakes built solely for hydropower. The requirements are not applicable when the water is also used for other purposes, such as drinking water supply, irrigation and industrial needs or for anything else, other than hydropower.

Still, one of the intakes used for the Blagoevgradska Bistritsa cascade built on the Slavova River is brand new, but the water taken can also go for the city, hence the case of this particular intake is unclear as far as the extension of the water permit is at stake. The Construction Permit however, can always be announced null and void if the prosecutor's office takes the necessary action.

Talking about cascades financed by the European Banks, another very interesting case occurred in the end of 2019 - the Cascade of nine pieces on the Ogosta River in the North West of Bulgaria. Due to the limited space this case will not be discussed here, but if any of the European Banks has anything to do with it, they are very welcome to get in contact and the preparation of a thorough case study will be a great pleasure.

Another big problem will occur if both banks are invited to support the new mega hydro projects included in the new government's ambitions, described here in section 3 - the two big hydro units on the Danube, the Yadenitsa dam and the Gorna Arda Cascade. Judging by the unwillingness of the banks to learn any lessons from their mistakes, it will not be a surprise if they agree to get involved again.

For example, both banks have already been invited by the National Electric Company to support the poor Yadenitsa dam project. In the late autumn of 2020 they received a thorough negative position form Balkanka Association, legitimate enough for the project to be refused any financial support, but one year later the banks' future intentions remain unclear. Hopefully, the managing bodies of the banks are still *taking into account the information*, before they take the right decision once again...

In the end of this section it must be underlined that the expected cassation of the Construction Permits for all small hydro units financed by the European Banks is not the only problem. The reputational risk is another problem to be dealt with, especially when the banks have been warned time and again, but didn't pay attention. The other legal challenges in the nearest future will be discussed in the next section.

6. Field of future legal intervention in 2022.

It should be expected sooner or later, one way or another, that the amendments of the new *Ordinance on the utilization of the surface water bodies* will be adopted by the Council of Ministers, regardless of the expected protests of the environmental NGOs and the huge reputational

risk. This will give a breath of fresh air to the hydro operators as the most urgent threat, namely the refusal for extensions of the Water Permits, will be avoided for the time being.

Of course, these amendments of the new *Ordinance* will be appealed in the Supreme Administrative Court, but even if the case is lost - the other big threat for the Construction Permits to be attacked by the Prosecutor's Offices across the country will still remain intact.

In 2022 an attempt for some amendments of the general legal framework in the Parliament can also be expected, because two of the political parties that have inspired the hydropower boom and benefited from it thereon are still in the Parliament. One of them /the former communists/ will take part even in the future cabinet. In this case amendments should be introduced into the State Property Act, the Spatial Planning Act, in the Environmental Protection Act and in the Water Act - the relevant issues were discussed here in section 1.

The amendments in these Acts will not be easy, because some of them will contradict the Constitution and all of them will have to be adopted with retroactive applicability. In a normal EU Member State this shouldn't be possible at all.

Another very important fact is that according to the Spatial Planning Act, in contradiction with the Aarhus Convention, environmental NGOs are not among the parties having legal interest to file law suits and to appeal illegal Detailed Spatial Plans and/or Construction Permits in court. Therefore, all those 155 cases depend on the good will of the Prosecutor's Offices in the country to follow the law. The eventual refusals can be appealed in the appellate prosecutor's office. Since the General Prosecutor's Office didn't close the case directly, it is obvious that these cases hold water, but nobody knows exactly what is going to happen in the end. Nevertheless, for three out of three cases of illegal Construction Permits brought in court so far, the decision was one and the same - "null and void".

Yet, there is still another option for the environmental NGOs - to appeal all screening decisions and the decisions on the approval of the EIA and AA reports when such have been required by the competent environmental authorities under the Environmental Protection Act. According to this Act the legal interest the environmental NGOs is always recognized and guaranteed.

Regardless of the business activity, the initiation of each Investment Plan in Bulgaria starts with a screening decision of the competent environmental authorities on the necessity of an EIA and AA procedures to be conducted. It was already proven here in section 1 that the hydro investors did not meet the definition for legal developers laid down in the Additional Provisions of the Environmental Protection Act, which means that they didn't legally exist and couldn't have been treated as official, legal developers at all. This legal mishap should be enough for all screening decisions to be announced null and void by every court in the country and it is just a matter of time for the environmental NGOs to take the necessary action in case the prosecutor's offices try to sweep the case under the carpet one more time.

Once a screening decision is announced null and void all the other administrative acts following and based on this decision - like the Water and the Construction Permits, become null and void automatically.

Obviously, with the expected efforts from all interested parties involved, having in mind that the Ministry of Environment and Water in the new cabinet with its key role in the process will be governed by

representative of the Green Party in favor of the environment at last, the vast public disapproval of the killing of our rivers and especially having in mind the infringement procedures DG ENV has started, with the forthcoming penalties expected, it will be a very meaningful and interesting 2022 year for the illegal small hydropower sector in Bulgaria...

7. Conclusion

There can be only one conclusion drawn from all the legal mess described above - there is not a single law that was not breached during the authorization of 155 small hydropower plants in Bulgaria with their intakes built in the riverbeds without permission from the owner of the property - the state. When someone takes and uses someone else's property without permission - this is always qualified as Theft!

Yes, our rivers have been stolen. Yet, they were not only stolen, they were killed cold bloodedly in front of the eyes of the whole society, with the explicit complicity of the state administration authorized to protect nature and its veins - the rivers. If anyone does not believe, just watch only one video²² out of hundreds uploaded on the HPP monitoring platform in Bulgaria. The Platform holds undisputable evidence of the grim reality - so many rivers dried down to the bottom and not a single penalty imposed on the perpetrators whatsoever! This is unimaginable in the 21st Century, in an EU Member State.

Yes, our rivers have been stolen and killed only to the profit of a few politically connected individuals, powerful enough to be untouchable by any law so far. And they were not only stolen and killed, but the society is paying incentives to the perpetrators for the Theft, and we are also paying wages for the wellbeing of their accomplices - the state authorities who made the crime possible. This will not go on forever!

Yes, the society is paying every bill so far, but we will additionally have to pay the penalties in result from the infringement procedures of the European Commission as well.

And they are trying to convince us that under the circumstances the illegal some ten or twenty years ago can become legal today as a result of some sort of a nearly legal deal between them and us? We will never have such deal!

Finally, just imagine what can happen if one day the Theft is legalized, but under a decision of the EU Court of Justice the same illegal hydropower plants will have to be demolished? Wouldn't it be cheaper to remove them now, having all the necessary legal grounds, not paying anything to the perpetrators, or shall we legalize them now to pay their costs tomorrow?

No, we've had enough of paying and definitely wouldn't have a Deal like that!

Sofia, Bulgaria
20.01.2022

dipl.eng.Dimitar Koumanov

²² <https://www.youtube.com/watch?v=Fq4ZVHpfyA>