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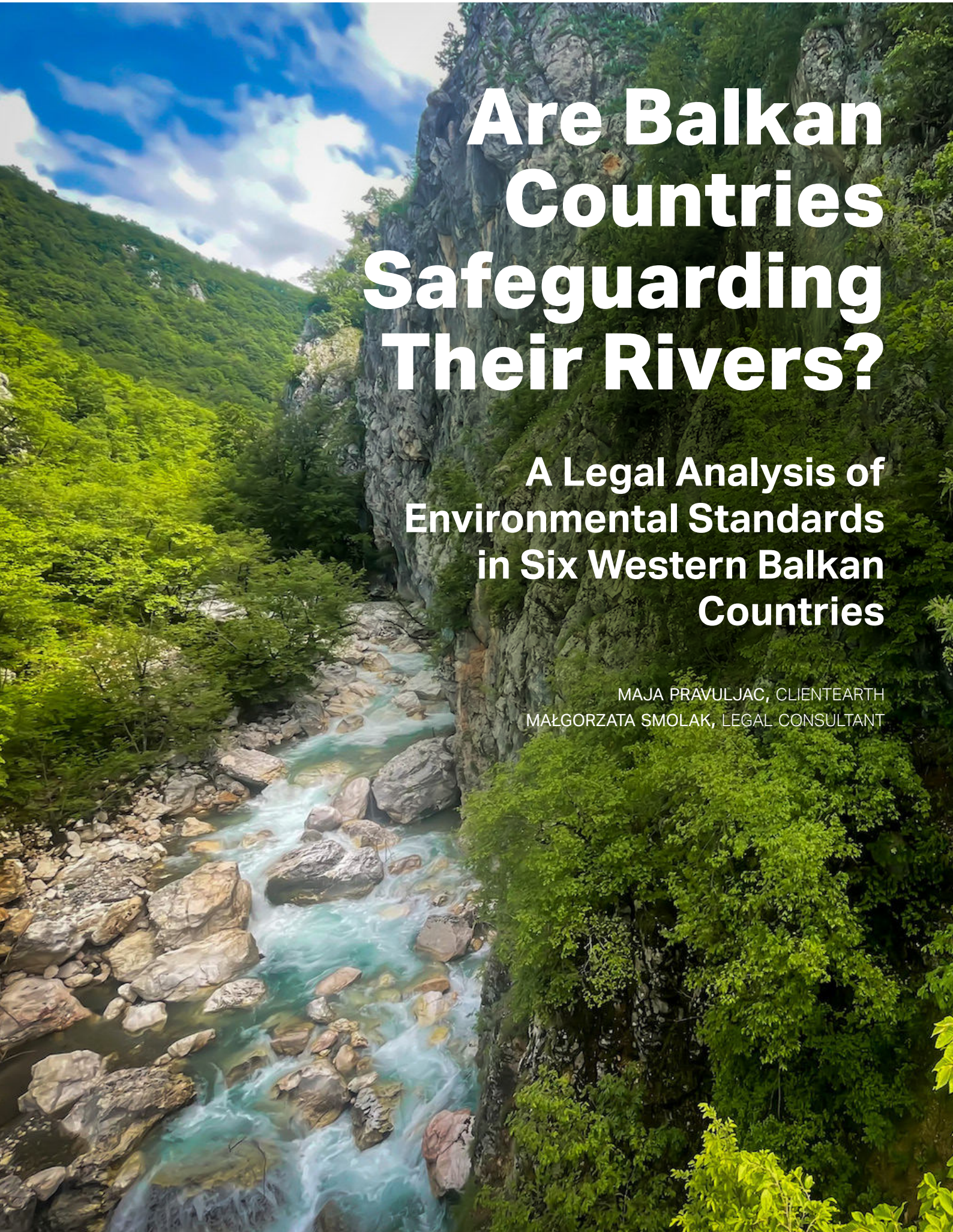

Are Balkan Countries Safeguarding Their Rivers?

A Legal Analysis of Environmental Standards in Six Western Balkan Countries

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ACKNOWLEDGEMENTS:

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Dr Irene Dule, ResPublica
Redžib Skomorac, Centre for Environment
Nina Kresevljaković, Aarhus center in B&H
Emina Veljović, Aarhus center in B&H
Rinon Arifi, Legal Expert
Andrijana Mićanović, Montenegrin Ecological Society
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Anja Jovanova, Front 21/42
Iskra Stojkovska, Front 21/42
Strahinja Macić, POLEKOL
Pippa Gallop, CEE Bankwatch Network
Andrey Ralev, CEE Bankwatch Network

Cover image: Ljuta River, Bosnia & Herzegovina © Ursi Seibert

This report was produced by ClientEarth, EuroNatur and Riverwatch within the frame of the “Save the Blue Heart of Europe” campaign.

June 2024

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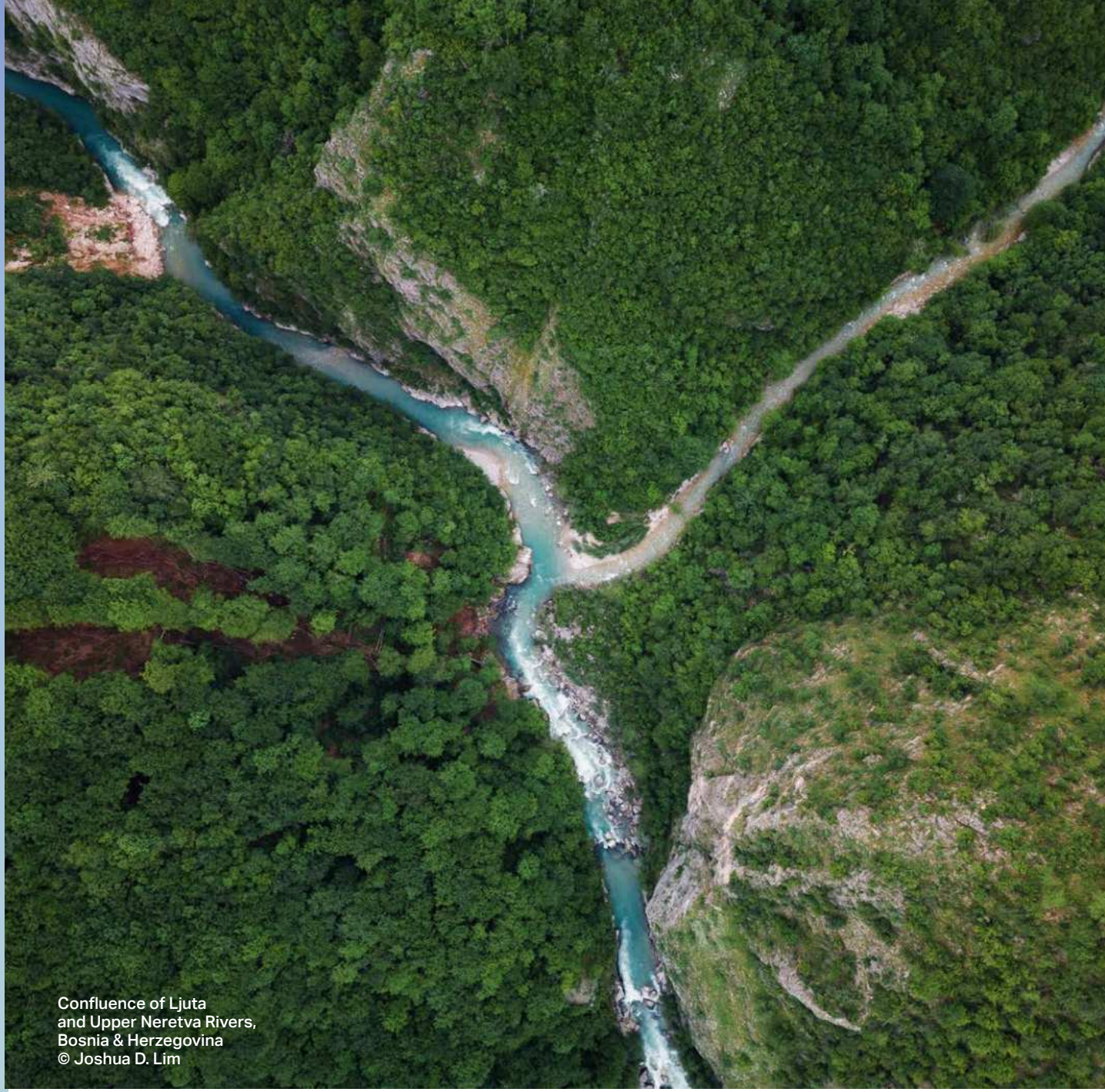
EXECUTIVE SUMMARY



Confluence of Ljuta
and Upper Neretva Rivers,
Bosnia & Herzegovina
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This report provides an interim evaluation of the extent to which the Western Balkan countries, namely Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia are safeguarding their rivers by incorporating pivotal EU Directives relevant to hydropower projects into their national laws.

Through a detailed legal analysis of the transposition and implementation of the Environmental Impact Assessment (EIA) Directive, Strategic Environmental Assessment (SEA) Directive, Environmental Liability Directive, Water Framework Directive, Habitats Directive and Birds Directive, the report examines the national legislation in each of these countries and sheds light on the crucial role of effective legal frameworks in shaping environmental outcomes.

Key findings

The analysis reveals that **despite significant variations in transposition among countries, a certain amount of progress has been made overall,** reflecting substantial efforts to meet the Directives' requirements. In some examples, the national laws even go beyond the requirements of the EU acquis, showcasing some of the exemplary standards for river protection.

However, the report also testifies to particular **systemic failures to comply with the EU framework concerning environmental law,** which hamper effective river protection. Numerous countries are yet to conclude the adoption of secondary legislation to fully harmonise their national legislation with EU environmental legislation, whilst the **urgent necessity for efficient enforcement of existing laws** is evident across all nations.

Some of the underlying problems, which undermine proper implementation of environmental regulations in the majority of countries, are **inadequate institutional capacity and lack of clear and extensive data** on water bodies, biodiversity and habitats. This is reflected, for example, in the **poor quality of data provided in the EIA reports,** and in some cases, in **outdated EIA decisions,** which remains a challenge in all countries, as demonstrated in cases of projects on the Vjosa River in Albania, Komarnica River in Montenegro, or Drina River in Bosnia and Herzegovina.

A significant concern, which arises in all countries, except in Albania, is the **restricted access to justice regarding decisions resulting from the strategic environmental assessment procedure,** while Montenegro is the only country, which has regulations in place that govern **liability for environmental damage.**

Concerning the **Water Framework Directive,** the core provisions have been largely adopted by most countries, and administrative arrangements are established for its implementation. Moreover, in the majority of the countries, River Basin Management Plans (RBMPs) and Programmes of Measures (PoMs) are in place, which should, at least in theory, ensure the protection and, where necessary, restoration of water bodies in order to reach good status, and prevent deterioration. However, the absence of proper **assessment of project level impacts of hydropower developments on water bodies** stresses the failures of effective implementation of the Directive.

The same problem applies to the **Nature Directives,** where the processes of designation of Natura 2000 sites still remain at the early stages at best, and thus conservation measures are not adequately adopted. Detailed **provisions on appropriate assessments** are lacking in almost all countries, meaning that such assessments are currently not being carried out. Consequently, a number of hydropower cases before the Bern Convention underscore the pressing need for the expeditious harmonisation of nature protection legislation and its effective implementation and enforcement.

Vjosa-Narta Protected Area, Albania
© Zydjon Vorpsi

Recommendations

With this report, we aspire to contribute to the ongoing development of environmental standards aimed at safeguarding rivers in the Western Balkans and beyond. The most critical issues and proposed standards that can facilitate forthcoming legislative and enforcement procedures are listed as follows:

The Environmental Impact Assessment (EIA) Directive:	■ All hydropower projects should be included in the EIA procedure and assessed against all screening criteria. Hydropower projects should not be excluded in advance from the screening procedure based solely on their power capacity. ■ Clear alignment with the appropriate assessment procedure should be provided for in all countries. ■ Public participation should be enhanced in order to ensure that representatives of civil society should be properly informed and can participate in decision-making, such as in the EIA Commissions' meetings. ■ Authorities should ensure that decisions on EIAs (reasoned conclusions) are still up to date when granting the development consent, regardless of the timeframes set. ■ The quality of the EIA reports should be improved in order to ensure that the hydropower projects are properly screened against their impact on nature and water resources.

The Strategic Environmental Assessment (SEA) Directive:	■ Access to justice for SEA-related decisions should be provided. ■ Clear alignment with the appropriate assessment procedure should be provided for in all countries. ■ Public participation should be enhanced. ■ Proper implementation of the SEA procedure should be strengthened.
The Environmental Liability Directive:	■ Regulations governing liability for environmental damage should be implemented across all regions, as currently only Montenegro has such regulations in place.
The Water Framework Directive (WFD):	■ Relevant secondary legislation should be adopted and institutional capacity strengthened. ■ Environmental objectives and Programmes of measures should be adopted in all of the countries. ■ Public participation should be enhanced. ■ River basin management plans need to be adopted or updated. ■ Proper assessment of the impacts of projects on water bodies in accordance with the WFD needs to be carried out.
The Nature Directives:	■ Relevant secondary legislation should be adopted and institutional capacity strengthened. ■ Natura 2000 sites should be designated. ■ Bylaws on appropriate assessment need to be adopted. ■ Transposition and implementation of the Birds Directive need to take place in all of the countries concerned.

Mala Reka River,
Mavrovo National Park,
North Macedonia
© Jan Pirnat

General context

The Balkan region boasts some of Europe's most pristine remaining free-flowing rivers, which serve as crucial hotspots for the continent's freshwater biodiversity. However, their integrity is under severe threat from over 3,400 proposed hydropower plants. If realised, these projects would irreversibly damage the last refuge for endangered and endemic river species.

To protect this natural heritage, grassroots and regional civil society groups, united in the **Save the Blue Heart of Europe coalition**[1], have strategically leveraged the power of national and international environmental legislation to challenge detrimental projects and advocate for sustainable alternatives.

1 https://balkanrivers.net/en

Regional legal framework

Over the years, the Western Balkan countries aspiring to join the European Union have undertaken considerable efforts to transpose and harmonise domestic regulations with EU environmental laws.

A precondition for countries aspiring to join the European Union and an important basis for negotiations is that countries have to fully transpose and implement the EU's legislation by the time of accession. This includes, inter alia, the implementation of **Stabilisation and Association Agreements**[2] and the harmonisation of domestic regulations with **Chapter 27**[3] **on the environment.** Moreover, as parties to the **Energy Community Treaty**[4], countries are required to implement various environmental acquis in relation to energy infrastructure.

Considering the already existing legal and political commitment to align national laws with the EU's legislation, the following policy tools have been used as a source for the legal analysis:

The Energy Community	The **Energy Community** is an international organisation which brings together the European Union and its neighbours to create an integrated pan-European energy marke[5]. The key objective of the Energy Community is to extend the EU's internal energy market rules and principles to countries in southeast Europe, the Black Sea region and beyond[6], on the basis of a legally binding framework. The parties committed themselves to implement the relevant EU law (*acquis communautaire*), to develop an adequate regulatory framework and to liberalise their energy markets in line with the acquis under the Treaty. The *acquis communautaire* on environment[7] relevant to the perspective of this report, which examines the national frameworks of countries related to hydropower projects, are namely the **EIA Directive, SEA Directive, Article 4(2) of the Birds Directive,** and **Environmental Liability Directive.**

2 The Stabilisation and Association Agreement constitutes the framework of relations between the European Union and the Western Balkan countries for implementation of the Stabilisation and Association Process. The agreements are adapted to the specific situation of each partner country and, while establishing a free trade area between the EU and the country concerned, they also identify common political and economic objectives and encourage regional co-operation. In the context of accession to the European Union, the agreement serves as the basis for implementation of the accession process. For more details, please see: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/stabilisation-and-association-agreement_en

3 The chapters of the acquis (presently 35) form the basis of the accession negotiations for each candidate country. They correspond to the different areas of the acquis for which reforms are needed in order to meet the accession conditions. The candidate countries are required to adapt their administrative and institutional infrastructures and to bring their national legislation into line with EU legislation in these areas. The different chapters are reviewed during the screening of the acquis and are evaluated regularly up until the time each chapter is closed. Chapter 27 aims to promote sustainable development and protect the environment for present and future generations. It is based on preventive action, the polluter pays principle, fighting environmental damage at source, shared responsibility and the integration of environmental protection into other EU policies. The acquis comprises over 200 major legal acts covering horizontal legislation, water and air quality, waste management, nature protection, industrial pollution control and risk management, chemicals and genetically modified organisms (GMOs), noise and forestry. Compliance with the acquis requires significant investment. A strong and well-equipped administration at a national and local level is imperative for the application and enforcement of the environment acquis. For more information, please see: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/chapters-acquis-negotiating-chapters_en

4 Treaty Establishing the Energy Community, October 2005

5 Energy Community, 'Who We Are', https://www.energy-community.org/aboutus/whoweare.html

6 The Contracting Parties are: Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine. Armenia, Norway and Turkey take part as Observers.

7 Article 16 of the ECT.

The Energy Community	The Energy Community Treaty brings a useful contribution to assessing and preventing or mitigating the likely impacts of energy infrastructure on biodiversity and water bodies. However, it does not prescribe explicit protection of specific habitats and species, nor a general prohibition on causing deterioration in the status of water bodies, considering that the **Water Framework Directive** and **Birds and Habitats Directives** are still not part of its environmental *acquis*[8].
Stabilisation and Association Agreements	The Western Balkan countries are in the process of joining the EU. Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia are candidate countries, with Kosovo considered a potential candidate, all of which have signed **Stabilisation and Association Agreements.** According to the negotiation principle, these countries are required to fully transpose and implement EU legislation, including Chapter 27 on the environment, by the time of accession.
EU Green Deal	Within the framework of the EU **Green Deal**[9], which pledges to achieve net-zero greenhouse gas emissions by 2050 and halt biodiversity loss, the Western Balkan countries are included as part of, among others, a **green agenda for the Western Balkans.** In November 2020, leaders from the Western Balkans signed the Sofia Declaration on the Green Agenda for the Western Balkans[10]. The signatories have pledged, among other commitments, to adhere to the EU Water Framework Directive, to collaborate on formulating a biodiversity framework beyond 2020, and to craft a comprehensive strategy aimed at halting biodiversity loss, safeguarding ecosystems, and nurturing diverse biological life[11].
Transport Community Treaty	The Southeast European Parties (Albania, Bosnia and Herzegovina, North Macedonia, Kosovo, Montenegro and Serbia) under the **Transport Community Treaty**[12] are mandated to implement environmental regulations concerning transportation. This encompasses, among other things, compliance with the Habitats Directive. If a project is anticipated to impact conservation sites significantly, a thorough nature conservation assessment akin to that outlined in Article 6 of the Directive must be conducted. Additionally, they are required to abide by the Water Framework Directive, stipulating that all navigation-related transport projects falling within the ambit of this Treaty must be developed and executed in accordance with Article 4(7) of the Directive[13].

8 'Legal analysis on including the EU Birds, Habitats and Water Framework Directives into the Energy Community Treaty', CEE Bankwatch Network, WWF and ClientEarth, January 2021, available at https://www.clientearth.org/latest/documents/legal-analysis-on-including-the-eu-birds-habitats-and-water-framework-directives-into-the-energy-community-treaty/, p. 8.

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, European Commission, COM/2019/640 final, 11 December 2019.

10 Sofia Declaration on the Green Agenda for the Western Balkans, 10 November 2020.

11 This includes the preparation of plans for nature protection and restoration. Additionally, they have agreed to develop initiatives and carry out necessary measures to enhance administrative capacities for implementing the Green Agenda for the Western Balkans. This entails monitoring, promoting, and enforcing compliance with environmental responsibilities, as well as ensuring effective mechanisms for public engagement, access to information, access to justice concerning environmental issues, and environmental reporting. See 'Legal analysis on including the EU Birds, Habitats and Water Framework Directives into the Energy Community Treaty', (n 7), p. 10.

12 Treaty establishing the Transport Community, Official Journal of the European Union, L 278, 27 October 2017.

13 'Legal analysis on including the EU Birds, Habitats and Water Framework Directives into the Energy Community Treaty', (n 8), p. 11.

Danube River Protection Convention	Three Western Balkan countries (Bosnia and Herzegovina, Montenegro and Serbia), which are the Parties to the **Danube River Protection Convention**[14], have obliged themselves to implement all transboundary aspects of the Water Framework Directive. Moreover, the non-EU Parties also committed themselves to implement the Water Framework Directive within the framework of the Danube River Protection Convention. Countries such as Albania and North Macedonia, which encompass a very small part of the Danube catchment, cooperate with the **International Commission for the Protection of the Danube River** (ICPDR) (and in particular with neighbouring countries – in this case with Serbia) under the Water Framework Directive[15].
Bern Convention	Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia have ratified the Bern Convention[16]. The Bern Convention is an initiative of the Council of Europe and is a binding international legal instrument in the field of nature conservation, covering most of the natural heritage of the European continent and extending to some States of Africa[17]. In the European Union, the Bern Convention was implemented by the Birds Directive and the Habitats Directive. The Natura 2000 network is considered to be the EU Member States' contribution to the Bern Convention's Pan-European Emerald Network. The two networks are fully compatible and use the same methodology[18].

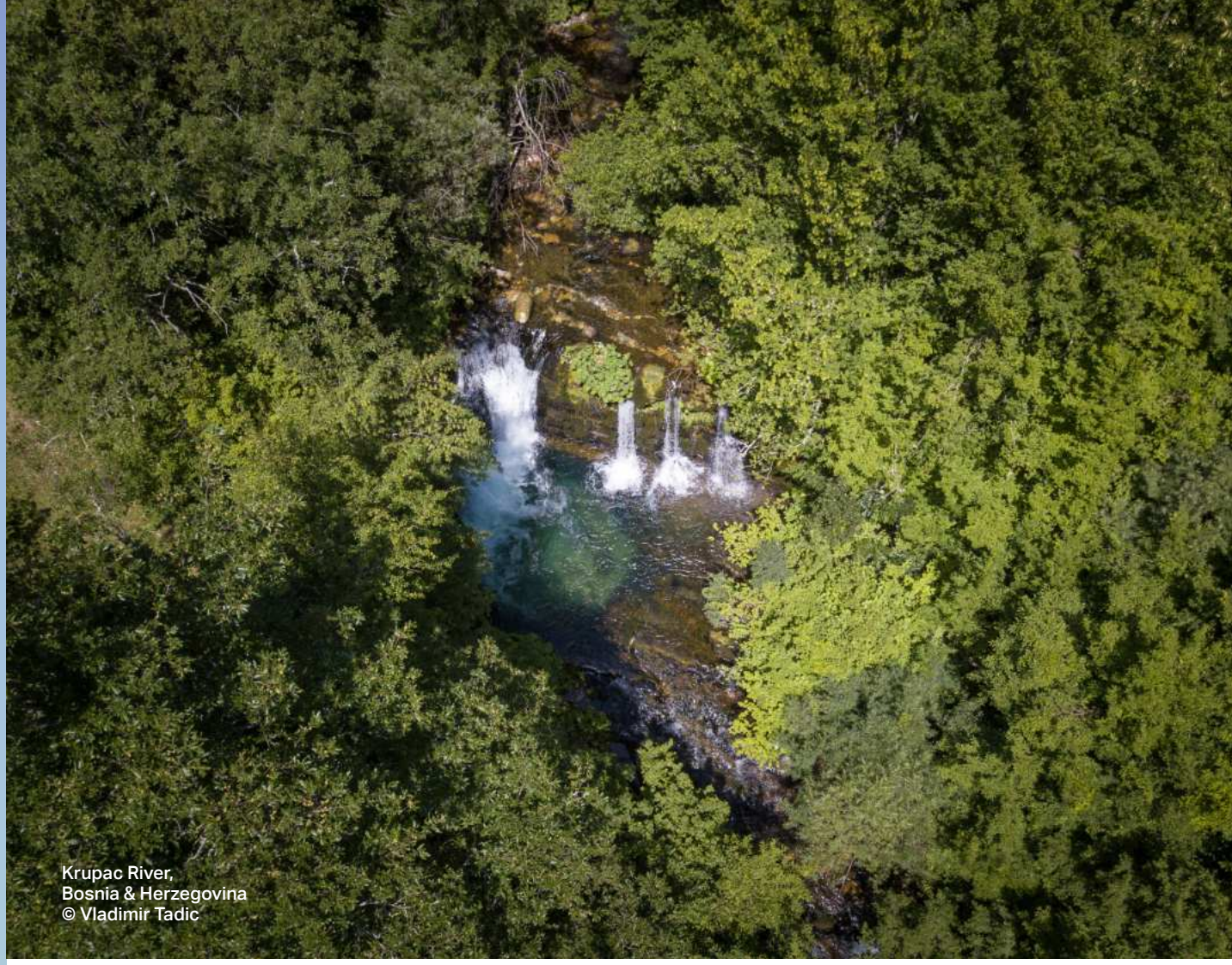
14 River Protection Convention. Countries such as Albania and North Macedonia, which encompass a very small part of the catchment, cooperate with the International Commission for the Protection of the Danube River (ICPDR) (and in particular with neighbouring countries – in this case with Serbia) under the EU Water Framework Directive.

15 'Legal analysis on including the EU Birds, Habitats and Water Framework Directives into the Energy Community Treaty', (n 8), pp. 11–12.

16 Convention on the Conservation of European Wildlife and Natural Habitats, Council of Europe, ETS No. 104, 19 September 1979.

17 Smolak, 'Toolkit on the use of EU and international environmental law to protect rivers from hydropower development', https://www.legaltoolkit4rivers.eu/, p. 55.

18 'Legal analysis on including the EU Birds, Habitats and Water Framework Directives into the Energy Community Treaty', (n 8), p. 13.



Krupac River,
Bosnia & Herzegovina
© Vladimir Tadic

Structure of the report

The report is organised into distinct sections for each Western Balkan country. Each country section is subdivided into subsections corresponding to the specific environmental directives: the Environmental Impact Assessment Directive, Strategic Environmental Assessment Directive, Environmental Liability Directive, Water Framework Directive, and Nature Directives, including the Habitats Directive and Birds Directive.

Under each environmental directive, the report details the process of transposing EU Directives into national legislation within the respective country. The focus of the analysis is on the alignment of domestic laws with EU standards, and the incorporation of Directive provisions into the national legal frameworks.

Following the transposition analysis, the report evaluates the implementation of the Directives within each country. This assessment considers the effectiveness of practical application of relevant pieces of EU law, including the adoption of secondary legislation, institutional arrangements, and enforcement mechanisms, in meeting the Directives' objectives at the national level.

The concluding section of the report provides recommendations based on the findings of the legal analysis. These recommendations include the need to strengthen transposition efforts, enhance implementation mechanisms, and address identified gaps in environmental governance.

Tara River,
Montenegro
© Jan Pirnat

In the energy sector, the EU has established definitive and ambitious policies aimed at safeguarding the natural environment, supported by comprehensive environmental legislation. The objective is to mitigate the impact of energy production and transmission on ecosystems and water bodies by adhering to the requirements outlined in relevant EU Directives when approving energy projects.

For hydropower specifically, the key pieces of EU legislation include:

1 **The Environmental Impact Assessment Directive (EIA Directive)**[19]. The Directive provides for any project likely to have significant effects on the environment to be preceded by an Environmental Impact Assessment, which needs to show what the impact of the given project is on the environment. The EIA Directive offers private persons and organisations ample opportunities to become involved and express their opinions and views. Although opinions and comments have to be 'taken into account' by the competent authority, they are not binding. However, eligible persons and organisations have the right to challenge the procedural and substantive (content) elements of decision-making.

19 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU.

Article 2 of the EIA Directive provides that 'Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment'.

All projects listed in **Annex I of the EIA Directive** are considered as having significant effects on the environment and require an EIA (e.g. dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres).

For projects listed in **Annex II** (e.g. installations for hydroelectric energy production), the national authorities have to decide whether an EIA is needed. This is done by the 'screening procedure', which determines if a project is likely to have significant effects on the environment on the basis of thresholds/criteria or a case-by-case examination. Where a case-by-case examination is carried out or thresholds and/or criteria are set to determine whether the projects listed in Annex II should be subject to an EIA, all the relevant selection criteria set out in **Annex III** shall be taken into consideration[20].

According to **Article 3,** the purpose of an environmental impact assessment is the identification, description and assessment of the direct and indirect impacts of the project on a number of factors, namely human beings, fauna and flora, soil, water, air, climate, landscape, material assets, cultural heritage and the interaction between all these factors. The Court of Justice of the European Union (CJEU) has ruled that Article 3 is a fundamental provision and has set a test for the correct implementation, which includes two cumulative criteria: first, an examination by the competent authority of all the information gathered from the project developer as well as the consideration of obtaining supplementary information and, second, an analysis on the basis of the information submitted by the project developer and any other information obtained by the competent authority via the application of the first criterion[21].

Article 5 and **Annex IV** of the EIA Directive sets out what must be included in the EIA report, and how to ensure that it is both complete and of sufficiently high quality.

Once the developer has prepared the EIA report, it has to be scrutinised by the public and various concerned authorities. According to **Articles 6 and 7** of the Directive, consultations on different information should take place with:

- public authorities likely to be concerned;
- the public concerned;
- relevant parties in other affected Member States (i.e. if a project is likely to cause significant environmental effects in another Member State, or if another Member State so requests, then transboundary consultations must be carried out).

20 See, for example, C-66/06, Commission v Ireland; C-255/08, Commission v Netherlands; C-435/09, Commission v Belgium. Member State's discretion as regards establishment of threshold or criteria is limited by the obligations set out in Article 2(1) of the Directive - C-72/95, Kraaijeveld and Others, para. 50; C-2/07, Abraham and Others, para. 37; C-75/08 Mellor, para. 50; C-427/07, Commission v Ireland, para. 41; C-244/12, Salzburger Flughafen, para. 29; C-531/13, Marktgemeinde Straβwalchen and Others, para. 40; C-141/14, Commission v Bulgaria (Kaliakra), para. 92.

21 C-50/09, Commission v Ireland, paragraphs 37-41 (emphasis added); Case ECS-1/15; Reasoned Request, para. 45.

The public concerned must be given early and effective opportunities to participate, and be able to provide their comments and opinions. An explicit timeframe is provided by the Directive whereby a minimum of thirty days is required for public consultation.

In order to decide on issuing the permit, the competent authority must take the results of consultations duly into account, i.e. the competent authority must examine the information provided in the EIA report, as well as the results of the consultations and, where appropriate, must request any supplementary information **(Article 8)**.

Article 8a(6) of the Directive concerns the timeframes for the validity of a competent authority's reasoned conclusion as part of the EIA process. The reasoned conclusion must be 'up-to-date' when a decision is taken to grant consent. This will be important where there is a significant time delay between the submission of the investor and determination by the authorities. In practice, it is likely that the period between the authority reaching a conclusion on the significant effects of a proposed project and the decision as to whether permission or consent should be granted will be a relatively short one. In other words, the EIA study should not become obsolete due to e.g. changes in a given location or of a relevant regulation. Furthermore, the obligation to determine whether the reasoned conclusion is still up to date rests upon the competent authorities, rather than on the project developer.

2 **The Strategic Environmental Assessment Directive (SEA Directive)**[22]. The procedure is fairly similar to the EIA but does not relate to projects but to plans and programmes adopted by parliaments and councils at the local, regional and national level.

Article 3(2) of the Directive lists types of plans and programmes that require an SEA (e.g. prepared for energy, industry, transport, water management, and country planning or land use, and which set the framework for future development consent of projects listed under the EIA Directive). For plans and programmes not listed above but which:

- determine the use of small areas at a local level, and for minor modifications to plans and programmes; or
- set the framework for future development consent of projects other than those listed in Annexes I and II of the EIA Directive,

Member States need to determine whether an SEA is required.

Annex II of the SEA Directive sets out the criteria which Member States shall take into account when determining whether plans or programmes are likely to have significant effects on the environment. The conclusions including the reasons for not requiring an environmental assessment are made available to the public.

Under **Article 5(1),** when an environmental assessment is required, Member States are required to prepare an environmental report, which identifies, describes and evaluates

22 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

the likely significant environmental effects of plans and programmes, as well as any reasonable alternatives. The information that the report needs to include is listed under **Annex I** of the Directive.

Before the adoption of the plan or programme or its submission to the legislative procedure, the draft plan or programme and the environmental report shall be evaluated by environmental authorities.

Likewise, the public, including the public affected or likely to be affected by or having an interest in the decision-making subject to the SEA Directive (including relevant non-governmental organisations), shall be given early and effective opportunities to express their opinion on the draft plan or programme and the accompanying environmental report **(Article 6)**.

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption of submission to the legislative procedure.

Unlike the EIA Directive, the text of the SEA Directive does not provide for a review procedure before a court to challenge the substantive or procedural legality of plans and programmes, however this issue has already been resolved in the interpretation of the Court of Justice[23], which had already established the right of access to national courts to invoke the public participation rights laid down in EU environmental directives, as well as the European Commission Notice[24] that suggests that Member States must ensure that individuals can rely on procedural provisions before national courts. Furthermore, the possibility to challenge the decisions under the SEA Directive is also regulated under Article 9(3) of the Aarhus Convention and confirmed by the Aarhus Convention Compliance Committee[25].

3

The Environmental Liability Directive (ELD)[26]. The ELD imposes liability on an economic operator for preventing and remediating an imminent threat of, or actual, environmental damage. The operator can be held accountable for the environmental harm they have caused, based on so-called 'polluter pays' principle.

23 See C-41/11 Inter-Environment, para. 44. And para. 46. See, for example, Cases C-72/95, Kraaijeveld ECLI:EU:C:1996:404, para. 56; C-435/97 WWF and Others ECLI:EU:C:1999:418, para. 69; C-201/02 Wells v Secretary of State for Transport, Local Government and the Regions, ECLI:EU:C:2004:12, paras. 54 – 61, and C-127/02 Waddenzee, ECLI:EU:C:2004:482, paras. 66–70.

24 Commission Notice on Access to Justice in Environmental Matters (2017/C 275/01), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52017XC0818%2802%29.

25 As the Aarhus Committee has clarified, 'Article 9, para. 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of "acts" under Article 9, para. 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment' (Report of the Aarhus Committee to the 6th MoP on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, para. 50).

26 Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU.

Article 3 provides a scope of the Directive, which applies to:

- environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities (a strict liability regime);
- damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent (a fault-based liability regime).

Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures **(Article 5)**.

Where environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

- all practicable steps to immediately limit or prevent further environmental
- damage and adverse effects on human health or further impairment of services; and
- the necessary remedial measures, in accordance with the relevant provisions of the ELD **(Article 6).**

Under **Article 12** of the Directive, the following persons and entities are entitled to request the competent authority to take action under the ELD:

- natural or legal persons affected or likely to be affected by environmental damage;
- a non-governmental organisation (NGO) promoting environmental protection;
- other natural or legal persons having a sufficient interest or whose rights have been impaired.

The persons or NGOs concerned also have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority **(Article 13).**

4 **The Water Framework Directive (WFD)**[27]. It aims at bringing all surface water bodies into good ecological and chemical status and preventing further deterioration of any status. Or, in case the water body is already heavily modified or artificial, good ecological potential and good chemical status.

27 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (consolidated version).

Article 3 refers to coordination of administrative arrangements within river basin districts, including the identification of the appropriate administrative arrangements. Article 13 obliges Member States to develop river basin management plans (RBMPs).

Article 4 sets the environmental objectives and provides derogations from those obligations to achieve compliance with said objectives. Article 11 obliges Member States to establish a Programme of measures in order to achieve the environmental objectives.

Articles 4(4), 4(5), 4(6) and 4(7) describe the conditions and the process in which Member States can derogate from environmental objectives set under Article 4(1). **Article 4(4)** allows for the extension of the deadlines for achieving the good status of the waters, whilst **Article 4(5)** allows the achievement of the less stringent objectives under certain conditions. Article 4(6) sets the conditions for temporary deterioration of good status in the case of natural causes or force majeure.

For hydropower the most significant is the right to derogate from set environmental objectives, established under **Article 4(7),** in the case of new modifications and sustainable human development activities, which result in the deterioration of the status of the water body, or which prevent the achievement of good ecological status or potential.

Article 14 refers to public information and consultation during different stages of preparation of the RBMPs. It requires Member States to encourage the active involvement of all interested parties in the implementation of this Directive. The Court of Justice of the European Union ruled that 'a duly constituted environmental organisation operating in accordance with the requirements of national law' (in short, any legally established environmental NGO) must be able to legally contest a decision granting a permit for a project, which does not comply with the obligation to prevent the deterioration of the status of bodies of water, as set out in Article 4 of the WFD.[28] Environmental organisations have the right to participate in both administrative and judicial procedures related to the implementation of the WFD[29].

5 **Birds[30] and Habitats Directives[31] (Nature Directives).** The aim of these Directives is to protect species and habitats in the EU. The Birds Directive aims to protect all naturally occurring wild bird species present in the EU and their most important habitats. To achieve these aims, EU countries are required to take any necessary measures to maintain or restore bird populations.

Based on the Habitats Directive, each Member State compiles a list of habitat types and species for which it will designate protected areas – so-called Natura 2000 sites. **Articles 3 to 11 of the Habitats Directive** refer to conservation of natural habitats and habitats of species. **Article 3** refers to the creation of the Natura 2000 network. **Articles 4 and 5** refer to priority natural habitat types and priority species, Sites of Community Importance (SCIs) and Special Areas of Conservation (SACs).

28 See C-664/15, Protect, para. 102.
29 Ibid., para. 81.
30 Directive 79/409/EEC of the Council of 2 April 1979 on the conservation of wild birds.
31 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

Article 6 sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. **Article 6(1)** makes provisions for the establishment of the necessary conservation measures and is focused on positive and proactive interventions; **Article 6(2)** stipulates preventive provisions for avoidance of habitat deterioration and significant species disturbance.

Any plan or project inside or outside of a Natura 2000 site – likely to have a significant negative impact on the integrity of the site – is not allowed (with an exception for some specific situations). If there is a likelihood that a plan or project has a significant negative impact, an Appropriate Assessment has to be carried out, and in case the project impacts the integrity of the site, the competent authority has to refuse the permit unless certain conditions are met **(Articles 6(3) and 6(4)).** According to ECJ case law, individuals have a right to challenge before national courts plans or projects likely to have a significant effect on Natura 2000 sites[32].

Articles 12 to 16 refer to the protection of species from activities such as: deliberate destruction, selling and hunting. Article 12 requires that Member States establish a system of strict protection for the animal species listed under Article IV. Member States can derogate from these strict conditions in exceptional cases, set out under **Article 16[33].**

32 Case C-243/15 Lesoochranárske zoskupenie VLK, para. 56.
33 For more information on EU environmental law relevant for hydropower, please see: Smolak, 'Toolkit on the use of EU and international environmental law to protect rivers from hydropower development', (n 16), p. 10.

Albania

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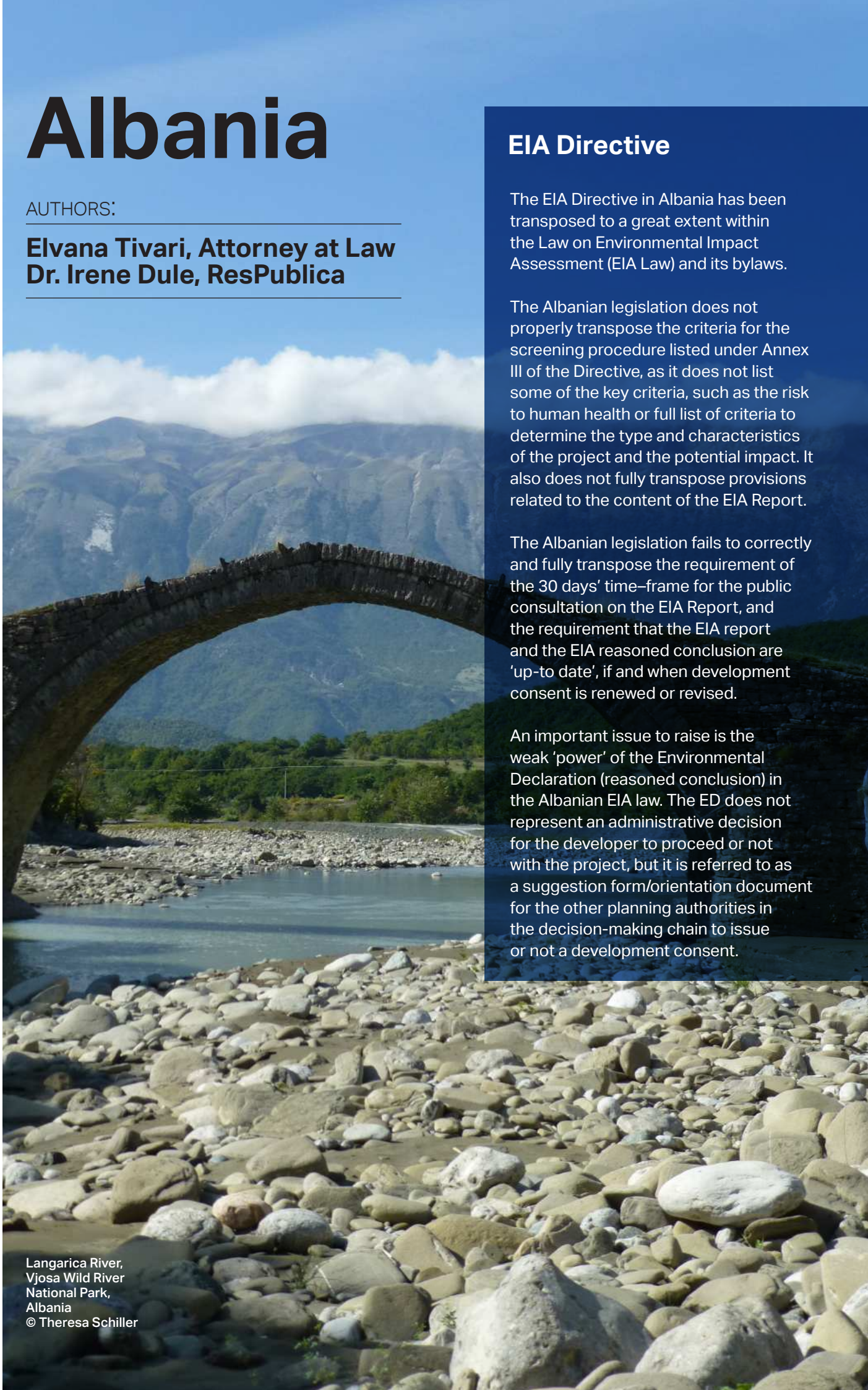
EIA Directive

The EIA Directive in Albania has been transposed to a great extent within the Law on Environmental Impact Assessment (EIA Law) and its bylaws.

The Albanian legislation does not properly transpose the criteria for the screening procedure listed under Annex III of the Directive, as it does not list some of the key criteria, such as the risk to human health or full list of criteria to determine the type and characteristics of the project and the potential impact. It also does not fully transpose provisions related to the content of the EIA Report.

The Albanian legislation fails to correctly and fully transpose the requirement of the 30 days' time–frame for the public consultation on the EIA Report, and the requirement that the EIA report and the EIA reasoned conclusion are 'up-to date', if and when development consent is renewed or revised.

An important issue to raise is the weak 'power' of the Environmental Declaration (reasoned conclusion) in the Albanian EIA law. The ED does not represent an administrative decision for the developer to proceed or not with the project, but it is referred to as a suggestion form/orientation document for the other planning authorities in the decision-making chain to issue or not a development consent.



Langarica River, Vjosa Wild River National Park, Albania
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1.1 Transposition

The EIA Directive is in an advanced phase of transposition into the Albanian legislation, where only Directive 2014/52/EU amending Directive 2011/92/EU remains not yet fully transposed.

The EIA related domestic legislation includes: the Law on Environmental Impact Assessment **(EIA Law)**[34], and four Decisions of Council of Ministers (DCM) dealing with rules and procedures during the preparation of the EIA **(DCM on Procedures)**[35], with the public consultations in this regard **(DCM on Public Participation)**[36], with the methodology for conducting the EIA **(DCM on Methodology)**[37] and with the procedures for the transboundary EIA **(DCM on Transboundary EIA)**[38].

Article 7(1) of the EIA Law provides that projects listed in **Annex I and Annex II of the Law** shall be made subject to an environmental impact assessment prior to the development consent being given by the competent authority/-ies that entitles the developer to proceed with the project.

The **EIA Law in Article 7(2)** provides that the EIA process, as a whole, consists of two procedural stages, namely (i) the preliminary EIA, documented with a preliminary EIA Report, which is in substance the screening procedure applied for projects listed under **Annex II of the EIA Law**; and (ii) the in-depth EIA, which is the thorough, fully developed EIA, obligatory in an automatic fashion for projects listed under **Annex I of the EIA Law**, and also applicable for those projects of Annex II for which, upon conclusion of the screening procedure, it is determined that an in-depth EIA should be conducted.

Projects under **Annex I of the EIA Law** are the same as those under Annex I of the EIA Directive, or in some cases even with higher thresholds. This means that some projects that do not require a mandatory fully developed EIA under the EIA Directive might require it under the Albanian law.

Under **paragraph 15 of Annex I of the EIA Law**, '*Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres*' require a mandatory in-depth EIA. This is directly transposed from **EIA Directive Annex I, para. 15**.

However, **Annex I of the EIA Law** does not cover '*any change to installations or extension of projects listed in Annex I, where such a change or extension in itself meets the threshold*' (para. 24 Annex I of the EIA Directive). **Article 8 of the EIA Law** provides that changes or extensions of projects listed in both Annex I and Annex II shall undergo the preliminary EIA procedure (screening) in order to determine whether the in-depth EIA needs to be conducted or not. **This is not in line with Annex I of the EIA Directive**, which also includes changes or extensions of Annex I projects, and also could potentially create situations where changes or extensions of these projects could bypass the need for the in-depth EIA, even when the thresholds might apply.

34 Law no. 10440, dated 7.7.2011, as amended in 2015 and 2020.
35 DCM no.686 of 29.07.2015 on adoption of rules, responsibilities and deadlines for the development of environmental impact assessment (EIA) procedure and the procedure of environmental declaration decision transfer, as amended.
36 DCM no.247 of 30.04.2014 on the Participation of the Public in the Environmental Decision Making.
37 DCM no.912 of 11.11.2015 on the adoption of the national methodology of the environmental impact assessment process.
38 DCM no.598 of 01.07.2015 on rules and procedures of EIA in a transboundary context.

Annex II of the EIA Law, which lists projects that are subject to the screening procedure, almost fully transposes **Annex II of the EIA Directive** and includes under **point a)(3):** '*Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I)*', and under **point e)(10)** '*Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I)*'. This ensures that all hydropower projects are covered by the environmental impact assessment procedure, regardless of the energy capacity threshold. This is a good example of properly transposing the EIA Directive, along with the case law of ECJ[39], as it ensures that **small hydropower projects are not exempt in advance from the procedure due to their energy capacity**.

Apart from the projects listed in **Annex II of the EIA Law**, and changes or extensions of projects listed in both **Annex I and II, Article 8 of the EIA Law** provides that the preliminary EIA (screening) is necessary also for:

- Projects which do not have a direct impact, or are not necessarily related to the management of a special conservation area, but which are likely to have a significant effect on this area, **which are also subject to appropriate assessment**, in order to ensure that these projects will not bring consequences to the integrity of the area. Such projects are identified on a case-by-case basis by the authority responsible for the management of special conservation areas, and the EIA preliminary report also includes the appropriate assessment of the impacts of these projects in that area, which is reviewed by the authority responsible for the management of special conservation areas. **Thus, the Law links the EIA procedure with the appropriate assessment**.

Articles 1(1) and 1(2) of the **DCM on Procedures** provide an extensive list of information that the developer should submit upon application for the preliminary EIA, and such information largely includes all the requirements of **Annex II.A** of the **EIA Directive**, leaving out only the information on demolition works, where relevant.

Articles 3, 4, 5 and 6 of the **DCM on Procedures** and **Chapter I of DCM on Public Participation** lay down the obligation for the National Environmental Agency (NEA) to undertake steps that ensure that the authorities, both central and local, likely to be concerned by the project, as well as the public and NGOs, are given an opportunity to express their opinion on the information supplied by the developer.

The screening criteria to be used during the preliminary EIA, are provided by **Annex 1** of the **DCM No. 686 of 29.07.2015** as amended in 2019 **(DCM on Procedures)**. However, **Annex 1** of the **DCM on Procedures does not fully transpose all the criteria listed under Annex III of the EIA Directive**. Specifically, it does not include the following:

- With regard to the characteristics of the project, it does not include assessment of: the design of the project **(Annex III, point 1(a) EIA Directive)**; risk of major accidents and/or disasters caused by climate change, in accordance with scientific knowledge **(Annex III, point 1(f) EIA Directive)**; and the risks to human health (for example due to water contamination or air pollution) **(Annex III, point 1(g) EIA Directive)**;

39 See: Case C-392/96, Commission v Ireland, para. 66.

- With regard to the location of the project, it does not include assessment of: the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground **(Annex III, point 2(b) EIA Directive)**; the absorption capacity of the riparian areas, river mouths and of the areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or in which it is considered that there is such a failure **(Annex III, point 2(c/I, c/vi) EIA Directive)**;

- With regard to the type and characteristics of the potential impact, it does not include assessment of: the expected onset, duration, frequency and reversibility of the impact **(Annex III, point 3(f) EIA Directive)**, the cumulation of the impact with the impact of other existing and/or approved projects **(Annex III, point 3(g) EIA Directive)**; the possibility of effectively reducing the impact **(Annex III, point 3(h) EIA Directive)**.

Article 11 of the EIA Law and **Articles 7, 10** and **11 of the DCM on Procedures** provide that the screening decision, which is to be taken by NEA, should as a minimum include: (i) the main reasons and consideration for the decision; (ii) the opinion of the concerned authorities; and (iii) the description, as appropriate, of the main measures to be taken to avoid, reduce and, if possible, correct possible impacts on the environment. Furthermore, it is also provided that the NEA decision on the screening procedure (preliminary EIA) should be published on the websites of both the NEA and the Ministry of the Environment (MoE).

Article 9 of the EIA Law is a complete transposition of **Article 3 of the EIA Directive**, covering all the factors that should be identified, described and assessed when the legal obligation to conduct an in-depth EIA applies, or when the screening decision leads to that.

Annex II of the DCM on Procedures, transposes to a great extent **Article 5(1)** and **Annex 4 of the EIA Directive** as related to the content of the EIA Report. However, it does not list elements such as:

- The requirement to take into account the available results of other relevant assessments, e.g., SEAs **(Article 5(1) EIA Directive)**;

- Information on demolition works, where relevant **(Annex IV point 1(b) and 5(a) EIA Directive)**;

- Description of human health as a factor likely to be significantly affected by the project **(Annex IV point 4 EIA Directive)**;

- Description of the impact of the project on climate (for example, the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change **(Annex IV point 5(f) EIA Directive)**;

- A description of the measures envisaged in order to offset likely significant adverse effects on the environment, when possible.

Articles 3 – 6 of the **DCM on Procedures** and **Chapter II, point 2** of the **DCM on Public Participation**, as well as **Chapter II, point 3** of the **DCM on Public Participation** lay down the obligation for the NEA to ensure that relevant information is provided and consultations on the

Valbona River, Albania
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scope and level of detail of the information to be included by the developer in the EIA report are conducted.

Even though the above provisions that ideally enable the public and the NGOs to get involved in both the screening, scoping and preparation stages of the EIA are in their entirety very positive and also go beyond the minimum requirements of the EIA Directive, when it comes to the public consultation of the EIA Report, the Albanian legislation fails to correctly and fully transpose **Article 6(7) of the EIA Directive** with regard to the requirement that the time- frame should not be shorter than 30 days.

Chapter II, points 5 – 7 of the DCM on Public Participation provides that the date for the public hearing about the EIA Report should be set no earlier than 30 days from the date when the EIA Report has been submitted to the NEA. But, at the same time, these provisions allow for the NEA 5 – 8 days to distribute the information and coordinate with its regional offices and the local government units which are tasked with exposing and making available the EIA Report in the field for the public concerned, **thus leaving effectively less than 30 days for the public to consult the information**. Moreover, the same provisions oblige the NEA and the developer **to publish the non-technical summary of the EIA Report for only 20 consecutive days**, thus restricting the timeframe allowed for comments by the interested NGOs and the public that do not participate in the public hearing to less than 30 days.

Article 12 of the EIA Law provides that the decision about the EIA Report is taken by the MoE at the end of the EIA procedure. Such decision (reasoned conclusion) takes the form of the **Environmental Declaration (ED)** and may conclude with: (i) approval for the development of the project; or (ii) approval for the development of the project with conditions; or (iii) rejection for the development of the project.

According again to **Article 12 of the EIA Law**, the ED should include: (i) the position of the Ministry and, as the case may be, the conditions that must be fulfilled by the developer; (ii) confirmation that the Ministry has taken into consideration the opinions expressed by the public and relevant

authorities, as well as the degree of their reflection in the EIA Report; (iii) information about the process of consultation with the public; (iv) the main reasons and considerations on which the opinion is based; (v) the description, as appropriate, of the main measures to be taken to avoid, reduce and, if possible, correct the significant effects; and (vi) if rejecting the development, the arguments for such rejection.

Furthermore, under the same **Article 12 of the EIA Law**, it is also provided that the ED should be published on both the Ministry and the NEA websites. **Chapter III of the DCM on Public Participation** additionally provides that the monitoring results of the conditions set out in the ED should be published on the NEA website and are subject to be challenged by the public, along with the screening/EIA decision, as provided by **Article 25 of the EIA Law**.

According to the **Article 20 of the EIA Law**, the authority responsible for the development consent, before its decision, ensures that the project, has been subject to the requirements of the EIA Law and, depending on the project, has been provided with an ED or a decision on the preliminary EIA (screening decision). Furthermore, when considering granting or not development consent for a project or setting conditions for the developer, the ED or the preliminary EIA (screening) decision should be taken into consideration.

The development consent act must include at least the following information: (i) justification by the competent authority for the significant effects of the project on the environment, taking into account the results of the review; (ii) any environmental conditions defined in the ED or in the decision on the preliminary EIA, description of the characteristics of the project and/or the measures envisaged to avoid, prevent or reduce and, if possible, compensate the significant impacts on the environment, as well as monitoring measures.

However, according to the same **Article 20 of the EIA Law**, the reasoned conclusion – be it the ED or the screening decision – **is not obligatory for the authority responsible for the development consent, since it allows for the development consent to be granted contrary to the reasoned conclusion for the EIA** that rejects the development, upon condition that the relevant arguments for such consent are provided. However, this is not in line with **Articles 1(2)(g)(iv), 8 and 8a of the EIA Directive**, which require the reasoned conclusion to be incorporated in the development consent.

Article 25(1) of the EIA Law provides that the ED or the preliminary EIA (screening) decision is valid as long as the development consent for the project is also valid[40]. It also provides that if the project, which has been subjected to the EIA process, does not start implementation on the ground, within 2 years from the date of approval of the ED or the preliminary EIA decision, then these documents are considered invalid and the EIA process starts from the beginning. This means that the Albanian legislation **does set a timeframe for the validity of the reasoned conclusion** by its connection to the development consent, as encouraged under **Article 8a(6) of the EIA Directive**, however it does not require from the competent authority to be satisfied that the reasoned conclusion is up-to date, regardless of the timeframe.

40 The provision explicitly refers to the 'development consent', defined in Art. 6 (14/1) of the EIA Law as '14/1. "Development consent" is the act issued by the authority responsible for approving the development of the projects that are subject to this law, which gives the right to the developer to continue with its implementation'. This definition includes, but is not limited to, the development consent issued in the realm of spatial planning regulations. A concession contract or an environmental permit may as well be considered development consent. The spatial planning regulations differentiate between development consent and a construction permit. The former is the act that in principle consents for the development to happen and greenlights the developer to apply for the construction permit, which is the actual permit that approves the project to be implemented with the specific design, under specific conditions. There is no one size fits all timeframe set by the legislation for the validity of the development consent; it comes with the development consent itself on a case-by-case bases.

Finally, it is important to note that the 2020 amendments to the EIA Law have introduced new definitions that better clarify and streamline the concepts of 'development consent' and the 'authority responsible for development consent'[41].

1.2 Implementation

Although the transposition of the EIA Directive is at an advanced stage, achievement of a desirable level of implementation requires qualified staff, coordination skills and capacities, compliance with the public participation procedures and timeframe, advanced communication tools and channels, and high-quality checks and controls.

The shortcomings of the environmental impact assessment legislation with regards to proper transposition and implementation of the EIA Directive was explicitly raised in the 2022 Energy Community Treaty Implementation Report[42]. The Report states that Albania failed to align the EIA Law with **Articles 8 and 8a of the EIA Directive** and that secondary legislation necessary for proper enforcement, in particular by-laws on certification of EIA experts and EIA screening criteria, is still lacking. The Report also highlighted that consultations with the public and relevant national authorities must be improved in order to secure their early and effective participation in the decision-making process[43].

The NEA does not properly inform the public on the opportunity they have to participate with comments and feedback in writing for the screening and scoping stages, even though the DCM on Public Participation provides for this.

> The procedure of public information and consultation for both preliminary EIA (screening) and in-depth EIA still lacks compliance with the rules for the timeframe allocated to passive dissemination of announcements, information and related documents. The public is provided with less time and information than required for proper information. Additionally, for the public hearings, they lack representative participation of affected communities and interested stakeholders in both number and backgrounds.

41 Article 6 points 9 ('Planning authority' has the meaning given in the legislation in force for spatial planning.") and 10 ('Authority responsible for licensing' is the public institution that, within the functions and powers specified in the law, is responsible for approving or not a certain permit/licence for the projects that are subject to this law) of the EIA Law, have been merged in one and replaced by Article 6, point 10 that reads: 'Authority responsible for development consent' is the public institution that, within the scope of its responsibilities, functions and powers as defined in the relevant sectoral law, is responsible for the development consent for the projects that are subject of this law. Furthermore, it has also been added Article 6, point 14/1 which reads: 'Development consent' is the act issued by the authority responsible for the development approval for the projects that are subject to this law, which gives the right to the developer to continue with its implementation. While prior to these amendments, the confusion led to the EIA being considered obligatory only prior to the development consent being issued in the realm of spatial planning and environmental permits, now it is made clear by the EIA Law that any type of development consent that involves projects under the EIA Law, that is issued by any type of responsible authority (central or local), should be preceded by an EIA and include its results into considerations made for such development consent. On the one hand, this legal development is to be considered a positive one, since it further aligns the EIA legislation with the EIA Directive, but on the other hand, there is a broad range of sectoral legislation that covers projects that fall under the EIA Law and most of these either do not set a time limit for the validity of the development consent, or it broadly varies (e.g. no set time limits for the development consent validity under the Spatial Planning Law, the Environmental Permits Law, or the Water Management Framework Law, while time-limits according to the Concessions Law vary from 10 to 35 years). Moreover, sectoral legislations regarding various forms of development consent, while generally allowing renewals or extensions and also providing that revision should be carried out under certain circumstances (significant changes in the project being the most common), do not include the obligation for the renewal of the EIA Report as well. This means that in practice permits, licences and other development consents acts would be based on outdated EIA reports.

42 2023 Implementation Report Albania, Energy Community Treaty, available at: https://www.energy-community.org/implementation/report/Albania.html, p. 13.

43 Ibid.

Final EIA reports are published on the NEA webpage, but all of them are missing information about when public consultations and public hearing were held, the list of participants, and minutes of the meetings (especially for in-depth EIA, for which this is mandatory). This information is also not included in the ED, which is a legal obligation. The current modus operandi makes it very hard to monitor the process in Albania and can be seen also as a lack of transparency on the final decision.

Furthermore, the NEA only publishes on its website a Register which records only the number, date and the final conclusion (accepted/rejected/further assessment through in-depth EIA) of the EIA screening decisions, while **the full screening decisions are not available to the public**.

> Monitoring is done only in the case of an in-depth EIA report through the monitoring of conditions in the ED document (which per se is vague), and Environmental Permit. The monitoring process is the sole responsibility of the developer (private or public) who delivers reports to the NEA/REA. The monitoring reports are not published on the NEA webpage, and thus the public cannot openly apply the legal right to comment on the published data as prescribed in the **DCM on Public Participation**.
>
> Weak EIA analyses and poor EIA reports represent a problem. Quality checks of EIA reports are missing, which is frequently raised by environmental civil society. The reports lack law compliance for the structure and content information, have shown frequently outdated data, superficial data interpretation and analyses, and frequently also a copy-paste material for different projects (e.g. Pocem and Kalivac HPPs). When it comes to a decision-making structure with regards to the EIA Report – be it the preliminary or the in-depth one – it is not clear who does the quality check of the reports. It would be of value to have a clear understanding on the expertise background of the experts that are part of the NEA and Ministry staff and the way they operate.

In regard to hydropower projects, a significant failure observed relates to the moment when the EIA is conducted for the HPP projects granted through a concession procedure. While for the privately built and owned projects it is mandatory to go through and complete an EIA, prior to submitting the application, for the ones that are awarded through a concession – the EIA is conducted only after the contract is signed.

Overall, the NGO community remains highly concerned on the lack of SEAs and proper EIAs undertaken for more than 530 small hydropower units planned, under construction or in operation around the country[44].

Significant examples in case law are worth exploring regarding the failure to properly implement public participation rules and the quality of screening decisions and EIA Reports.

44 The Alternative View of Environmental Progress: Albania's Negotiations with EU and Chapter 27; April 2021 – prepared by the GREEN 27+ consortium consisting of REC Albania, INCA, EDEN Center and Urban Research Institute, supported by 20 other environmental organisations with the assistance of the Swedish Government, through the Swedish Environmental Protection Agency; https://www.uri.org.al/web/wp-content/uploads/2021/04/GREEN27_ShadowReport_Englisht_web_Final.pdf

Black Drin River, Albania
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PLANNED HYDROPOWER PROJECTS ON THE VJOSA RIVER

On the basis of a highly inadequate EIA, as well as a highly deficient public consultation process, the NGOs EcoAlbania, Riverwatch and EuroNatur, as well as 38 affected residents filed a lawsuit against Poçem HPP on the Vjosa with the Albanian Administrative Court in December 2016 –the first-ever environmental lawsuit in Albania.

Public consultations (public hearing) were held in the Fier Municipality, which is a different local government unit than the one of the project site. The participants were not members of the affected community at all, and the legal timeframes were not followed. In May 2017, the Court decided to rule in favour of the plaintiffs and against the construction of the projected Poçem HPP based on the arguments that the developer has not acted under the binding rules on public participation; the approval of the EIA was issued in violation of public participation and consultation rules; and the Ministry of Infrastructure and Energy has acted beyond its competencies by deciding on usage of the water resources.

> In its final judgment, the Court concluded that all administrative acts and procedures are deemed absolutely null and void, and thus without any legal consequence, because they have been issued in contradiction of the procedures foreseen by law and the Concession Agreement for building a large dam on the Vjosa River and constructing the Poçem HPP.

Following this decision, the Albanian Ministry of Infrastructure and Energy as well as the Ministry of Environment and the Turkish construction company have filed an appeal to the Tirana Court of Appeal. The review of the appeal is still pending, but in the meantime, in March 2023 the whole Vjosa River including three of its tributaries (Bence, Drino and Shushica) was declared a National Park.

In October 2017, the Ministry of Energy awarded to a consortium of Turkish-Albanian companies the concession contract for the construction of the **Kalivaç HPP on the Vjosa River**. In August 2020, the developer submitted the EIA for Kalivaç to the NEA. In September 2020, Eco Albania and a large team of experts and scientists engaged by the Save the Blue Heart of Europe campaign prepared an analysis of the EIA of the Kalivaç HPP and sent the report, that included an extensive list of findings related to the poor quality of EIA Report, to the public authorities, including the NEA.

In September 2020, the Ministry of Tourism and Environment, in conjunction with the NEA, rejected the EIA Report and issued a negative Environmental Declaration, largely based on the findings presented by Eco Albania and the science community. The ED concluded that the EIA Report failed to address and assess that the construction of the project on the Vjosa River would have a negative impacts on the environment with long-term consequences, including: land floods, use of explosives during construction, serious threat to flora and fauna in the ecosystem, damage to the microclimate, a decline in water quality and its physic-chemical qualities, damage to the biodiversity of the Vjosa River, one of the largest in the Balkans, where live hundreds of living species, some of them unknown to science, etc.

The developer did not proceed with the application for development consent; however, they filed a lawsuit against the Ministry in February 2021 before the Administrative Court of Tirana, requesting that the negative ED be declared null and void. The CSOs Eco Albania, EuroNatur and Riverwatch, as well as 39 residents of the Kalivac project area intervened in this judgment as interested parties. The Administrative Court ruled in favour of them participating by arguing that, as interested parties in the environmental decision-making process and referring to domestic law and the Aarhus Convention, they are entitled to be parties in this judgment, to be heard and to present their claims.

As per the merits of the case, the First Instance Administrative Court of Tirana rejected the lawsuit, with the arguments that the ED was in accordance with the law. The Court underlined that this administrative act provides all the technical arguments that have led the competent authority to issue a negative ED and it found no grounds for these arguments not be upheld, and as a consequence for this act to be declared invalid. It was also noted that at the time of the trial, the Vjosa River was declared a managed nature park/nature reserve with high importance.

Planned dams on the Vjosa River were also the subject of international complaints. In 2016, a complaint was brought before the Bern Convention by EcoAlbania with concerns regarding the construction of hydropower plants on the Vjosa River in Poçem and Kalivaç as well as an airport within the boundaries of the Protected Area Vjosë-Nartë in Albania. In their Recommendation no. 202 (2018), the Standing Committee of the Bern Convention stated that the precautionary approach should be applied by suspending the two hydropower projects until the necessary additional assessments, including an integrated River Basin Management Plan and a strategic environmental impact assessment including social aspects – particularly the potential for ecotourism – has been carried out[45].

On 14 September 2020, the Secretariat of the Energy Community Treaty initiated a preliminary procedure by sending an Opening Letter to Albania to address concerns with regard to the breaches of the EIA Directive and development of the Poçem HPP[46].

45 Presumed negative impact of developments on the Vjosa River including hydropower plant development and Vlora International Airport, https://www.coe.int/en/web/bern-convention/-/2016-5-albania-presumed-negative-impact-of-hydro-power-plant-development-on-the-vjosa-river

46 Case ECS 03/19: Albania/environment, https://www.energy-community.org/legal/cases/2019/case0319AL.html

2 SEA Directive

The SEA Directive is transposed by the Law on Strategic Impact Assessment (SEA Law), which is further implemented by several by-laws.

The requirement to conduct the SEA for plans and programmes that entail 'the use of small areas at a local level', is not included at all in the SEA Law, but is only found in Article 24 of the Law on Environmental Protection (of 2011), which is only an introductory provision for the SEA. Furthermore, the SEA Law limits the scope of the plans and programmes that should be subjected to a screening procedure only in the cases when a protected area might be involved.

The SEA Law ensures the possibility to challenge either the screening decision or faulty SEA procedure once it has been conducted, which would also include the possibility to challenge the failure of the authorities to initiate the SEA procedure before adoption of a plan or programme.

2.1 Transposition

The SEA Directive is transposed by the **Law on Strategic Impact Assessment (SEA Law)**[47], which is further implemented by several by-laws, namely the DCM on detailed list of plans and programmes for which a SEA should be conducted **(DCM on Plans/Programmes)**[48], the DCM dealing with rules and procedures for public consultations and hearings **(DCM on SEAs Public Consultations)**[49], the DCM on SEAs in the transboundary context **(DCM on Transboundary SEAs)**[50], and the Guidelines about the methodology to be used for conducting the SEAs **(SEA Methodology Guidelines)**[51].

Article 2(1)(a) of the SEA Law transposes **Article 3(2) of the SEA Directive** and lists types of plans and programmes that require the SEA. Point (1)(a) of this Article lists the plans and programmes in the area of agriculture, forestry, fishing, energy, industry, mining industry, transport, waste management, water management, telecommunications, tourism, national and local urban and rural spatial plans, as well as protection of landscape and land use, which establish the framework for the approval, in the future, of the projects listed in **Annex I and II of the EIA Law**.

The screening criteria of **Annex II of the SEA Directive** are transposed in **Annex I of the SEA Law**.

Point (1)(b) and (c) of the **Article 2 of the SEA Law** provide that a SEA will be conducted also for revisions, changes or modifications of plans or programmes subject to mandatory SEA [point 1(b)], as well as plans or programmes, which are not subject of mandatory SEA, but for which is assessed that may have significant negative impacts on a protected area **[point 1(c)]**.

47 Law no. 91, dated 28.02.2013, as amended with Law no. 51 dated 06.07.2023.
48 DCM no. 507, dated 10.06.2015 on approval of the detailed list of plans and programmes with negative impacts to the environment, that need to undergo a SEA process.
49 DCM no.219, dated 11.03.2015 on rules and procedures for consultation with stakeholders and public, as well as public hearing during the process of strategic environmental assessment.
50 DCM no. 620, dated 07.07.2015 on rules, responsibilities and detailed procedures for SEA in transboundary context.
51 Guidelines no.6, dated 22.12.2016 on the national methodology for SEA.

Vjosa Wild River
National Park, Albania
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For these categories of plans and programmes, the decision on whether to conduct or not the SEA is taken by the competent authority (MoE), after a screening procedure. It is provided by **Article 8(3) of the SEA Law** that the criteria listed in **Annex I of the Law** should be used by the Ministry, both for the screening of these projects as well for the scoping stage.

A confusion may have been created for the category provided in **Article 3(3) of the SEA Directive** with regard to '*the use of small areas at a local level*', which is not included at all in the SEA Law, but is only found in **Article 24 of the Law on Environmental Protection**[52], which is only an introductory provision for the SEA, and for implementation purposes refers to the detailed provisions of the SEA Law. This means that in practice no SEA is conducted for these projects, contrary to the obligation under **Article 3(3) of the SEA Directive**.

Furthermore, **point 1(c) of Article 2 of the SEA Law** limits the scope of the plans and programmes that should be subjected to a screening procedure only in cases when a protected area might be involved. In the context of the plans and programmes that 'use small areas at a local level' that are, as explained above, left out of the scope of both obligatory SEA as well the screening, when such 'small areas at a local level' coincide to be at the same time designated protected areas, they are, however, covered by the **point 1(c) of Article 2 of the SEA Law**.

The SEA Law provides that upon the proposal submitted by the authority competent for the preparation of the plan and programme, the decision on conducting the SEA procedure is issued by the MoE.

52 Law no.10431 dated 09.06.2011 on Environmental Protection, as amended in 2020.

Article 8(2)(a) of the SEA Law provides that the MoE should issue the screening decision within 30 days from receipt of the proposal from the Competent Authority. **Article 8(4) and 8(5) of the SEA Law** provide that **prior to reaching the screening decision, the MoE should consult several stakeholders** such as: a) public health protection institutions; b) local government units; c) agricultural land protection institutions; d) environmental associations (NGOs) active in the field of environmental protection; and e) other relevant authorities that are identified with responsibility in the proposal (ministries, etc.), by giving them a 20-day deadline to respond. The same obligation for consulting both the MoE and the above stakeholders is provided by **Article 9 of the SEA Law** for the competent authority that prepares and adopts the plan/programme, **with regard to the issues to be addressed in the SEA Report (scoping stage)**.

Article 10(3) of the SEA Law determines the minimum requirements for the content of the SEA Report, and it fully transposes **Article 5 and Annex I of the SEA Directive.**

Article 10(2)(6)(7) and (9) of the Law provide that the public information and consultation is obligatory for the Competent Authority, while Article 10(8) of the SEA Law provides furthermore that if the MoE deems it necessary, it may decide to also conduct an additional public hearing itself. **DCM on SEAs Public Consultation**s provides in detail the rules and procedures to be followed regarding the information and consultations of the public and relevant stakeholders, both in the screening and scoping stage as well as for the consultation of the SEA Report.

Article 8(7) of the SEA Law provides that the screening decisions issued by the MoE, besides being notified to the consulted stakeholders, should, within 5 days from adoption, be published on the Ministry's website. **Until now, no screening decisions have ever been made, and consequently have not been published as the above provision requires**.

Article 8(8) of the SEA Law provides that an appeal can be made in accordance with the provision of **Article 14 of the SEA Law** against the screening decision of the MoE. The latter provides that stakeholders – including the public – have the right to administrative appeal against the Minister's final SEA decision (Declaration), along with the ministry's screening decision, within 30 days from the announcement, in accordance with the provisions of the Code of Administrative Procedures.

Article 8(8) and 14 of the SEA Law, along with the rules of the Administrative Procedures Code, **ensure the possibility to challenge either the screening decision or faulty SEA procedure**[53], once it has been conducted, which as referred to the administrative procedures' rules, would also include the possibility to challenge **the failure of the authorities to initiate the SEA procedure before adoption of a plan or programme**.

53 The SEA Law itself does not differentiate whether it can be challenged only on procedural or substantial grounds, but the administrative procedure code allows for both procedural and substantial grounds to be used when challenging administrative acts and/or activity.

2.2 Implementation

It is important to note that the SEA process is a very recent process for Albania and so far, has been implemented with success for the territorial/ spatial planning respectively in the General National Spatial Plan and in all the Local Spatial Plans adopted. The competent authority has successfully coordinated and conducted the entire process and so have the local government units. On the webpage of the competent authority, there is a clear reflection of the processes and outputs, and the public has access to each related document, including the SEA report.

Although the public hearings are reflected as news on the webpage, no additional information on comments, reflection of comments, explanation for rejection of any comment, list of participants etc., is provided. The Municipalities also have engaged in the process, even though not all of them have reflected the process on their webpages.

In brief, **it is sometimes difficult to monitor the implementation of the SEA because of the vague indications for information and consultation processes**, as well as due to the fact that information on the webpages of various competent authorities – other than those responsible for spatial planning – is either partially available or missing for the public.

Additionally, while the MoE is the legally responsible authority for reporting annually on the implementation of the SEA legislation and for publishing it on its webpage, such reporting is not public, and there are no indications if it is done at all.

Nevertheless, according to the 2023 Energy Community Implementation Report, the effective implementation of the SEA Directive continues to pose challenges. No new mechanisms were introduced to enhance the consultation process, including its transboundary dimension. Similarly, the existing secondary legislation remains unchanged, allowing for the revision of plans and programmes approved without a completed SEA process[54]. Although **Point (1) (b) and (c) of the Article 2 of the SEA Law** provides that the SEA shall be conducted also for revisions, changes or modifications of plans or programmes, in practice this has not been done to date, signalling a clear implementation issue.

Additionally, while the MoE is the legally responsible authority for reporting annually on the implementation of the SEA legislation and for publishing it on its webpage, such reporting is not public, and there are no indications if it is done at all.

54 2023 Implementation Report Albania, (n 43), p. 11.

There is no public information available for any screening procedure conducted, and there is no indication whether this is done when the law requires it. Moreover, usually development of projects that fall under the EIA Law, which were not initially included into the plans/programmes for which a SEA was conducted, are not considered as changes/modifications of these plans and programmes, therefore no screening procedure is conducted at all.

There are two examples of the SEA process which in the past have proven not to be so successful, such as the **Water Resource Management Strategy** and the **National Master Plan for Gas Infrastructure**, which show that the MoE could improve its role in pushing for a proper process. In both cases, the SEA process started after the main documents (the strategy and the master plan) were adopted.

In the case of the National Energy and Climate Plan, even though it was made subject to the SEA procedure, its adoption was made prior to the SEA procedure being concluded.

3 Environmental Liability Directive

The Environmental Liability Directive (ELD) is weakly transposed into the Albanian legislation through the Environmental Protection Law.

The Environmental Protection Law sets forth key environmental principles, such as sustainable development, prevention, preservation of natural resources, and the Polluter pays principle. It emphasises the need for an integrated approach to protecting all elements of the environment, including air, water, land, biodiversity, and climate change.

The Law grants the public the right to request measures and file lawsuits in cases of environmental threats, pollution, or damage.

Furthermore, the Law outlines the establishment of an Environmental Fund and the utilisation of permit fees and fines for environmental protection activities.

However, the implementation of these provisions has been hindered by the absence of secondary legislation. The lack of specific regulations has prevented the full execution of the environmental liability regime, leaving only the general provisions of the Civil Code applicable.

3.1 Transposition

The ELD is weakly transposed into the Albanian legislation through **Law o. 10431 of 09.06.2011 on Environmental Protection** as amended in 2013 and 2020 ('EP Law'). The Law determines the general principles, requirements, responsibilities, and rules and procedures for guaranteeing a high level of environmental protection.

The EP Law defines in **Article 5(3) the environmental damage** as 'the damage done to the environment or loss of natural function of the components of the environment, caused by the loss of any of its components, due to human interference from connections between the environmental components and/or the natural flow of their development'.

Article 48 of the EP Law provides that in the case of a threat to the environment, pollution and its damage, the public has the right:

- to request the relevant public authorities take the appropriate measures within the deadlines and in accordance with the authority given by the law;
- to file a lawsuit in court, in accordance with the conditions provided by the Code of Civil Procedure, against the public authority.

Considering that the Civil Code and the Civil Procedures Code only grant standing to the person(s) impacted by the damage and that the ELD does not cover criminal liability or liability for traditional civil law damage, such as property damage or personal injury, this is not in accordance with the spirit and provisions of the Directive.

Article 50 of the EP Law outlines general provisions for environmental liability, which is determined based on:

- the damage caused to the environment as well as the potential threat of such damage by specific dangerous activities that are to be determined by the Council of Ministers along with the criteria for assessing potential threats and determining environmental damage;
- damage caused to protected species and natural habitats due to professional activities other than those specified in (a), along with the potential threat of this damage, due to operator negligence.

Operators engaging in specific dangerous activities (as determined by the Council of Ministers), are to be held responsible and obliged to cover the costs for any damage or direct threats to the environment, as well as if they fail to take preventive or remedial measures or fail to notify the National Environment Agency of potential environmental risks.

Moreover, in the case of environmental damage, operators are obliged to rehabilitate the damage following the polluter pays principle, and take measures to control and prevent further harm.

Furthermore, **Article 50 of the EP Law** provides that the Minister approves measures for rehabilitating damaged environments and methods for calculating costs related to identifying and mitigating threats and damage.
Article 53 of the EP Law provides that the operator, engaging in specific dangerous activities (as determined by the Council of Ministers), makes available, in advance, the necessary funds to compensate for possible damage to the environment or for eliminating an imminent threat of environmental damage. The rules, methods and procedures for securing such funds, such as the necessary guarantees or insurances, are to be determined by the Council of Ministers.

Up to date, **none of the secondary legislation necessary to implement the above provisions have been adopted** either by the Council of Ministers or the Minister.

Shushica River, Vjosa Wild River National Park, Albania © Nick St. Oegger

Article 52 of the Law provides that individuals or legal entities and environmental associations in the territory, which are directly affected or suffer the consequences of the damage caused to the environment, have the right to ask the National Environment Agency to request from the operator:

- the **restoration** of the environment to its previous state;
- **compensation for damage caused to the environment**, if restoring the environment to its previous state is impossible. If rehabilitation and return of the environment to the state it was in before the damage was caused is impossible, the operator is forced to pay compensation for the damage caused to the environment.

Article 12 of the ELD does not limit the right for request for action only to the local environmental associations, but extends it to any non-governmental organisation promoting environmental protection.

Article 5 of ELD provides for preventive action, which also can be requested by entitled persons, and Article 6 together with Annex II for remedial action and measures. Remedying of environmental damage is to be achieved through the restoration of the environment to its baseline condition by way of primary, complementary and compensatory remediation and not by paying compensations for the damage caused to the environment. Thus, **Article 52 of the Law** is not in line with the ELD and should be amended.

The EP Law provides that both the strict liability regime and the no-fault liability regime should be applied. However, secondary legislation is still not in place that would enable:

- (i) determination of the list of activities for the strict liability regime;
- (ii) setting of the criteria for assessment of the potential threats and the environmental damage;
- (iii) setting of the criteria and methodology for determining the necessary preventive and restorative measures for environmental damage;
- (iv) rules and procedures for remedying the environmental damage and recovery of costs;
- (v) rules and procedures for financial mechanisms as environmental guarantees and/or insurances.

3.2 Implementation

Even though the EP Law dedicates a separate chapter to environmental liability, the lack of secondary legislation is still an obstacle for the implementation to start. This was also confirmed in the 2023 Implementation Report that noted that the secondary legislation remains to be adopted and the financial mechanisms to ensure implementation of the Directive's provisions is yet to be set up[55].

According to the EP Law, the income from permit fees and fines for not complying with the environmental legislation should be used to finance environmental protection activities. However, even though the EP Law provides for the Environmental Fund to be established, due to the lack of secondary legislation neither the Fund nor state budget line for an environment-related purpose have been established.

Because the environmental liability legal framework has been impossible to implement due to lack of adoption of secondary legislation, the only available regime is the general provision of the Civil Code related to environmental liability, but this does not allow in practice for the environmental damages to be properly and fully identified, assessed, measured, and addressed for prevention, remedy or compensation; therefore, to date no cases related to environmental damage have been explored. Moreover, the ELD does not cover criminal liability or liability for traditional civil law damage, such as property damage or personal injury, thus further amendments to the national administrative law are needed in order to harmonise the law with the ELD.

55 2023 Implementation Report Albania, (n 42).

4 Water Framework Directive

Albania transposed the WFD into its national legislation through the Law on Integrated Water Resource Management (IWRM) and its bylaws, however the transposition is still incomplete.

The IWRM Law has introduced key water management concepts of the WFD, such as the environmental objectives, Programme of measures, and River Basin Management Plans. The IWRM Law and its by-laws do not transpose many technical requirements, without which implementation of the WFD would be incomplete.

The existing legislation does not fully transpose Annexes II, IV, V of the WFD in order to establish the necessary technical specifications, therefore insufficient guidance or standards are provided to set environmental objectives, establish Program of measures to achieve those objectives, properly develop River Basin Management Plans, or adequately protect water sources.

In 2022, the legislative process has started for a new Law on water resources of Albania. This new draft Law represents a shift paradigm for the water sector, aiming to provide for all related institutions the necessary mechanisms to better manage and protect the water resources. The purpose of this new draft Law is to integrate in one legal act the full transposition, not only of the WFD but also of several other water-related EU directives.

The developed RBMPs still suffer from the lack of data since all river basins lack reliable time-series data that would allow an accurate characterisation of physical-chemical and ecological status of the waters.

4.1 Transposition

Albania transposed the WFD into its national legislation through the adoption of **Law No. 111/2012 on Integrated Water Resource Management ('IWRM Law')**, as amended in 2018. The Government subsequently adopted a number of secondary legislations to further implement the IWRM Law which regulate the institutional arrangements at the national and river basin level, transboundary water management, water inspection, drinking water, water quality and water use.

The majority of the secondary legislation has been concentrated on changing the institutional arrangements, which have been recently rearranged by the 2018 amendments of the IWRM Law. Three of almost twenty bylaws establish substantive standards, such as: DCM No. 379 of 2016 concerning Drinking Water Quality, **DCM No. 246 of 2014 concerning Surface Water Standards and DCM No. 267 of 2014 concerning the Priority Substances in Water Facilities**, while five of them establish administrative standards, such as: **DCM 696 of 2019 on Determination of River Basins, DCM No. 993 of 2020 concerning Water Tariffs, DCM No. 1015 of 2020 on Content, adoption and implementation of the water resources planning documents, DCM No. 1122 of 2020 on National cadastre of water resources and DCM No. 550 of 2020 concerning Standard procedures for water use permits**.

The IWRM Law has introduced key water management concepts of the WFD, such as environmental objectives, Programme of measures, and River Basin Management Plans. However, the transposition of the WFD is still incomplete.

The IWRM Law introduces the management and protection of water resources not at the national level but at the level of each river basin. This new concept brought a new administrative arrangement of institutions. It also requires new environmental objectives set specifically for each water body within a river basin district, a Programme of measures based on water monitoring and the characteristics of each River Basin District, the review of the environmental impact of human activity, and the economic analysis of water use.

The IWRM Law and its bylaws do not transpose many technical requirements, without which implementation of the WFD would be incomplete. The existing legislation does not fully transpose **Annexes II, IV, V of the WFD** in order to establish the necessary technical specifications, therefore an insufficient guidance or standards are provided to set environmental objectives, establish a Programme of measures to achieve those objectives, properly develop River Basin Management Plans, or adequately protect water sources.

However, in 2022, the legislative process commenced for a new Law on water resources of Albania. This new draft Law represents a shift paradigm for the water sector aiming to provide – for all related institutions – the necessary mechanisms to better manage and protect the water resources through an EU standardised approach. The purpose of this new draft Law is to integrate in one legal act the full transposition not only of the WFD, but also of several other water related EU directives.

RIVER BASIN MANAGEMENT PLANS

DCM 696 of 2019, implementing **Article 8 of the IWRM Law**, divides the territory of the Republic of Albania, in function of the management of water resources, into seven water basins: a) the Drin-Buna water basin; b) Mat water basin; c) Ishem water basin; d) Erzen water basin; e) Shkumbin water basin; f) Seman water basin; and g) Vjosa water basin.

Furthermore, **Article 8 of the IWRM Law** provides that the Council of Ministers approves the RBMP, upon prior approval by the National Water Council. According to **Article 11 of the IWRM Law**, each RBMP shall be developed by the Water Resources Management Agency, which is the public entity established and organised both at the central level, as well as at the water basin level through water basin administration offices.

DCM 1015 of 2020 on Content, adoption and implementation of the water resources planning documents further details the necessary content of the RBMP, which transposes Annex VII of the WFD.

Article 17 of the IWRM Law, and the implementing **DCM 1015 of 2020**, provide that the RBMP shall be reviewed and, if necessary, updated every 6 years, with a first review to be conducted in 2027.

ENVIRONMENTAL OBJECTIVES

Article 25 of the IWRM Law provides that the environmental objectives for surface and groundwater bodies, as well as for protected areas, are to be established with the aim of preventing damage to water bodies, as well as protecting, augmenting and rehabilitating all water bodies (both surface and groundwater), taking into consideration their chemical, ecological and quantitative status. This article further provides that the Council of Ministers approves the criteria for setting environmental objectives, which was done with the adoption of **DCM 1015 of 2020**.

Further on, **Annex 3 of the DCM 1015 of 2020 on Content, adoption and implementation of the water resources planning documents** provides a detailed transposition of **Article 4 of the WFD**, followed by **Annex 5 of the same DCM,** which aims to transpose **Annex V of the WFD.**

Annex 3 of the **DCM 1015 of 2020** provides that the environmental objectives should be achieved not later than the end of year 2032.

However, provisions found in **points 1(2)(6)** (concerning the procedure for the setting of chemical quality standards) and **1(3)(6)** (concerning the standards for monitoring of quality elements) of **Annex V of the WFD, are not transposed into this DCM 1015 of 2020**.

Article 4(9) of the WFD, providing that at least the same level of protection must be achieved as provided for by existing Community law (including those elements to be repealed), **has not been transposed** into the Albanian legislation.

REGISTER OF PROTECTED AREAS

Article 34 of the IWRM Law regulates the establishment of protected areas. It also introduces the concept of a register of protected areas to be created, managed and updated as part of the RBMP.

However, there is no further transposition of **Article 6, Article 7(1) and Annex IV of the WFD** on the requirements and how such a Register of protected areas should be established, therefore these WFD provisions remain not fully transposed.

PROGRAMME OF MEASURES

Under **Article 37 of the IWRM Law**, a Programme of measures shall be prepared by the Water Resources Management Agency in cooperation with the water basin administration offices and approved by the National Water Council for each river basin, which should be reviewed every six years, and updated if necessary.

Article 37 of the IWRM Law further provides that such a Programme of measures should be prepared taking into account the results of the assessment of the impact of human activity on the status of surface and groundwater, economic analysis of water use, as well as the analysis of the monitoring results.

Furthermore, **DCM 1015 of 2020 on Content, adoption and implementation of the water resources planning documents** in its **Appendix II**, followed by **Annex IV**, provides a detailed

transposition of Annex VI of the WFD, fully aligned with all the requirements and provisions related to the type of measures by listing in detail all the basic and the supplementary measures. However, **Article 11(3), 11(5) and 11(6) of the WFD** remain weakly or not at all transposed.

According to the **DCM 1015 of 2020**, Programmes of measures must be drawn up by the end of 2028 and put into operation by the end of 2030. The Programmes of measures must be reviewed and, if necessary, updated **by the end of 2029 and every six years thereafter**. Other new or revised measures designed according to the updated programme **must be put into operation within three years of their adoption**.

PUBLIC PARTICIPATION

Article 14 of the WFD ensures that the public is involved in the preparation of an RBMP and its update. This provision has been transposed into **Article 91 of the IWRM Law** and the **DCM 1015 of 2020 on Content, adoption and implementation of the water resources planning documents**.

In **Article 91 of the IWRM Law**, it is established that every natural and legal person has the right to be provided with available information about water resources, and that the public is provided with information on the basic documents and data used for the design of RBMPs, as well as the opportunity to participate in the process of consultation and comment thereof.

DCM 1015 of 2020 provides that the public is informed and involved throughout all the stages of the process.

4.2 Implementation

The National Strategy for Integrated Water Resources Management 2018-2027 is the main framework document for IWRM, which integrates the current policy in Albania, taking into account also the expected risks from climate change, and is based on four main strategic pillars: water for people, water for food, water for environment, and water for industry.

In 2020, the first two RBMPs prepared in accordance with the IWRM Law and the new secondary legislation that transposes the WFD were adopted, namely the **RBMP of Drin-Buna** and the **RBMP of Seman**, followed by the adoption of other two RBMPs in November 2023, namely the **RBMP of Erzen** and the **RBMP of Ishem**.

Overall, there is a weak administrative capacity for water management. River basin management is at an initial stage, with weak basin authorities. The slow progress in RBMPs' development is harming some of the rivers, where intensive habitat alteration is occurring due to gravel extraction and HPP construction. The NGO community remains highly concerned over the lack of SEAs and proper EIAs undertaken for more than 530 small hydropower units planned, under construction or in operation around the country[56].

56 The Alternative View of Environmental Progress: Albania's Negotiations with the EU and Chapter 27 (n 44).

Shushica River, Vjosa Wild River National Park, Albania © Nick St. Oegger

The water governance in Albania appears highly fragmented with little convergence across the sectors. Investment decisions related to water are often made on the basis of single sector considerations. In addition, the role of regional level governance structures in decision making processes pertaining to water management has been considerably weak. The participation of local communities, through community-based organisations, in drafting an RBMP is at best formal.

The developed RBMPs still suffer from the lack of data, since all river basins lack reliable time-series data that would allow an accurate characterisation of the physical-chemical and ecological status of the waters.

In at least two judicial cases against HPPs (Pocem HPP and Shushica HPPs), one of the main arguments brought before the courts were that the projects had not obtained prior approval from the water management authorities, and also that such projects had been approved without being firstly assessed and provided for in the RBMPs.

5 Nature Directives

The Nature Directives are at a partial level of transposition, within the Law on Protected Areas, Law on Biodiversity Protection and Law on the Protection of Wild Fauna.

The provisions of the Habitats Directive, related to necessary compensatory measures required to ensure the overall coherence of Natura 2000, principle of non-deterioration of conservation areas, and management of landscape features of major importance for wild fauna and flora, still need to be transposed.

As regards the Birds Directive, transposition must be completed regarding requisite measures to maintain the population of the species and their habitats at a level which corresponds to ecological, scientific and cultural requirements, and to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

5.1 Transposition

The Habitats Directive is at a partial level of transposition, with the **Law 81/2017 on Protected Areas**[57] and **Law 9587 of 20.07.2006 on Biodiversity Protection** (as amended in 2013, 2014 and 2020) transposing most of the requirements.

The recent amendments (2020) of the **EIA Law (Articles 6(16/1), Article 8(c) and (d), and Article 21)** have enabled the appropriate assessments to be conducted along with the EIA procedure, and have made the reasoned conclusion of such assessment mandatory for the development consent. Derogations apply as well, under conditions specifically provided for in the EIA Law.

In this regard, in line with **Article 6(4) of the Habitat Directive**, the EIA Law amendments of 2020, specifically **Article 21(2)**, provides that when in case of **major reasons of national public interest** the project must be developed – regardless of the impacts on the area identified in the appropriate assessment and in case of absence of alternative choices – the competent authorities can approve the development only on the condition that the developer takes all compensatory measures in order to ensure that the special conservation area does not lose its integrity, taking the opinion of the local self-government unit into account where the project would be developed.

The text of the law does not include the exact wording of the term 'overriding public interest' that would, in a ***comparative*** context, indicate that the other interest overrides achieving the objectives of the Habitats Directive, thus it will be important to see how the authorities will apply this wording in practice.

57 The Law 21/2024, that amended the PA Law 81/2017, was initiated by a group of members of Parliament in November 2023, approved on February 22, 2024, decreed by the President on March 18, 2024, and published in the Official Gazette on March 20, 2024. Considering that at the time of writing of this analysis, the PA Law 81/2017 was legally binding, and that the new Law 21/2024 has not significantly amended provisions that transpose the EU Nature Directives, the current analysis will focus on the provisions of the PA Law 81/2017.

No bylaws have further been adopted for the implementation of the legal provisions related to the appropriate assessment and currently – to the best of our knowledge – there has yet not been any appropriate assessment carried out in accordance with these provisions.

Article 29 of the Law on Protected Areas transposes **Article 4 and Annex III of the Habitat Directive**, while **DCM 369 of 2019 on the procedures for the designation of Special Areas of Conservation** was adopted to implement the above-mentioned Article 29, which provides detailed rules for the designation of the Special Areas of Conservation.

No bylaws have further been adopted for the implementation of the legal provisions related to the appropriate assessment and currently – to the best of our knowledge – there has yet not been any appropriate assessment carried out in accordance with these provisions.

Article 3 of DCM 369 of 2019 provides that the Ministry responsible for the environmental protected areas, after the opening of negotiations with the European Union, starts to coordinate the work for the process of identifying the potential SACs.

Article 32(2) of the Law on Protected Areas transposed **Article 6(1) of the Habitat Directive**, but so far **Article 6(2) of the Habitat Directive** has not been transposed.

Articles 22, 23 and 24 of the Law 9587 of 20.07.2006 on Biodiversity Protection fully transpose **Articles 12 and 13 of the Habitat Directive**, while **Article 16 of the Habitats Directive** remains yet to be transposed in order to fully ensure harmonisation with the species protection provisions.

Furthermore, with regards to the Habitat Directive, further alignment of the legislation is needed to transpose provisions related to necessary compensatory measures required to ensure the overall coherence of Natura 2000, to ensure no measures are taken that deteriorate conservation areas and encourage management of landscape features of major importance for wild fauna and flora (those which are essential for the migration, dispersion and genetic exchange of wild species).

Some requirements of the **Bird Directive** are transposed by the **Law 10006 of 23.10.2008 on the protection of wild fauna, DCM 369 of 2019 on the procedures for the designation of Special Areas of Conservation, DCM 546 of 07.07.2010 on the approval of the list of wild fauna species object of hunting and DCM No. 866 date 10.12.2014 on the lists of types of natural habitats, plants, animals, and birds of interest for the European Union**. However, transposition must be completed regarding requisite measures to maintain the population of the species and their habitats at a level which corresponds to ecological, scientific and cultural requirements and to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds.

Article 4(2) of the Birds Directive, which is a legally binding provision under the Energy Community Treaty, that requires introduction of similar measures for migratory species, **has not been transposed**. Moreover, certain aspects of the EU legislation, such as the obligation to pay particular attention to the protection of wetlands, and particularly to wetlands of international importance, is not provided and/or identified in relation to migratory species.

Several general measures **(Articles 5, 6 and 8 of Law No. 10006 of 23.10.2008 on the protection of wild fauna)** provide for the protection of migration routes and **Article 13 of Law No. 10006 of**

23.10.2008 on the protection of wild fauna regulates the conservation of wild migratory birds. However, the legislation **does not specify that these measures apply to *'regularly occurring migratory species not listed in Annex I'***.

> Furthermore, certain gaps have been identified and the applicable legal framework remains unclear regarding specific legal measures and concepts due to the fragmentation of rules, different use of terms (deviating from the Nature Directives), or the repetition and overlap of relevant provisions. It is therefore not always clear how the applicable legislation regulates the exact relation between Special Areas of Conservation (SACs) and Special Protection Areas (SPAs).

5.2 Implementation

For the proper implementation of the Birds and Habitats Directives, it is firstly necessary to carry out a full transposition of their requirements into national legislation.

The list of habitats and species of Community interest occurring in Albania is adopted[58], although experts consider it can be improved. Additionally, experts have identified several correction/additions to the list[59] of species and habitats of community interests occurring in Albania, but the list of species and habitats types in the annexes are not yet complete for correct application of the Directives.

There is limited information on the population of bird species present in Albania, as well as for inventories and monitoring of bird species. Likewise, there is no full assessment of Annex I (Bird Directive) bird species and regularly occurring migratory species.

Not all potential Sites of Community Interest (SCI) are well defined in terms of boundaries, as more detailed habitat mapping is required within the sites. The proper definition of potential SCIs boundaries requires national experts to be engaged on activities of habitat mapping and species distribution areas on each of the proposed sites. There are only two sites on the proposed list covering the marine area, although Albania has a significant coastline and important marine biodiversity values. None of the proposed sites is designated yet as a Natura 2000 site.

The preliminary list of Sites of Community Interest developed by the NaturAL project includes 44 sites[60] covering existing protected areas, as well as areas not yet under protection. The list is based on the Emerald network, expert knowledge and limited existing data. The list includes all internationally recognised (Ramsar, World Heritage Sites, Biosphere Reserves, IBAs) sites in Albania, some of which are already under protected areas.

Moreover, detailed habitat maps covering all the country are missing. Knowledge about distribution area of species (which might require site designation) is limited and/or scattered. The knowledge gap is larger on marine biodiversity, while the invertebrates are the least known group of species with the biggest data gap on their presence and/or distribution.

58 DCM 866 of 10.12.2014 on approval of the list of natural habitat types, plants, animals and birds with interest for European Community
59 The Alternative View of Environmental Progress: Albania's Negotiations with EU and Chapter 27, (n 44).
60 Ibid., p. 92.

Even though the process of identification of Natura 2000 sites has commenced, no conservation measures or management plans have been adopted for any of the identified special areas of conservation, as provided for by Article 6(1) of the Habitat Directive and **Article 32(2) of the Law on Protected Areas**.

There are no specific measures to ensure that bird populations are maintained at appropriate levels, both inside and outside SPAs. It is necessary to develop a site/habitat management plan and/or specific species conservation action plans defining protection safeguards and list of appropriate conservation measures. In addition, it is important to support the implementation of such measures in selected sites.

There is no system for monitoring of conservation status of habitats and species in place yet. The national biodiversity monitoring programme is not regularly implemented and not in line with the real needs of habitat and species monitoring requirements. Therefore, it is necessary to develop an appropriate monitoring system for conservation status of habitats and species. It is necessary to strengthen capacities of relevant institutions to implement the appropriate monitoring and data collection system and ensure proper reporting.

In 2019, the National Agency of Protected Areas launched the project for the revision of the Protected Areas, which was concluded with three Decisions of the Council of Ministers in 2021. These three DCMs provided for the revision of the boundaries of: the National Parks, Natural Parks, and the Vjosë – Narta Protected Area.

As was reported by a civil society organisations[61] since the beginning of the process, a good part of the protected areas was removed from protection and these are mainly areas of high interest for development near the coast.

The revision of protected areas must be done according to the legal criteria provided by the Law on Protected Areas, specifically Article 35 and 36 of the Law. The process of revising the borders of the protected areas did not comply with the above legal requirements, therefore 11 environmental organisations, led by the Albanian Ornithological Association (AOS), turned to the court with a request for annulment of the decisions of revising the borders of National Parks and Natural Parks, in the reduction of protected areas. The cases are being examined in the Tirana Administrative Court of Appeal.

In parallel with these two processes, the lawsuit for the review of the borders of the Vjosë – Nartë area, submitted by two organisations – AOS and PPNEA – is also being considered in the same court.

As explained in the EIA section of the report, protection of the Vjosë – Nartë area was also the subject of international legal processes, namely, in 2016 a complaint was brought before the Bern Convention by EcoAlbania with concerns regarding the construction of hydropower plants on the Vjosa River in Poçem and Kalivaç, as well as an airport within the boundaries of the Protected Area Vjosë-Nartë in Albania. In their Recommendation no. 202 (2018), the Standing Committee of the Bern Convention stated that the precautionary approach should be applied by suspending the two hydropower projects until the necessary additional assessments – including an integrated River Basin Management Plan and a strategic environmental impact assessment including social aspects, particularly the potential for ecotourism – has been carried out[62].

61 Planned revision of Albania's protected areas, Euronatur, available at: https://www.euronatur.org/en/what-we-do/news/planned-revision-of-albania-s-protected-areas; The battle to keep Albania's protected areas protected, BirdLife, available at: https://www.birdlife.org/news/2020/04/17/the-battle-to-keep-albanias-protected-areas-protected/

62 Presumed negative impact of developments on the Vjosa River including hydropower plant development and Vlora International Airport, (n 45).

Upper Neretva River,
Bosnia & Herzegovina
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Bosnia and Herzegovina

Note to readers:

Considering the Constitutional arrangement of Bosnia and Herzegovina that is designed in a matter where the division of competences between the state and federal units ('entities') is done so that entities carry the majority of competences, including the area of environment and energy, the following analysis will focus on transposition and implementation of the EU Directives on the entity level, namely in Republika Srpska and Federation of Bosnia and Herzegovina.
The analysis does not focus on the legislation of the District Brčko, a self-governing administrative unit within Bosnia and Herzegoivna.

6 EIA Directive

6.1 Republika Srpska

The EIA Directive in Republika Srpska has been transposed to a great extent within the Law on Environmental Protection and Rulebook on projects that require an EIA and criteria for determining if the EIA is needed and its scope. The Law and bylaws ensure that all hydropower projects, regardless of their energy capacity, are covered by the EIA procedure. Hydropower projects with an energy capacity of 5MW and above always require an EIA Report, while smaller projects need to go through the screening procedure.
The legislation, however, falls short in properly transposing the criteria for the screening procedure listed under Annex III of the Directive, as it does not list some of the key criteria, such as the risk to human health or full list of criteria to determine the type and characteristics of the potential impact.

Finally, the Law falls to properly ensure that the EIA report and the EIA consent are 'up-to date' when renewing and revising the environmental permit, as required by Article 8a(6) of the Directive.

6.1.1 TRANSPOSITION

Harmonisation with the EIA Directive was done through the adoption of the **Law on Environmental Protection** ("Official Gazette of RS", nos. 71/12, 79/15, 70/20). **Articles 60-79** regulate the EIA procedure and transpose a great deal of provisions from the EIA Directive. Secondary legislation transposing the annexes to the EIA Directive are the **Rulebook on projects that require an EIA and criteria for determining if the EIA is needed and its scope** (No. 124/12) ('Rulebook'), and the **Guideline for content of the EIA** (No. 108/13) ('Guidelines').

The EIA screening procedure is introduced at the early stages of project development, as it consists of two phases: 1) the preliminary assessment, and 2) the EIA itself. The preliminary assessment is required before other permits, such as the location permit.

The **Rulebook** transposed **Annex I, II and III of the EIA Directive. Article 2 of the Rulebook** lists projects that always require an EIA. Under **point a)(4)**, projects for production of hydroelectric energy with a power of 5MW or more always require an EIA, as well as dams and other installations designed for the holding and accumulation of water, where a new or additional amount of water held back or accumulated amounts to 10 million cubic metres and more **(point e) (4))**. Although the latter requirement is listed under Annex I of the EIA Directive, the former goes beyond the EIA Directive as it recognises that hydropower projects with an energy capacity of 5MW or more have a significant impact on the environment and thus require an EIA report.

Article 3 of the Rulebook lists projects that should be subject to the screening procedure after a case-by-case examination. **Point a)(9)** regulates installations for production of hydroelectric energy (except those listed under Article 2), while **point d)(9)** requires dams and other installations designed to hold water or store it on a long-term basis (except those listed under article 2), to be subject to the screening procedure. The Rulebook thus ensures

that all hydropower projects are covered by the environmental impact assessment procedure, regardless of the energy capacity threshold. This is a good example of properly transposing the EIA Directive, and the case law of ECJ[63], as it ensures that **small hydropower projects are not exempt in advance from the procedure due to their energy capacity**.

Furthermore, **point I)(8)** states that any change or extension of projects listed in Articles 2 and 3, already authorised, executed or in the process of being executed, which may have a significant adverse impact on the environment, shall also be subject to the screening procedure.

Apart from projects listed in the Rulebook, **Article 63 of the Law** states that the EIA is also necessary for:

- Significant changes to these projects, where such a change or extension in itself meets the thresholds set by these regulations;
- Projects listed in the Rulebook where the increase in production, energy use, use of water, space, emissions or production of waste in the last ten years exceeded 25% from the determined values; and
- Decommissioning of the plants or their demolition.

Although **Article 63** goes further in environmental protection than the EIA Directive, it is not clear from the Law if this provision provides for a mandatory EIA procedure or just the screening procedure. If indeed the projects need to go through the mandatory EIA, one could wonder if it also applies to projects listed under Article 3 of the Rulebook that initially required only the screening procedure.

Article 4 of the Rulebook provides that Ministry may decide to subject certain project to the screening procedure even though they do not meet the prescribed threshold, if it finds that the project would still have a significant impact on the environment, due to:

- the significant sensitivity of the environment in the area;
- the special measures of environmental protection of the area; or
- the significant impact of the project on the environment of the other entity, District Brčko or other countries.

Thus, it is up to the competent authorities to decide whether to initiate the environmental impact assessment procedure in these instances. **These provisions go beyond the EIA Directive and again ensure that projects are not excluded in advance from the procedure due to the threshold set under the law**.

Under **Article 6 of the Rulebook**, when conducting a screening procedure (all projects that do not require a mandatory EIA), the authorities need to base their decision on the set of criteria.

63 See: Case C-392/96, Commission v Ireland, para. 66.

However, this Article **does not fully transpose all the criteria listed under Annex III of the EIA Directive**. For instance, when assessing characteristics of the project, assessment of the **risks to human health** (for example, due to water contamination or air pollution) **(Annex III, point 1(g) EIA Directive)**, is not listed as one of the criteria. Similarly, when assessing the **type and characteristics of the potential impact**, the competent authority is not obliged to assess:

- the nature of the impact; (Annex III, point 3(b))
- the transboundary nature of the impact; (Annex III, point 3(c))
- the intensity and complexity of the impact; (Annex III, point 3(d))
- the cumulation of the impact with the impact of other existing and/or approved projects; (Annex III, point 3(g))
- the possibility of effectively reducing the impact (Annex III, point 3(h)).

Article 72 of the Law further obliges the operator to submit the EIA report for an independent revision, where the scientific quality of the assessment will be checked. The revision of the report should be carried out by a competent legal person that fulfils the conditions set out in the **Rulebook on conditions for performance of activities in the area of environment** ("Official Gazette of Republika Srpska", nos. 28/13, 74/18). **Article 72(3) of the Law** lists exact points that the revision needs to assess, such as inter alia: ***sources and accuracy of data provided in the report (point b), professional validity of the description, analysis and assessment of conclusions and positions given in the report***.[64] **Article 72(4)** further limits the possibility for revision to be done by, among others, the investor or the company that prepared the EIA report[65]. The provision itself thus theoretically ensures the quality of the report.

According to **Article 73 of the Law**, the decision to approve the EIA report (reasoned conclusion) shall cease to have effect if the project holder fails to obtain a construction or environmental permit (development consent), or any other decision in accordance with special regulations within a period of two years from the date of receipt of the decision. As a logical connection with the process of obtaining the development consent, the Law sets a timeframe for validity of the reasoned conclusion[66], as encouraged under **Article 8a(6) of the EIA Directive**, however it does not require from the competent authority to be satisfied that the reasoned conclusion is up-to-date, regardless of the timeframe.

64 The full list of points that need to be revised according to the Article 72(3) of the Law are as follows: *(...) a) compliance of the scope and content of the impact report with the decision from Article 66 of this law, legal acts and bylaws in the field of environmental protection, technical norms and standards which refer to the activity planned by the project, with republic strategic documents from the area of environmental protection and local planning documents in the field of environmental protection in the territory where the project would be carried out, if these documents were adopted; b) sources and accuracy of the data specified in the impact report; v) the professional validity of the description, analysis and evaluation of the conclusions and positions given in the report of the impact on the current state of the environment, possible impacts on the environment, measures for removal, reduction or prevention of harmful effects on the environment and other and g) the existence, scope and quality of the special part of the impact report and the existence of the Management Waste Plan from Article 68, paragraphs 2 and 3 of this law.*

65 Full list of persons that would be in conflict of interest is as follows:
The writer of the report cannot carry out the revision referred to in paragraph 1 of this article, nor can the following persons: a) applicant; b) persons who work for the applicant on the basis of an employment relationship or contract; v) persons who work for the authorised legal entity that created the report on the basis of an employment relationship or contract; g) spouses, blood relatives up to the fourth degree of kinship and in-law relatives up to the second degree of kinship of the persons listed in point a) to c) of this paragraph; d) an auditor who did not create or revise at least one report for the project that is the subject of the audit.

66 Before the amendments of the Law in 2020, the Law even included a provision number 98(7) that allowed for an expired environmental permit to be replaced by a new one, without conducting an Environmental Impact Assessment, if there was no significant change in the conditions under which the environmental permit was issued previously. In the 2020 amendments, this provision was deleted.

Under **Article 90(7) of the Law**, the environmental permit (development consent) shall be valid for 5 years. The competent authority is obliged under **Article 94** to conduct a revision and renewal of the environmental permit according to the **Rulebook** o**n the procedure for revision and renewal of the environmental permit** ("Official Gazette of RS", no. 28/13).

The renewal is initiated by the investor not later than 3 months before the expiry of the permit, while the competent authority can initiate an ex officio revision of the permit **(Art. 95)**. Both **Article 95 of the Law** and the **Rulebook on the procedure for revision and renewal of the environmental permit** contain a list of reasons for revision of the permit, but these are not harmonised. For instance, the Rulebook specifically provides that if there is a **danger of damage caused by the pollution, or if the damage has already occurred, the competent authority is obliged to conduct an ex officio revision of the permit**. This has, however, not been provided for in the Law.

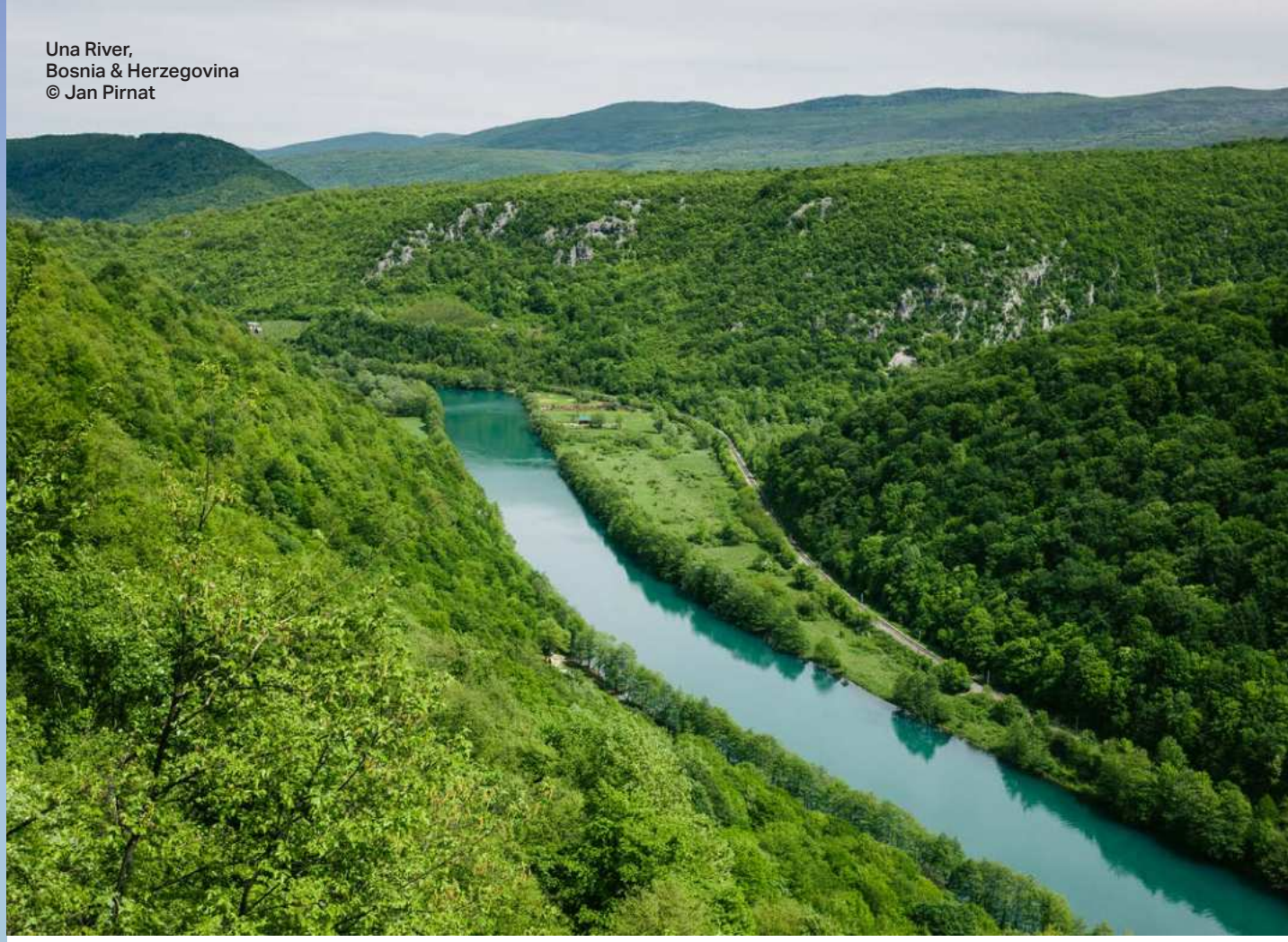
Furthermore, **Article 95(2) of the Law** specifically enables individuals that live in the proximity of the facility that can have a negative impact, to request from the authorities to initiate the revision procedure, however it is not stated if environmental NGOs and public concerned would have the same right.

However, it is important to note that the renewal and revision of the environmental permit does not lead to the renewal of the EIA Report. The Law also does not state any time limit on how many times the permit can be renewed or revised. Considering also that the EIA Report does not have a time limit similar to the environmental permit, this would mean that the developers can rely on reports as old as 10 years or more when renewing the environmental permit.

In connection to this, the construction permit has a 'life-time' validity, meaning that once it is issued and the initial construction works start, the developer has a permanent construction permit (that does not expire), which enables it to legally perform construction, regardless of the validity of the environmental permit that is issued for the duration of 5 years. Moreover, court cases have proven that the construction permits cannot be challenged only due to the environmental permit expiration[67].

This, however, raises the question of proper alignment with **Article 8a(6) of the EIA Directive**, since in practice the environmental permit that is issued within two years can then be renewed several times based on an old and outdated EIA consent. The reasoned conclusion must be 'up-to-date' at the moment when a development consent decision is taken. In other words, the EIA report should not become obsolete due to e.g. changes in a given location, biodiversity, alternative solutions or changes in relevant regulation, **and it is a duty of the competent authority to determine if the reasoned conclusion is still up to date**. The practical implications of these provisions will further be explained in the implementation part of the report.

67 In a case before the District Court of Banja Luka no.: 11 0 U 03143222U against a decision to issue a construction permit for HPP "B2a" on the Bistrica River from 23.01.2023, the Court has stressed that the legality of a legal act is being assessed based on the state it had at the moment that it was issued, meaning that reasons that happen after its issuance cannot be seen as reasons for its annulment. Thus, the non-existence of an environmental permit at the time that the construction started cannot be a reason to annul a construction permit.



Una River,
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Article 96 of the Law deals with the cases of significant changes to the project during the validity of environmental permit. The investor is obliged to notify the competent authority if, during the validity of the permit, changes to the nature or the functioning of the facility or the expansion of the facility that are likely to have an impact on the environment are planned. If more data is necessary in order to determine the significance of the change, the competent authority can ask the investor to provide an opinion of the competent legal person competent in the area of the environment, about the likely impact of the change on the environment. The competent authority will decide whether the planned change is significant within 30 days from the day it received the data. If the change is considered to be significant, the competent authority shall notify the investor to request a new environmental permit that would include data on the existing and planned part of the facility. The procedure for issuance of the new permit – in case the change is found to be significant – also requires for an environmental impact assessment procedure to be carried out prior to the permit, if the planned part of the facility falls under the list of projects from **Article 63 of the Law (Annex I and II of the EIA Directive)**. In the case of the EIA, the procedure will cover both the existing and planned part of the facility.

However, the provision seems to put the obligation of assessment of significance of the change on the external private company of the developer's choice, rather than obliging the authorities to carry out an EIA procedure under **Article 4 of the Directive**. This is important also from the point of access to justice and transparency of the assessment of changes to the project, considering that the provisions are more designed as a direct communication with the developer, rather than making sure that the public is properly informed of the procedure, and able to challenge it.

6.1.2 IMPLEMENTATION

Although the transposition of the EIA Directive in the legislation of Republika Srpska has been carried out in a great extent, the implementation of the national environmental legislation when approving hydro-energy projects has seen some significant shortcomings.

One of the main issues in implementation that is going to be discussed in this section, concerns the quality and up-to dateness of the EIA Reports and data provided therein, as well as fact that comments provided by civil society during the public consultation procedure are rarely taken properly into consideration. Closely connected to the above, the problem of lack of screening of changes of the projects, with an example of HPP "Ulog", will be discussed in more detail.

The shortcomings of the environmental impact assessment legislation with regards to the EIA consent and the validity of the development consent (the construction and environmental permits) was explicitly raised in the 2023 Energy Community Treaty Implementation Report[68]. The Report states that the permits for energy projects, in particular for hydropower projects, are being prolonged and their validity extended for periods longer than ten years based on outdated EIA consents, which is not in line with the EIA Directive[69].

CASE STUDY

One of the most significant examples of this was the approval of the hydropower projects on the Drina River, more specifically **HPP "Buk Bijela"**. The national NGOs challenged the projects at a national level and also complained to the **Espoo Convention Implementation Committee** and to the **Energy Community Secretariat** respectively, claiming that the initial EIA consent and the environmental permit were issued between 2011 and 2013, and then renewed in 2019 based on the old EIA report. According to the complainants, the reports were of poor quality, failing to specify exactly which species are present at the site, using old hydrological data, failing to assess the cumulative impacts of the three dam projects, and failing to properly assess the transboundary impact on Montenegro. During the renewal procedure, the authorities did not request a new environmental impact assessment procedure, which means that the environmental permit was based on an outdated EIA report and was not in line with the amended EIA Directive. Montenegro expressed their concerns over the projects within the transboundary EIA procedure, as well as before the Espoo Convention Implementation Committee and the impact they are likely to have on the UNESCO protected Tara National Park. In December 2023, the Espoo Committee issued a draft decision[70] **stating that Bosnia and Herzegovina was in breach of the Espoo Convention and requesting Bosnia and Herzegovina to conduct a transboundary environmental impact assessment procedure involving Montenegro and, as needed, other affected Parties**[71].

As a result of the dispute, the Energy Community Secretariat initiated **a cross-border dialogue working group** that aims to address the challenges associated with the Buk Bijela hydropower project, located on the border between the two countries[72].

68 2023 Implementation Report Energy Community Treaty, Bosnia and Herzegovina https://www.energy-community.org/implementation/report/Bosnia_Herzegovina.html, p. 14.
69 Ibid.
70 Draft decisions on compliance with the Convention and the Protocol https://unece.org/sites/default/files/2023-10/ece_mp.eia_2023_4-ece_mp.eia_sea_4_e.pdf
71 Ibid., pp. 6–7.
72 https://www.energy-community.org/news/Energy-Community-News/2023/07/04.html

Concerns over poor quality of data and research in the EIA reports was also raised in the complaint to the **Energy Community Secretariat** concerning the **HPP "Ulog" and 7 hydropower plants in the candidate Emerald site Upper Neretva**. Work on the Ulog plant started for the first time in 2013, but in July that year two fatal incidents took place and the works were stopped. After this, the works were put on hold while more research was conducted, but in 2017 the project was redesigned with the dam slightly further downstream. The investor notified the authorities about the changes to the project, supporting it with the Expert Opinion stating that the changes are not significant. The authorities confirmed in the form of a letter that the changes are not considered significant, without carrying out the screening procedure as required by **Article 4.2 of the EIA Directive**. The fact that no proper screening procedure was conducted is a breach of the EIA Directive, as confirmed by the Court of Justice in the Case C-72/95[73].

On the other hand, the 7 hydropower projects **HES "Upper Neretva"** was divided into two phases. Initially, in 2012, the investor was obliged to carry out an environmental impact assessment. The approval of the EIA report expired in 2020, and the investor submitted a new screening procedure for Phase I (which included 3 out of the 7 plants). This time the Ministry decided during the screening procedure that no EIA is needed, disregarding the opinions of other competent authorities. For instance, the Ministry of Health and Social Protection criticised the outdated information provided by the developer, whilst the Institute for the Protection of Cultural-Historical and Natural Heritage expressed their objections to the project due to the sensitivity of the area and plans for its protection, old hydrological and climatic parameters, lack of cumulative impact assessment and lack of correct information on flora and fauna.

In May 2020, the Centre for Environment submitted a lawsuit to the Banja Luka District Court challenging the screening decision. In January 2021, the Court agreed with the lawsuit and annulled the decision, stating that the authority failed to explain **how the data and opinions were analysed and how the received opinions were considered**. The Court explicitly pointed to the Opinion received by the Institute for the Protection of Cultural-Historical and Natural Heritage **that the project would significantly impact the principles of nature protection**. Following the court's decision, the authority issued a new decision, obliging the investor to carry out an environmental impact assessment procedure. The preliminary assessment is still being awaited and the project remains pending.

73 See; https://www.enviroportal.sk/uploads/files/EIA_SEA/VykladNOVEof-definitions-annex-I-and-II-EIA-Directive2015en.pdf, pp. 57–59, especially re Case C-72/95 and last para., p. 59.

6.2 Federation of Bosnia and Herzegovina

By adoption of the new Law on Environmental Protection, FBiH has further harmonised the national law with the EIA Directive. The secondary legislation adopted for this purpose is the Regulation on projects for which the mandatory environmental impact assessment is required and projects for which the environmental impact assessment is being decided.

In comparison to the Directive, the new Law goes further than the EU Law by subjecting all hydropower projects to the mandatory EIA procedure, meaning that for every hydropower project, regardless of their size and capacity, an environmental impact assessment study needs to be carried out.

The new Law also introduces the institution of a Professional Commission, with the task to assess the environmental impact assessment study and provide reasons for rejecting the EIA study, and thus the project itself.

6.2.1 TRANSPOSITION

In 2021, the FBiH adopted a new **Law on Environmental Protection** ("Official Gazette of FBiH", no. 15/21), by which they further harmonised the national legislation with the EIA Directives. **Regulation on projects for which the mandatory environmental impact assessment is required and projects for which the environmental impact assessment is being decided** ("Official Gazette of FBiH", nos. 51/21, 33/22 and 104/22) was adopted, transposing Annexes I, II and III of the Directive.

Chapter IX of the Law regulates the environmental impact assessment procedure. Under **Article 67 of the Law**, the EIA procedure consists of two phases: 1) screening procedure (including scoping when the EIA report is needed), and 2) development of the EIA report.

The lists of projects that require a mandatory EIA and those that need to go to the screening procedure are listed in the **Regulation on projects for which the mandatory environmental impact assessment is required and projects for which the environmental impact assessment is being decided**.

Annex I of the Regulation transposes **Annex I of the EIA Directive**. Contrary to the EIA Directive, **Annex I of the Regulation obliges all hydropower projects to go through the mandatory EIA procedure (Annex I (24))**. This is quite a significant update to the EU environmental law, since it recognises that all hydropower projects have a significant impact on the environment.

A list of criteria that the authorities need to consider during the screening procedure is listed under **Chapter IV of the Regulation**, fully transposing the **Annex III of the EIA Directive**.

Apart from projects listed in the Regulation, **Article 68 of the Law** states that the EIA is also necessary for:

- Significant changes to the projects, set under **Article 95 of the Law** where such a change or extension in itself meets the thresholds set by the Regulation;
- Projects where the increase in production, energy use, use of water, space, emissions or production of waste exceeds 25% from the determined values; and
- Decommissioning, demolition and end of work of the facilities.

Regarding the significant changes to the projects, **Article 68** clearly refers to **Article 95 of the Law** where it is explained that the authority is obliged to determine, in the request for amendment of the environmental permit, whether the use of energy, water, space, emissions and waste production exceeds 25% of the determined values. The authority is obliged to assess whether the change is significant, and to ask from the operator to submit a request for a new environmental permit that would include both data on the existing and planned part of the facility. Thus, in comparison to the same provisions in Republika Srpska, the Law in FBiH puts a responsibility of assessing the significance of change on the competent authority rather than on a private company chosen by the operator. However, **it is not clear if this procedure is done as part of the screening procedure, applying the necessary criteria, and if this procedure could be challenged by the public before the competent court**.

Article 78 of the Law ensures for the EIA Report to be subjected to the Professional Commission ('Commission'). The Commission has a deadline to assess the report within 30 days from the day of public consultation. If the report has identified flaws, it is then sent back to the developer in accordance with the comments of the Commission and interested public. An interesting provision in **paragraph 7 states that the report can only be sent once for the amendment, otherwise the developer needs to submit a new report not earlier than 6 months**.

Article 79(2) of the Law lists reasons for rejecting the EIA report. These are as follows:

- If it is determined that the project is likely to significantly pollute the environment or significantly endanger the environment;
- The project is not in accordance with the Strategy for Protection of the Environment of FBiH and the Action Plan for Environmental Protection; and
- The project is not in accordance with the international environmental obligations.

Setting reasons for the rejection of the EIA report is a welcome amendment that ensures legal certainty in the decision-making process. Since the EIA Directive itself does not lists reasons for rejection, in some countries the environmental impact assessment is mainly seen as an additional administrative burden, **rather than a process for assessment of the impact that a project is likely to have on the environment in order for it to be approved or rejected**.

The approval decision of the EIA report (reasoned conclusion) ceases to be valid if the developer does not obtain the construction permit within 3 years. Similarly to **the Law of Republika Srpska, the Law in FBiH sets a timeframe for validity of the reasoned conclusion** by its connection to the development consent, as encouraged by **Article 8a(6) of the EIA Directive**.

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The environmental permit is issued for 5 years. The renewal of this permit can be requested not later than 90 days before its expiry. However, it is important to note that the Law does not ensure for the EIA report to also be revised when the same is requested for the environmental permit, which in theory can create a practice where permits are based on outdated EIA reports.

Similarly to the situation in Republika Srpska, the development consent, such as the construction permit, has a 'life-time' validity, meaning that once it is issued and the initial construction works start, the developer has a permanent construction permit (that does not expire), which enables it to legally perform construction, regardless of the validity of environmental permit that is issued for the duration of 5 years.

6.2.2 IMPLEMENTATION

By adoption of the new Law on Environmental Protection, FBiH has further transposed the EU EIA Directive. The new piece of legislation has thus corrected certain solutions that were not in line with the EU Law, most importantly in the area of access to justice and public participation. However, certain shortcomings are still present in the new legislation which were explicitly mentioned in the ECT 2023 Implementation Report concerning the EIA consent and the validity of the development consent (the construction and environmental permits). Permits for energy projects, in particular for hydropower projects, are being prolonged and their validity extended for periods longer than ten years based on outdated EIA consents, which is not in line with the EIA Directive[74].

Since the Law has entered into force recently, the monitoring of the implementation process is still at its early stages, so the Implementation chapter will focus on the cases initiated during the validity of the previous Law and showcase the issues in implementation identified during the validity of the previous law which the new law was intended to correct.

74 Ibid.

SMALL HYDROPOWER PLANT "OŠTRAC" ON UGAR RIVER"

CASE STUDY

As noted above, the main implementation issues in the FBiH concern the process of public participation and access to justice. One of the most interesting examples was that of **small hydropower plant "Oštrac" on Ugar River**. The **Sport Fisheries Association from Travnik**, as an organisation with the Agreement of cession of fishing rights, challenged a decision for amendments of the environmental permit before the competent Ministry in the Central Bosnian Canton ('Canton'). The Ministry dismissed the appeal, stating that it was not timely, since the deadline for challenging the decision was 15 days from the day the decision was delivered to the party (investor). Moreover, the decision stated that the local fishing Association was also not considered as an Interested Party with active legitimation since they did not participate in the previous procedure for the issuance of the environmental permit.

The Association challenged the decision before the Federal Ministry of Environment and Tourism, as a higher instance authority, claiming their right based on the national law and the Aarhus Convention. The Ministry rejected the appeal, by which they agreed with the interpretation of the lower instance authority. The Association then decided to forward the case to the Cantonal Court in Travnik, that again confirmed the reasoning of the Federal Ministry and dismissed the lawsuit.

Relying on an extraordinary remedy as a last resort, the Association submitted a request before the **Supreme Court of FBiH** for extraordinary re-evaluation of the decision. **The Supreme Court accepted the request, annulled the decisions of Cantonal and Federal Ministries and ordered a retrial**. The Supreme Court challenged the interpretation of the Ministry in regards to the timeline for challenging the decision, and stated that **it would be unacceptable to only ensure the right to challenge the decision from the moment the decision was delivered to the investor, meaning the party that actually initiated the procedure**. Thus, based on the law, the Fisheries Association's deadline for challenging the decision **could only be counted from the moment the decision was delivered to them**.

The Association brought the same cases against the construction and urban permits, which were also successful before the Supreme Court. The decisions of the Supreme Court clearly stated the right of the Association to be an interested party, and an obligation of the Cantonal Court to decide in meritum and not just dismiss the claim. However, in the retrial the competent authority again dismissed the appeals for not being timely, going against the binding Supreme Court decision. This matter is currently before the Supreme Court for the third time.

CASE STUDY

SMALL HYDROPOWER PLANT "DINDO" ON THE LJUTA RIVER

Lack of proper implementation of access to justice in environmental matters provisions was also present in a case of **small hydropower plant "Dindo" on the Ljuta River**. The Centre for Environment (CfE), an environmental NGO from Banja Luka, challenged an environmental permit issued to the investor before the Cantonal Court in Sarajevo. The CfE had previously participated in the public consultation for the EIA study procedure. The Court dismissed the lawsuit due to the fact that claimant was not based in the Municipality of Konjic (location of the plant), but in the City of Banja Luka. Thus, the basis for dismissal was found in the address of the claimant alone. The Court also challenged the status of the interested party of the claimant, questioning if their rights or legal interests were violated by the decision. This case is currently before the Aarhus Convention Compliance Committee[75].

7 SEA Directive

7.1 Republika Srpska

The SEA Directive in Republika Srpska has been transposed to a great extent within the Law on Environmental Protection and Rulebook on criteria for deciding on SEA on environment (No. 28/2013) and Rulebook on the content of the SEA report (No. 28/2013).

The SEA procedure is divided into four phases, namely the preparatory phase, preparation of the SEA Report, consultation phase and the assessment phase.

If the competent authority decides that no SEA is needed, it shall issue a decision that should contain the reasons for not carrying out the assessment, as well as the criteria based on which it was assessed that there would be no likely significant impact on the environment.

Although the Law has transposed the Directive to a great extent, it fails to ensure access to justice against the decisions deriving from the SEA procedure, as required by the case law of ECJ and Article 9.3 of the Aarhus Convention.

7.1.1 TRANSPOSITION

The SEA Directive has been transposed into **Articles 48–59 of the Law on Environmental** Protection ("Official Gazette of RS", nos. 71/12, 79/15, 70/20). Secondary legislation transposing the annexes of the Directive are the **Rulebook on criteria for deciding on SEA on environment** (No. 28/2013) and the **Rulebook on the content of the SEA report** (No. 28/2013).

75 https://unece.org/sites/default/files/2021-11/Communication_CfE_BaH_26.10.2021.pdf

Article 48(1) of the Law transposes **Article 3(2) of the Directive** and lists types of plans and programmes that require the SEA. These are the projects in the area of spatial and urban planning, land use, agriculture, forestry, fishing, hunting, energy, industry, traffic, waste management, water management, telecommunications, tourism, conversation of natural habitats and flora and fauna that set the framework for future development consent for projects regulated by the environmental impact assessment provisions.

Projects from **Article 48(1)**, which determine the use of small areas at a local level and minor modifications to plans and programmes, as well as for the plans and programmes not included in the **Article 48(1)** are subject to the screening procedure based on the set criteria. The **Rulebook on criteria for deciding on SEA on environment** fully transposed **Annex II of the SEA Directive**, meaning the criteria for screening plans and programmes. When screening the environmental problems relevant to the plan and programme, contrary to the Directive, the **Rulebook lists environmental problems in questions, such as air, water, land, climate, flora and fauna, habitats and biodiversity, protected areas, human health, cities and other areas, cultural and historic heritage, infrastructure, industrial and other facilities, etc**.

The decision on conducting the SEA procedure is issued by the authority competent for the preparation of the plan and programme, if based on the set criteria, determines that there is a likely significant effect on the environment. The competent authority for development of the plan or programme is required to obtain the opinion of the competent environmental authority, prior to issuing the decision on the need to carry out the SEA.

Article 51 of the Law lists 4 phases of SEA procedure. These are as follows:

- **Preparatory phase**:
  - Deciding on carrying out the strategic assessment;
  - Deciding on the developer of the SEA report;
  - Participation of interested authorities and organisations.
- **Preparation of the SEA Report**.
- **Consultation phase**:
  - Participation of interested authorities and organisations;
  - Public participation;
  - Consultations with interested authorities, organisations, public from other entity, Brcko District, or other country, if the plan or programme is likely to have an impact on the environment of other entity, Brcko District or other country;
  - Report on the results of consultations with interested authorities, organisations and public.

Softmouth Trout,
Upper Neretva River,
Bosnia & Herzegovina
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- **Assessment of the SEA Report phase** that includes issuance of an opinion of the Ministry on the SEA Report that takes into account the results of consultations with authorities, organisations and the public, and especially consultations with representatives of other entity, Brcko District and other country.

Article 52 of the Law, lists the content of the decision to carry out the SEA report, which needs to refer, among others, to the reasons for carrying out the assessment, or reasons for excluding certain issues and problems from the assessment[76]. When the decision is made that no SEA is needed, such a decision needs to contain **the reasons for not carrying out the assessment, as well as the criteria based on which it was assessed that there would be no likely significant impact on the environment**.

Although this is a welcome provision that obliges the authorities to explicitly state the reasons, in reference to the criteria from Annex II of the Directive as to why the decision was made not to conduct the SEA, it is important to state that the Law does not provide for the possibility of challenging the screening decision.

In the final, forth phase of the SEA procedure, Ministry needs to issue an opinion that takes into account the results of consultations and opinions of the interested authorities, organisations, the public, other entity, other country (in case of transboundary consultations) and Brčko District, as well as the interests of protection, preservation and advancement of the environment, and especially:

76 Decision determining the obligation to carry out the strategic impact assessment for plans and programmes from Article 48(1) of this Law contains:
a) Reasons for carrying out the strategic impact assessment based on the criteria from Article 48 paragraph 3 of this Law;
b) Resume of questions and problems relevant to the environment in the plan and programme that will be assessed within the strategic assessment;
c) Reasons for excluding certain questions and problems from the strategic assessment in the plan and programme relevant to the environment;
d) Elements of the strategic assessment report;
e) Choice and obligations of the subject that is developing the report on strategic assessment;
f) Ways of participation of interested authorities and organisations and the public in the procedure for development and assessment of the report on strategic assessment;
g) Other information important for development of the strategic assessment.

- Degree of impact of implementation of the plan on the environment, by focusing on each individual case and on their cumulative effects;
- Measures and activities planned so that the adverse effect of the plan and programme is minimised or prevented;
- Report on conducted consultations with the relevant authorities and the public;
- Report on consultations with the relevant authorities and the public of other entity, DB and other country;
- Planned monitoring measures on the impact on the environment and planned measures in the case of significant adverse effect anticipated **(Article 57)**.

Before adoption of the plan and programme, the competent authority that adopts the plan and programme shall take into account the opinion of the Ministry in accordance with the interests of protection, preservation and advancement of the environment **(Article 58)**. The opinion on the SEA Report, SEA Report, Report on the results on the participation of relevant authorities, organisations and the public are **integral part of the document basis for the plan and programme**.

In comparison to the screening procedure regulated under **Article 52 of the Law**, where the Ministry is obliged to issue a decision on carrying out or not carrying out the SEA procedure, provisions regulating the final stage of the procedure **only oblige the authority to issue an opinion that becomes part of the plan or programme**.

Regardless of the format in which this is being done, it needs to be stressed that in either case the Law does not ensure the possibility to challenge either the screening decision or faulty SEA procedure once it has been conducted. Additionally, the failure of the authorities to initiate the procedure before adoption of a plan or programme is also something where the public is prevented from challenging and ensuring the authorities remedy the failure not to carry out the impact assessment on the environment.

Although the SEA Directive itself does not contain the access to justice provision, this issue has already been resolved in the interpretation of the Court of Justice, which had already established the right of access to national courts to invoke the public participation rights laid down in EU environmental directives[77], as well as the European Commission[78]. Furthermore, the possibility to challenge the decisions under the SEA Directive is also regulated under **Article 9(3) of the Aarhus Convention** and confirmed by the Aarhus Convention Compliance Committee[79].

77 C-41/11 Inter-Environment, para. 44. and para 46. See, for example, Cases C-72/95, Kraaijeveld ECLI:EU:C:1996:404, para. 56; C-435/97 WWF and Others ECLI:EU:C:1999:418, para. 69; C-201/02 Wells v Secretary of State for Transport, Local Government and the Regions, ECLI:EU:C:2004:12, paras 54 – 61, and C-127/02 Waddenzee, ECLI:EU:C:2004:482, paras. 66–70.

78 COMMUNICATION FROM THE COMMISSION of 28.4.2017 Commission Notice on Access to Justice in Environmental Matters Brussels, 28.4.2017 C(2017) 2616 final, para. 47.

79 As the Aarhus Committee has clarified, 'Article 9, para. 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of "acts" under Article 9, para. 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment' (Report of the Aarhus Committee to the 6th MoP on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, para. 50).

7.2 Federation of Bosnia and Herzegovina

By adoption of the new Law on Environmental Protection, FBiH has further harmonised the national law with the SEA Directive.

Although the new Law included more articles on the SEA procedure than the previous one, it still contains some significant shortcomings in comparison to the SEA Directive. Namely, the Law fails to fully transpose types of plans and programmes that always require the SEA procedure, as well as those that should be subjected to the screening procedure. Consequently, the Law does not contain any screening criteria.

Similarly to the EIA procedure, the Law envisages the institute of the Professional Commission with the task to assess the SEA study and ensure proper assessment on the environment; however, due to the failure to adopt the necessary bylaws in this area, it is still not clear how this Commission works in practice.

Finally, the Law fails to ensure access to justice for decisions deriving from the SEA procedure.

7.2.1 TRANSPOSITION

The new **Law on Environmental Protection** ("Official Gazette of FBiH", no. 15/21) is a primary legislation in FBiH transposing the SEA Directive. **Article 48(2) of the Law** transposes **Article 3(2) of the Directive** and lists types of strategies, plans and programmes that require the SEA, such as those in the area of spatial and urban planning, land use, agriculture, forestry, fishing, hunting, energy, industry, traffic, waste management, water management, telecommunications, tourism, conversation of natural habitats and flora and fauna that set the framework for future development consent.

However, the **Law fails to transpose other paragraphs of Article 3 of the Directive**, as it lacks the provision on other types of plans and programmes that would require the SEA procedure, such as those that have been determined to require an assessment pursuant to **Article 6 of the Habitats Directive (Art. 3(2)(b) of the SEA Directive)**, or plans and programmes that are required to go through the screening procedure, such as those that determine the use of small areas at a local level and minor modifications to the plan and programme **(Art. 3(3) of the SEA Directive)**, and other plans and programmes which set the framework for future development consent of projects that are likely to have significant environmental effects **(Art. 3(4) of the SEA Directive)**. Consequently, due to the absence of plans and programmes that are required to be subject to the screening procedure, the Law does not envisage any criteria in this regard, and thus fails to transpose **Article 3(5) of the Directive**.

Article 53 of the Law states that the SEA procedure shall be conducted during the development of the draft strategy, plan or programme, before the final proposal of the strategy, plan or programme and its adoption.

According to the above, **Article 50 of the Law** envisages five stages of the SEA procedure, which are as follows:

- Setting the scope and content of the SEA study.
- Assessment of the SEA study by the Professional Commission.
- Consultation phase on the draft strategy, plan and programme, and SEA study, which includes:
  - Participation of interested organisations and authorities;
  - Public participation;
  - Consultations with interested organisations, authorities and the public of the other entity, Brcko District, or other country, if the implementation of the plan, programme or strategy is likely to have an impact on the environment of the other entity, Brcko District and other country;
  - Report on results of the participation of interested authorities, organisations and the public.
- Assessment of the draft strategy, plan and programme and SEA study that includes an opinion of the Federal Ministry that takes into account the results of the assessment of the SEA study by the Professional Commission, consultations with authorities, organisations, and with the public, and especially consultations carried out with the representatives of the other entity, District Brcko or other country.
- Adoption of Report for preparation of the strategy, plan and programme.

Before initiating the procedure for the preparation of the strategy, plan or programme, the competent authority is obliged to obtain an opinion of the competent environmental Ministry regarding the scope and content of the study **(Art. 51)**. The adoption of bylaw that would regulate the scope and content of the study is envisaged under **Article 52 of the Law, however such a document has not yet been adopted**.

Similarly to the EIA procedure, the new Law in the FBiH envisages the Professional Commission tasked to assess the SEA. The Commission is formed by the competent Ministry, and its work is supposed to be regulated by the same bylaw as the one envisaged to regulate the scope and the content of the study **(Art. 56)**. Although the introduction of the Commission can be accepted as a welcome improvement in the proper assessment, **it is still not clear how their work would be done, considering that the necessary bylaw has still not been adopted**, as explained above.

According to **Article 60 of the Law**, the SEA procedure finishes with the assessment of the SEA study by the Commission, which includes the ways in which the environmental questions need to be integrated into the strategy, plan or programme.

Under **Article 61 of the Law**, the competent environmental Ministry provides an opinion on the study within 30 days from delivery of the assessment of the SEA study performed by the Commission. The Ministry is obliged to take into account the interests of the protection, conservation and improvement of the environment, as well as:

- Degree of impact of implementation of the strategy, plan and programme on the environment, assessing every possible impact, including the cumulative impacts on the area covered by the plan, programme or strategy;
- Measures and activities that need to be taken to minimise or prevent the negative impact of the strategy, plan or programme, as well as reasonable alternatives based on the goals and geographical scope of the strategy, plan or programme;
- Report on conducted consultations with competent authorities, organisations and the public;
- Report on conducted consultations with the other entity, District Brčko and other countries; and
- Ways of monitoring of the impact of realisation of the plan, programme, strategy on the environment, and measures that need to be taken if, during the realisation, larger negative impacts on the environment are noted than those envisaged or expected.

Before adoption of the proposal of the strategy, plan and programme, the competent authority is obliged to take into consideration the opinion of the Ministry competent in the area of the environment on the draft strategy, plan or programme. **According to the opinion, the competent authority is obliged to adjust the strategy, plan or programme with the interests of protection, conservation and improvement of the environment (Art. 62**). This is quite a significant provision, as it ensures – at least in theory – that all environmental issues and concerns are harmonised and implemented in the strategies, plans and programmes, and that the SEA procedures exist beyond only fulfilling the procedural requirements.

Finally, similarly to the Law in Republika Srpska, the Law on Environmental Protection of FBiH, does not provide for access to justice provision, meaning the possibility of challenging the decisions deriving from the SEA procedure.

7.3 Implementation

The implementation of the Directive between the entities and District Brčko has been developing with different speed and efficiency, depending on the process of transposition and harmonisation of national laws with the ones of the EU. Due to the earlier transposition of the Directive in the Law of Republika Srpska, this process has started much earlier than in the other parts of the country[80].

> However, the main difficulties in implementing the SEA Directive across the entire territory of Bosnia and Herzegovina derives from the decentralised state organisation of the country, and division of competences in the area of the environment between the state and the entities. Namly, under the Constitution of Bosnia and Herzegovina, the presumption of competences lies on the entities rather than on the central government, which means that the entities have much wider competence to regulate this area than the central government. The area of environment is in the exclusive competence of the entities, which makes it difficult to ensure unified strategic assessment that would cover the entire territory of the country. This problem has also been highlighted in the ECT Implementation Reports, where the main challenges for implementing the Directive have been seen for plans and programmes that concern both entities and are adopted on a national level[81].

Certain procedures initiated at the state level, such as the Framework Energy Strategy till 2035, which was adopted at a national level without SEA, were still not initiated at an entity level. Similarly, SEAs for the draft National Energy and Climate Plan (NECP) have also not been initiated properly despite the draft being at an advanced stage[82]. More specifically, the civil society has complained that the Ministry of Foreign Trade and Economic Relations did not properly initiate the public consultations, but rather only notified competent authorities and certain non-governmental organisations via email, rather than notifying the public as a whole. Once the NECP is adopted at the state level, the entities are required to initiate the procedure at the entity level.

One of the examples of unified creation of strategic documents within Bosnia and Herzegovina was also the implementation of the ESAP 2030+ project, with the idea to create an Environmental Strategy and Action Plan for the entire territory of Bosnia and Herzegovina, with strategies and actions plans for all four competency levels, (meaning at the level of entities, District Brčko and the state), where environmental policies would be harmonised as much as possible within the state with those of the EU. In that context, the Report on SEA of Republika Srpska (2022-2032), SEA study of FBiH 2022-2032 and Report on SEA on District Brčko (2022-2032) was created as a basis for the environmental strategies for both entities and District Brčko[83].

80 See, for more details, Emina Veljović, 'Analiza značaja strateške procjene uticaja na okoliš kao alat zaštite okiliša BiH', Heinrich Böll Stiftung, Sarajevo, 2022, available at, https://ba.boell.org/sites/default/files/2022-12/analiza-strateska-procjena-okolisa-16-12-2022.pdf, p. 14.
81 2023 Implementation Report, Energy Community Treaty, Bosnia and Herzegovina, (n 68).
82 Ibid.
83 Veljović, (n 80), p. 17.

CASE STUDY

PLANNED HYDROPOWER PLANTS IN THE UPPER NERETVA BASIN

The problem of lack of coordinated planning and strategic impact assessment procedures between the entities was evident in the case of the **planned hydropower plants in the Upper Neretva Basin**. In Republika Srpska, HPP "Ulog" and the HES "Upper Neretva" comprising 7 small hydropower plants were planned, while in the FBiH three bigger projects – namely HPP "Bjelimici", HPP "Bjelimici II" and HPP "Glavatičevo" – were planned, within the complex of 70 planned hydropower projects in the river basin. On the other hand, the Strategy for integrated water management in Republika Srpska 2015-2024 states that the area is planned for protection within the Emerald and Natura 2000 network, which would mean that the construction of small hydroelectric or other projects that are changing the water regime is forbidden[84]. Thus, a proper strategic impact assessment would help resolve these contracting policies.

8 Environmental Liability Directive

The Environmental Liability Directive has not been transposed or implemented into the legal system of Republika Srpska.

Chapter XII of the Law on Environmental Protection of FBiH contains some of the provisions that are transposing the Environmental Liability Directive; however, the regulation of environmental damage in the FBiH is limited and it does not provide for the comprehensive procedure within which the issue of environmental damage would be regulated.

8.1 Republika Srpska

8.1.1 TRANSPOSITION

Under the Decision of the Ministerial Council of the Energy Community D/2016/14/MC-EnC, Contracting Parties of the Energy Community Treaty were obliged to implement the Environmental Liability Directive by 1 January 2021. **The Environmental Liability Directive has not been transposed or implemented into the legal system of Republika Srpska**.

84 Ibid., p. 19.

Upper Neretva River, Bosnia & Herzegovina © Vladimir Tadić

8.2 Federation of Bosnia and Herzegovina

8.2.1 TRANSPOSITION

Chapter XII of the **Law on Environmental Protection** ("Official Gazette of FBiH", no. 15/21) contains some of the provisions that are transposing the Environmental Liability Directive. The regulation of environmental damage in the FBiH is limited, and it does not provide for the comprehensive procedure within which the issue of environmental damage would be regulated.

Article 4 of the Law contains a **definition of the environmental liability** as 'any damage caused to the protected flora and fauna species and their habitats, water, sea, land and earth's stone crust'. The term **damage** was defined more closely to the Directive as '*measurable adverse damaging effect*', or '*change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly*'.

The regulation of environmental damage in the FBiH is limited, and it does not provide for the comprehensive procedure within which the issue of environmental damage would be regulated.

Article 116 of the Law contains the polluter pays principle provision, stating that the operator of the activity dangerous for the environment is liable for the damage caused to people, property and the environment. **Paragraph 3 of the same article** lists plants and facilities that are considered dangerous for the environment according to the way in which they are operated, materials used or the activities that are being carried out in them. Among the plants listed, **dams and hydropower infrastructure are considered dangerous for the environment**.

Article 119 of the Law states that the operator that carries out the activity dangerous for the environment is obliged to ensure, or otherwise set monetary amount for special purposes that would be used for compensation in the environment. The operator guarantees compensation for damages with all of its assets.

By **Article 120 of the Law**, if the dangerous activity is causing damage to the environment, the operator is obliged to compensate for the assessment of the damage and costs of measures for restoration to the state that was immediately before the occurrence of damage or mitigation of damage caused to the environment, as well as compensation for damage caused to persons and property caused by dangerous activity.

Finally, **Article 122 of the Law** states that for all other issues regarding environmental damage not regulated by the Law on Environmental Protection, the Law on Obligations – meaning civil law liability – shall be applicable. However, the ELD does not cover criminal liability or liability for traditional civil law damage, such as property damage or personal injury, thus further amendments to the national administrative law are needed in order to harmonise the law with the ELD.

The Law does not contain any provisions ensuring for the public affected or having sufficient interest from the damage to submit any observations to the competent authority relating to instances of environmental damage and request action or have access to the review procedure. Therefore, Articles 12 and 13 of the ELD have not been transposed.

The Law does not contain any provisions ensuring for the public affected or having sufficient interest from the damage to submit any observations to the competent authority relating to instances of environmental damage and request action or have access to the review procedure. Therefore, **Articles 12 and 13 of the ELD have not been transposed**.

8.3 Implementation

As showcased above, the ELD has not been transposed in Republika Srpska, while in the FBiH, the Law on Environmental Protection transposes the provisions of the Environmental Liability Directive with regard to the prevention and elimination of environmental damage.

As a Contracting Party to the Energy Community Treaty, Bosnia and Herzegovina was under an obligation to transpose and implement the ELD and notify the Energy Community Secretariat thereof by 1 January 2021. Since to date no measures necessary to implement the ELD have been adopted, **the Secretariat has opened a case against Bosnia and Herzegovina and submitted a Reasoned Request to the Ministerial Council of the Energy Community Treaty**[85].

85 https://www.energy-community.org/legal/cases/2023/case1023BH.html

9 Water Framework Directive

In BiH, water management and water policy are under the competence of the entities. This means that the transposition of the Directive will be done at the entity level and level of the district. However, the entity laws only regulate the water management within their territories, which might then require a level of coordination that would ensure proper management at the river basin. At present, due to the state arrangement, the Sava River is divided between three water areas as part of the international basin of the River Danube, whilst the international basin of the Adriatic Sea is divided into the two river basins[86].

One of the main shortcomings regarding the implementation of the WFD in the country is the lack of river basin management plans for the entire country or the entire river basin.

As will be shown below, the River Basin Management Plan for the River Sava are divided between the two entities without joint coordination and harmonisation of the Plans.

9.1 Republika Srpska

Transposition of the WFD in the Law of Republika Srpska commenced in 2006 with the adoption of the *Water Law* and a series of bylaws regulating this area.

The WFD provisions relevant to hydropower projects, such as Articles 3, 4, 6, 11 and 14 have been transposed to a great extent.
The implementation of the WFD in Republika Srpska is still ongoing. The first River Basin Management Plans for the period 2016-2021 were adopted in 2016, however they have still not been updated as required by the WFD and the Water Law.

9.1.1 TRANSPOSITION

Water management in Republika Srpska is regulated according to the **Water Law** ("Official Gazette of RS", nos. 50/06, 92/09, 121/12 and 74/17), initially adopted in 2006 with an idea to transpose a number of EU Directives in the area of water management and protection, including the WFD.

Due to its unitary arrangement, the water management in Republika Srpska is in the exclusive competence of the authorities of Republika Srpska. According to the Water Law, the National Assembly of Republika Srpska adopts laws and strategies in the area of water, while the Government of Republika Srpska – on a proposal by the competent Ministry and the public institution "Vode Srpske" – adopts the RBMPs[87].

86 Approximation Strategy of the EU aquis communautaire on environment in Bosnia and Herzegovina, EAS-BIH, May 2017, available at https://www.fmoit.gov.ba/upload/file/2017/EAS-%20FINALNA%20VERZIJA%20%20KOREKCIJE%20MAJ%202017.pdf, p. 102.

87 In 2013, the Agency for waters for the district river basin of the River Sava and the Agency for the waters of the district river basin of the River Trebišnjica were integrated into one institution – the Public Institution "Vode Srpske".

The WFD has been partially transposed into the following legislation:

- Water Law ("Official Gazette of RS" nos. 50/06, 92/09/121/12 and 74/17);
- Regulation on the classification of waters and categorisation of watercourses ("Official Gazette of RS", no. 42/01);
- Decision on the determination of boundaries of district river basins and basins on the territory of Republika Srpska ("Official Gazette of RS", no. 98/06);
- Regulation on means of participation of the public in water management ("Official Gazette of RS", no. 35/07).

RIVER BASIN MANAGEMENT PLANS

Under **Article 23 of the Water Law**, Republika Srpska is divided into two river districts, namely the River District for River Sava and the River District for River Trebišnjica.

Article 26 of the Law provides that an RBMP shall be developed for each river basin district in accordance with the Water Law and the WFD. The public institution "Vode Srpske" is competent for implementation of the water management in the river basins as well as for the preparation of the RBMP, which is then submitted for approval to the Ministry of Agriculture, Forestry and Water Industry. The Government of Republika Srpska is responsible for the final adoption of the RBMPs **(Art. 33 of the Law)**.

> According to **Article 31 of the Water Law**, during the preparation of an RBMP, the public institution "Vode Srpske" is required to coordinate all of the activities with the relevant authorities for the development of the RBMP in other areas of BiH. **It is, however, not clear what this means in practice and to which extent the RBMPs authorities would be working together on coordination and harmonisation of the RBMPs**. This is especially relevant to the RBMPs for river basins that are divided between the entities, or influence one another, which is the case with those in Bosnia and Herzegovina.

Article 26 of the Water Law lists the necessary content of the RBMP in accordance with the Annex VII of WFD. Under **Article 26(3) of the Water Law**, the first and all of the following amendments of the RBMP shall include all necessary elements of the WFD during the period of 6 years.

ENVIRONMENTAL OBJECTIVES

Article 35 of the Water Law lists the environmental objectives that need to be included in the RBMPs for surface water, groundwater and protected areas in accordance with **Article 4(1) of the WFD**. The objectives ought to be achieved not later than **15 years from the entry into force of the Law**.

Criteria for the designation of artificial or heavily modified water bodies in the RBMPs, regulated under the **Article 4(3) of the WFD**, has been fully transposed within **Article 36 of the Water Law**.

Article 39 of the Water Law envisages the possibility of **extension of a deadline** for the achievement of environmental objectives under **Article 35 of the Law**. The reasons for extension of a deadline are aligned with those set out under **Article 4(4) of the WFD** and are limited to a **maximum of one further update** of the river basin management plan, except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

According to **Article 38 of the Law,** less stringent environmental objectives than those set under **Article 35 of the Law** shall be set for specific water bodies when they are so affected by human activity, or their natural conditions are such that the achievement of the objectives would be infeasible or disproportionately expensive, and if the set conditions are met. **Article 38 of the Law** fully transposed the requirements under Article 4(5) of the WFD.

Temporary deterioration from achieving a good status is possible under **Article 35(2) of the Water Law**. In comparison to **Article 4(6) of the WFD**. This provision allows for temporary deteriorations if all practicable steps are taken to prevent further deterioration and in order not to compromise the achievements of the objectives but does not takes into account other conditions that must be met in **Article 4(6)(b-e)**. Thus, **Article 4(6)(a) of the WFD** is not properly transposed.

Article 4(7) of the WFD provides exceptions to the achievement of good status in cases of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent status deterioration of a body of surface water, as a result of new human activities. This provision has been transposed under **Article 37 of the Water Law**, with the exception that the Law does not require for **the condition for the reasons for those modifications to be reviewed every six years**.

Article 4(2) of the WFD, which requires additional requirements to be included in the RBMP in order to ensure coherence with the Habitats Directive, has not been transposed into the Law.

Articles 4(8) and 4(9) of the WFD introduce two principles applicable to all exemptions, namely that exemptions for one water body must not permanently exclude or compromise the achievement of the environmental objectives in other water bodies; at least the same level of protection must be achieved as provided for by existing Community law (including those elements to be repealed).

However, **neither of these two provisions have been transposed**.

REGISTER OF PROTECTED AREAS

Section V(2) of the Water Law regulates the establishment of protected areas. However, a register of protected areas in accordance with **Article 6(1) and Article IV of the WFD** has not been formed, which was also noted in the *Programme of Approximation of Law of Republika Srpska with acquis communitaire*[88].

PROGRAMME OF MEASURES

Under **Article 27 of the Water Law**, the Programme of Measures shall be included to fulfil the environmental objectives of the WFD and the Law for each river basin, taking into account the results of economic analysis stated in the Directive. The Programme of Measures shall be determined by RBMPs.

This provision briefly mentions as 'basic' measures those one that are required by the Directives mentioned in the WFD and its **Annex VI – Part A**. However, it is not clear if by this the Law ensures as basic measures also those listed under **Article 11(3) b)-l)**. The ***River Basin Management Plan for the Sava River Basin District in RS (2017-2021)*** lists as 'basic' measures those listed under **Article 11 of the WFD** and stresses that the analysis of the basic measures for the RBMP for the Sava River was based on the idea that the basic measures are only the minimum requirements for the implementation of the Directive.

As for the 'supplementary measures', **Article 27(2)(b) of the Water Law** directly refers to measures listed under **Article 11 of the WFD and Annex VI – Part B**, or those in force at the time after the second amendment of the RBMP.

However, **Articles 11(5) and 11(6) of the WFD** have not been transposed.

PUBLIC PARTICIPATION

Article 14 of the WFD ensures that the public is involved in the preparation of an RBMP and its update. This provision has been transposed into the **Articles 28 and 29** of the **Water Law** and the **Regulation on means of participation of the public in water management** ("Official Gazette of RS", no. 35/07).

Under **Article 28 of the Water Law**, a timetable and working programme for the production of the plan shall be prepared and published at least three years before the period to which it refers. An interim overview of the significant water management issues identified in the river basin shall be prepared and published at least two years before the beginning of the period to which the plan refers, and draft copies of the RBMPs shall be prepared and published at least one year before the beginning of the period to which the plan refers.

Article 29 of the Law provides details on public consultations requiring a 6 months commenting period for any general act that is in the competence of the public institution "Vode Srpske", and ensures access to all of the documents and information used in the preparation of the draft RBMP.

88 http://www.mvteo.gov.ba/data/Home/%D0%94%D0%BE%D0%BA%D1%83%D0%BC%D0%B5%D0%BD%D1%82%D0-%B8/%D0%92%D0%BE%D0%B4%D0%BD%D0%B8%20%D1%80%D0%B5%D1%81%D1%83%D1%80%D1%81%D0%B8/Program_prilago%C4%91avanja_zakonodavstva_RS_sa_pravnom_tekovinom_EU_u_oblasti_za%C5%A1tite_%C5%BEivotne_sredine.pdf

Upper Neretva River, Bosnia & Herzegovina © Vladimir Tadić

Regulation on means of participation of the public in water management further regulates public participation in the area of water management by ensuring public participation during the:

- Adoption of the Strategy for water management;
- Adoption of the RBMPs;
- Adoption of the Water management programmes (such as Programme of measures or amendments of the RBMPs);
- Adoption of individual decisions within the water sector from competent authorities;
- Draft of individual acts that regulate the water sector;
- Informing the public on works of authorities and incidents;
- Participation in management and work of competent authorities in the water sector.

9.1.2 IMPLEMENTATION

In 2016, the National Assembly of Republika Srpska adopted the **Strategy on integrated water management of Republika Srpska for 2015-2024**, and in 2022, the Strategy on environmental protection (2022-2032)[89] that, among other topics, regulates the issue of water management.

In November 2017, the Government of Republika Srpska adopted the **River Basin Management Plan for the Sava River Basin District in RS (2017-2021)**[90] and the **River Basin Management Plan for the Trebišnjica River Basin District in RS (2017-2021)**[91]. For the purpose of update of the RBMPs, the Public Institution "Vode Srpske" adopted two documents, namely, the Overview of significant questions for water management for the district of river Sava of Republika Srpska and Overview of significant questions for water management for the district of river Trebišnjica of Republika Srpska[92]. **The official update procedure has still not started.** One of the main reasons for the slow implementation according to the **Strategy on environmental protection** are the lack of financial resources for a proper implementation and update of the RBMP[93].

The **River Basin Management Plan for the Sava River Basin District in RS (2017-2021)** mentions three projects identified as those that should fall under Article 4(7) of the WFD – HPP "Foca", HPP "Buk Bijela" and HPP "Mrsovo" – however the Plan does not mention whether any assessment or justification in accordance with the Article 4(7) of the WFD has been conducted for these projects.

9.2 Federation of Bosnia and Herzegovina

Transposition of the WFD in the Law of FBiH commenced in 2006 with the adoption of the Water Law and a series of bylaws regulating this area.

The WFD provisions relevant to hydropower projects, such as Articles 3, 4, 6, 11 and 14 have been transposed to a great extent.

The implementation of the WFD in the FBiH is still ongoing, however it is important to note that the implementation process is already at its second cycle. The first River Basin Management Plans for the period 2016-2021 were adopted in 2016 and updated during 2022. In 2022, the Government of FBiH adopted the River Basin Management Plan for the Sava River Watershed in FBiH (2022-2027) and the River Basin Management Plan for the Adriatic Sea Watershed in FBiH (2022-2027).

89 Strategy on environmental protection of Republika Srpska 2022–2032, https://www.vladars.net/sr-SP-Cyrl/Vlada/Ministarstva/mgr/

90 River Basin Management Plan for the Sava River Basin District in RS (2017–2021), http://www.voders.org/dokumentacija/%D0%9F%D0%BB%D0%B0%D0%BD%20%D1%83%D0%BF%D1%80%D0%B0%D0%B2%D1%99%D0%B0%D1%9A%D0%B0%20%D0%B2%D0%BE%D0%B4%D0%B0%D0%BC%D0%B0%20%D0%9E%D0%A0%D0%A1%20%D0%A1%D0%B0%D0%B2%D0%B5%202017-2021.pdf

91 River Basin Management Plan for the Trebišnjica River Basin District in RS (2017–2021), http://www.voders.org/dokumentacija/%D0%9F%D0%BB%D0%B0%D0%BD%20%D1%83%D0%BF%D1%80%D0%B0%D0%B2%D1%99%D0%B0%D1%9A%D0%B0%20%D0%B2%D0%BE%D0%B4%D0%B0%D0%BC%D0%B0%20%D0%9E%D0%A0%D0%A1%20%D0%A2%D1%80%D0%B5%D0%B1%D0%B8%D1%88%D1%9A%D0%B8%D1%86%D0%B5%202017-2021.pdf

92 Strategy on environmental protection of Republika Srpska 2022-2032, (n 89), p. 16.

93 Ibid.

9.2.1 TRANSPOSITION

The WFD has been partially transposed into the following legislation:

- Water Law ("Official Gazette of FBiH", no. 70/06) ("the Law")[94];
- Decision on the characterisation of surface and groundwater, reference conditions and parameters for assessment of status and monitoring of waters ("Official Gazette of FBiH", no. 1/14);
- Regulation on types and content of plans for protection from harmful effects of water ("Official Gazette of FBiH", no. 26/09);
- Rules on procedures and measures in case of accidents on waters and coastal land ("Official Gazette of FBiH", nos. 71/09, 102/18);
- Rules on the method of determining environmental flow ("Official Gazette of FBiH", nos. 04/13, 56/16, 62/19, 63/22);
- The Decision on river basin borders and water areas in the territory of FBiH ("Official Gazette of FBiH", no. 41/07).

RIVER BASIN MANAGEMENT PLANS

Under Article 23 of the Water Law, FBiH is divided into two river districts, namely the River District for the River Sava and the River District for the Adriatic Sea. The River District Sava is a part of the international Danube River Basin in the territory of BiH, while the River District for the Adriatic Sea is a part of international River Basins for Neretva, Trebišnjica, Cetina and Krka.

According to **Article 39 of the Water Law**, during the preparation of an RBMP, authorities are required to coordinate all of the activities with the relevant authorities for the development of the RBMP for the same river basin in Republika Srpska and District Brčko **in order to ensure a united RBMP in BiH**. Similarly to the Law in Republika Srpska, the Water Law of FBiH requires a level of coordination between the authorities competent for development of the RBMPs. **Article 39 of the Water Law even suggests the idea of having a joint RMPS for the same river basin, but from the implementation perspective it is clear that it has not been done**.

As for the competent authority, two Water Agencies formed for each of the water districts, together with the Ministry of Agriculture, Water and Forestry, are competent for the preparation of the RBMP (Art. 29), whilst their adoption is within the competence of the Government of FBiH **(Art. 40)**.

94 FBiH Water Law ("Official Gazette" no. 70/06) has been prepared with the support of the EU during the 2001-2005 period that focused on the institutional arrangement and harmonisation of legislation within the entities and District Brčko. The main legal instrument in this process was the WFD and Analysis of current legislation in the area of protection of water resources in the Federation of BiH.

Article 25(2) of the Water Law lists the necessary content of the RBMP which fully transposed **Annexe VII of the WFD**, while **Article 25(4) of the Law** envisages that the Government of FBiH will adopt a special act for the content and adoption of the RBMP. However, it seems that **this act has still not been adopted**.

For the achievement of goals for the protection, management, protection from harmful effects and its use, **Article 26 of the Water Law** ensures adoption of Programme of Measures, which are part of the RBMP.

Article 42 of the Water Law ensures that the RBMPs and Spatial plans are harmonised by stating that the Spatial and other similar plans that have an impact on the protection of waters, their usage and regulation shall include protected and endangered areas in accordance with the Water Law.

Under Article 27 of the Law, the RBMPs are required to be updated every six years.

ENVIRONMENTAL OBJECTIVES

Article II (27) of the **Decision on the characterisation of surface and groundwater, reference conditions and parameters for assessment of status and monitoring of waters** ("Official Gazette of FBiH", no. 1/14) states that the 'environmental objectives' are objectives set out under **Article 4 of the WFD**.

Article 30 of the Water Law further lists the environmental objectives in accordance with **Article 4(1) of the WFD**, and sets the deadline for the achievement of environmental objectives, which is **six years from the adoption of the first RBMP**.

Article 4(2) of the WFD states that 'where more than one of the objectives relates to a given body of water, the most stringent shall apply, irrespective of the fact that all objectives must be achieved'. These additional requirements should ideally be included in the RBMP in the part that deals with the protected areas to ensure the coherence between the WFD and Habitats Directives **(article 4(1)(c))**[95]. However, similarly to the Law of Republika Srpska, **this provision has not been transposed into the law of FBiH**.

Article 4(3) of the WFD sets strict criteria for the designation of artificial or heavily modified water bodies. This article has been fully transposed under **Article 33 of the Water Law**.

Article 34 of the Water Law envisages the possibility of **extension of a deadline** for the achievement of environmental objectives set out under **Article 30** of the Law. The time limits laid down in Article 30 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water if:

- completing the improvements within the timescale would be technically impossible or disproportionately expensive; or
- natural conditions do not allow for timely improvement in the status of the body of water.

95 Ibid.

The extension of the deadline and the reasons for it are specifically set out and explained in the RBMPs. Extensions shall be limited to a maximum of two further updates of the river basin management plan, except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

Temporary deterioration from achieving a good status is possible under Article 30(2) of the Water Law. In comparison to the Article 4(6) of the WFD; this provision only sets one condition in which the deterioration will not be in breach of the requirements under the Law, which is if all practicable steps are taken to prevent further deterioration. Thus, Article 4(6) of the WFD is not properly transposed.

Article 4(7) of the WFD provides exceptions to the achievement of good status in cases of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent status deterioration of a body of surface water as a result of new human activities. This provision has been partially transposed under **Article 36 of the Water Law**. In comparison to the conditions set under the Article 4.7 of the WFD, **Article 36 of the Law does not contain the condition for the reasons of those modifications or alterations to be of overriding public interest, or for them to be reviewed every six years**.

Articles 4(8) and 4(9) of the WFD introduce two principles applicable to all exemptions, namely that:

- exemptions for one water body must not permanently exclude or compromise the achievement of the environmental objectives in other water bodies;
- at least the same level of protection must be achieved as provided for by existing Community law (including those elements to be repealed).

However, only **Article 4(8)** has been fully transposed into **Article 37 of the Water Law.**

REGISTER OF PROTECTED AREAS

Section II of the Water Law regulates the establishment of protected areas. **However, so far such register has not been established**.

PROGRAMME OF MEASURES

Under **Article 26 of the Water Law**, a Programme of measures includes three types of 'basic' measures. These are:

- Measures for the protection of waters;
- Measures for the regulation of waters and protection from the adverse effects of waters; and
- Measures for the use of waters.

The Programme of measures can contain also the 'supplementary' measures if they are necessary for the achievement of good status. A list of measures is supplemented in accordance with **Article 11 of the WFD** under **Article 25 of the Law**, where it is also stated that the RBMP shall include an outline of the Programme of Measures as well as the means for achieving them.

PUBLIC PARTICIPATION

Article 14 of the WFD that ensures that the public is involved in the preparation of RBMP and its update has been transposed into the **Articles 28 and 38 of the Water Law**. Under **Article 28**, a working programme for the preparation of the plan shall be notified to the public at least three years before the period to which it refers.

The Water Agency is obliged to ensure active public participation in the process of preparation and development of the plan by notifying in writing the Advisory Council for Waters, canton, city or municipality, and the public. However, Article 38 limits the meaning of the public only to the natural and legal persons located in the area of the river basin district. This is against the WFD and the Aarhus Convention.

The Water Agency is obliged to publish the draft plan not later than one year before the beginning of the period to which it refers. The public can submit their comments in six months from its publication, on which the Water Agency has three months to prepare a report that contains accepted and rejected comments.

However, the Law does not specify if the same procedure applies to the update of the plan.

9.2.2 IMPLEMENTATION

In August 2022, the Government of FBiH adopted the **Federal Environmental Strategy 2022-2032**, that includes seven thematic areas, among others the water management, biodiversity and nature protection[96]. According to the Strategy, transposition of the EU water legislation started in 2006 and its still ongoing.

The first RBMPs for the watersheds of the River Sava and the Adriatic Sea (first cycle) were developed for the period 2016-2021. According to the Water Law and the WFD, the RBMPs have been updated after 6 years[97]. In November 2022, the **River Basin Management Plan for the Sava River Watershed in FBiH (2022-2027)**[98] and the **River Basin Management Plan for the Adriatic Sea Watershed in FBiH (2022-2027)**[99] were adopted.

96 Federal Environmental Strategy 2022-2032, https://www.fmoit.gov.ba/bs/novosti/vijesti/usvojena-federalna-strategija-zastite-okolisa-2022-2032
97 Ibid., p. 24.
98 Decision on adoption of River Basin Management Plan for the Sava River Watershed in FBiH (2022-2027), https://fmpvs.gov.ba/wp-content/uploads/2022/09/07-plan-upravljanja-odluka-75-22.pdf
99 Decision on adoption of the River Basin Management Plan for the Adriatic Sea Watershed in FBiH (2022-2027), https://fmpvs.gov.ba/wp-content/uploads/2022/12/07-odluka-puv-jm-22-27.pdf

According to the Strategy, implementation of the RBMPs during their first cycle (2016-2021) was faced with difficulties, mainly due to the lack of financial resources for their realisation[100]. Reports on the realisation of the RBMPs were being prepared every two years, which means that during the first cycle, Reports for the period 2016-2017 and 2018-2019 were prepared. The analysis of implementation showed unsatisfactory results in the implementation of the planned measures, where for the RBMPs for the district of the River Sava, only 24% of the measures were fully implemented, 27% partially implemented, and 49% were not implemented. Similarly for the RBMP for the Adriatic Sea, 25% of the measures were implemented, 52% were partially implemented, and 23% were not implemented[101].

Regarding the implementation of the environmental objectives, objectives included in the first cycle RBMPs have stayed the same in the second cycle RBMPs, but due to the new knowledge acquired in the last period, a new dynamic of fulfilment of the set environmental objectives has been set. This means that in the previous cycle, the objectives were determined as too ambitious and thus their implementation was not going as planned[102].

The RBMP for the district of the River Sava lists 16 more planned HPPs in the Sava basin for the set period[103]. Concerning the application of the WFD Article 4.7 derogation provision, the RBMP mentions only one hydropower project as the one that can derogate from the fulfilment of the environmental objectives, which is the HPP "Vranduk".

10 Nature Directives

10.1 Republika Srpska

The main legal instrument that regulates issues of nature protection in Republika Srpska is the *Law on Nature Protection.* The Law transposed a great deal of the Nature Directives, by which a baseline for proper implementation was set.

However, the implementation process is still at its early stages, considering that the ecological network has still not been set, and also that a number of necessary implementation bylaws have still not been adopted.

In 2012, the Government adopted the *Regulation on the red list of protected species of flora and fauna of Republika Srpska*, however the list does not include the required category of endangerment. The *Regulation on the Red Book* has not been adopted, while the *Regulation on strictly protected and protected wild species* was adopted in 2020.

As for the Birds Directive, Article 4(1) was transposed in Article 32(2) of the Law, while Article 4(2) of the Birds Directive, which is a legally binding provision under the Energy Community Treaty, has not been transposed.

100 Federal Environmental Strategy 2022-2032, (n 96), p. 25.
101 Ibid., p. 26.
102 Ibid.
103 Ibid., p. 157.

Confluence of Buna and Neretva Rivers, Bosnia & Herzegovina
© Jan Pirnat

10.1.1 TRANSPOSITION

The main legal instrument that regulates issues of nature protection in Republika Srpska is the **Law on Nature Protection** ("Official Gazette of RS", no. 20/14). The Law regulates protection and preservation of nature, biological, geological and landscape diversity as part of the environment in accordance with the Nature Directives.

Although the Law transposed to the certain extent the provisions of the Directives, the ***Approximation Programme of implementation of the EU acquis communautaire on environment into the law of RS*** identified certain deficiencies in the transposition of the Directives, such as the partial transposition of definitions, deficiencies in adoption of measures necessary for protection and prevention of degradation, and their inclusion into the spatial plans, monitoring, partial transposition of the Birds Directive, and so on[104].

As for the competent authorities, the Ministry of Spatial Planning, Construction and Ecology is the competent authority in the area of nature protection. At the local level, the nature protection authorities are the specific departments within the local municipalities. Professional works on nature protection are performed by the Republic Institute for Protection of Cultural-Historical and Natural Heritage, and other professional and scientific organisations, when necessary. The legal person that fulfils professional and organisational conditions can be in charge of the management of protected areas, whilst the public institutions manage the national parks.
The Nature Directive have been transposed into the following legislation:

104 Approximation Programme of implementation of the EU acquis communautaire on environment into the law of RS, Banja Luka, November 2016, p. 101.

- Law on Nature Protection ("Official Gazette of RS", no. 20/14)[105];
- Law on Environmental Protection ("Official Gazette of RS", nos. 71/12, 79/15, 70/20);
- Law on National Parks ("Official Gazette of RS", no. 75/10);
- Rulebook on the content, determining and the manner of implementation of protected areas management measures ("Official Gazette of RS", no. 83/15);
- Rulebook on the manner of establishing and management of the information system for protection of nature and of the monitoring system ("Official Gazette of RS", no. 85/05);
- Regulation on the red list of protected species of flora and fauna of Republika Srpska ("Official Gazette of RS", no. 124/12);
- Regulation on strictly protected and protected wild species ("Official Gazette of RS", no. 65/20);
- Rulebook on registry of protected natural resources ("Official Gazette of RS", no. 55/15).

Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Under **Article 25** of the **Law on Nature Protection, ecological network consists of ecologically important areas, ecological corridors and protected zones**. The Government of Republika Srpska is obliged to adopt the regulation for the setting of the ecological network, as well as the means for its management and financing that would identify ecologically important areas for the EU that would become part of the European ecological network Natura 2000. However, **such a document has still not been adopted**.

The Law also regulates technical and administrative matters regarding the management and protection of the ecological network. **Article 26 of the Law** states that the protection of the ecological network is ensured through implementation of the set protection measures for protection of its biological and landscape diversity, sustainable use and restoration of natural resources and goods, and improvement of protected areas, types of habitats and habitats of wild species.

The Republic Institute for Protection of Cultural-Historical and Natural Heritage ('Institute') shall monitor the status of the ecological network. The manager of the protected area manages the area of the ecological network that is at the same time the protected area.

105 There is an ongoing legislative process concerning the adoption of a new Law on Nature Protection. Public consultations on a draft Law are expected in the coming period.

For the ecological area, a management plan that prescribes measures for protection, restoration and improvement of its status shall be adopted.

Under **Article 67 of the Law**, the Government shall adopt the Regulation on the Red List which lists endangered wild species distributed by vulnerability categories and the Regulation on the Red Book of endangered wild species and habitats that contains detailed information on basic characteristics of a species and degree of its endangerment, factors of endangerment, as well as suggested measures for the protection of the species. In 2012, the Government adopted the ***Regulation on the red list of protected species of flora and fauna of Republika Srpska***, however the list does not include the category of endangerment. The ***Regulation on the Red Book*** has not been adopted.

Under **Article 68 of the Law**, the Government shall adopt a Regulation that determines wild species, strictly protected wild species or protected wild species. The ***Regulation on strictly protected and protected wild species*** was adopted in 2020.

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

Under **Article 26 of the Law,** the protection of the ecological network is ensured through the implementation of special protection measures for the preservation of biological and landscape diversity, sustainable use and restoration of natural resources and goods and improvement of protected areas, types of habitats and habitats of wild species. In the area of the ecological network, measures, methods and technical and technological solutions are applied for protection of the ecologically significant areas and improvement of damaged status of parts of the ecological network. Activities that can compromise and disrupt its functionality, and disrupt or permanently damage the properties and values of individual parts of the ecological network, are prohibited.

Under **Article 29 of the Law**, protection of wild species is ensured through implementation of measures and activities on their protection, their population and their habitats, ecosystems and corridors.

Under **Article 77 of the Law**, for each protected area a management plan[106] shall be adopted for the period of 10 years. For some protected areas, a Protection Act can envisage a shorter duration of the management plan.

Under **Article 78 of the Law,** special planning documents determine protected areas for special purpose areas. For special purpose areas or protected areas of importance for the Republic, or the local municipality, the adoption of a zoning plan is mandatory.

Planning, regulation and use of space, natural resources, protected areas and ecological network is conducted based on the spatial and urban plans, planning and project documentation, foundation and management programmes, and use of natural resources in certain sectors, such as mining, energy, traffic and so on **(Art. 17 of the Law)**. During preparation of these plans, programmes, projects, works and activities, **it is mandatory to obtain the conditions on nature protection from the Institute**.

106 The management plan shall determine the means for implementation of protection, use and management of protected areas, guidelines and priorities for their protection and preservation of natural values of the protected area, as well as the development guidelines by taking into account the needs of the local population. The management plan shall be adopted within two years from adoption of the Protection Act.

Under **Article 19 of the Law**, if, during the process of issuance of nature protection conditions, it is determined that there is a likelihood that plans, programmes, projects, works and activities are likely to have a significant impact on the protection objectives and integrity of ecologically important areas, **the Ministry or the local municipality shall conduct an appropriate assessment**. In the case such plan or activity is subject to the strategic environmental assessment, or environmental impact assessment, the appropriate assessment shall be done within these assessments.

> In the case the appropriate assessment determines that the plan, programme, works and activity can have a significant impact on protection goals and integrity of the ecologically significant area, the authorities shall reject granting of their consent. Therefore, **Article 19(1)(2)(3) of the Law** regulates the appropriate assessment procedure in accordance with **Article 6(3) of the Habitats Directive**.

Article 6(4) of the Habitats Directive, or the derogations from Article 6.3, is further transposed in **Article 19(4) of the Law** that sets out the conditions that need to be fulfilled in order for the project to be allowed to derogate from the protection objectives.

Under Article 19(5) of the Law, it is prescribed that the Government shall adopt the regulation on appropriate assessment procedure, however such a document has still not been adopted.

Article 21 of the Law envisages compensatory measures for mitigation of the adverse consequences from realisation of the plans, programmes, works and activities. The Ministry is obliged to adopt a rulebook on determination of compensatory measures. However, **such a bylaw has still not been adopted**.

PROTECTION OF SPECIES

Regarding protection of species and plants regulated under **Articles 12 and 13 of the Habitats Directive, Article 69 of the Law** and **Article 5** of the ***Regulation on strictly protected and protected wild species*** fully transposed these provisions.

Article 70 of the Law, allows for the derogation from **Article 69 of the Law** in accordance with **Article 16 of the Habitats Directive**.

Birds Directive

Article 31(2) of the Law states that in order to maintain the population of the species of wild birds, all necessary measures shall be carried out, taking account of economic and recreational requirements.

Article 31(3) of the Law transposed **Article 3 of the Birds Directive**, stating that in the light of maintaining or re-establishing a sufficient diversity and area of habitats for all the species of birds, the following measures shall be taken:

- the creation of protected areas;
- the upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
- the re-establishment of destroyed biotopes;
- the creation of biotopes.

Article 34 of the Law provides that in order to define areas to preserve wild birds species, research and activities need to be carried out, transposing the conditions from **Annex V of the Directive**.

Annex I(2) of the ***Regulation on the red list of protected species of flora and fauna of Republika Srpska*** provides a list of the endangered birds species, while the ***Regulation on strictly protected and protected wild species*** lists strictly protected birds species in RS.

Article 32(1) of the Law follows the wording of **Article 4(1) of the Birds Directive** and provides that species of wild birds subject to special conservation measures concerning their habitat, in order to ensure their survival and reproduction in their area of distribution, are:

- species in danger of extinction;
- species vulnerable to specific changes in their habitat;
- species considered rare because of small populations or restricted local distribution;
- other species requiring particular attention for reasons of the specific nature of their habitat.

Article 4(2) of the Birds Directive, which is a legally binding provision under the Energy Community Treaty, that requires introduction of similar measures for migratory species, **has not been transposed**.

Article 32(2) of the Law directly transposes **Article 5 of the Birds Directive** on a general system of protection for all species of birds.

However, Article 9 of the Birds Directive that allows for derogations from the provisions on the protection of birds in case of, among others, public health or air safety, has not been transposed. Similarly, Article 13 of the Directive that provides for the measures not to lead to the deterioration as regards the conservation of the species of birds has not been transposed.

10.2 Federation of Bosnia and Herzegovina

The EU Nature Directives have been transposed in the Federation of Bosnia and Herzegovina under the Law on Nature Protection.

Section IV of the Law regulates the conservation of habitat types and ecologically important areas.

In 2011, the Government adopted the Regulation on Natura 2000 Programme – protected areas in Europe, which further transposes provisions of the Nature Directives.

However, no bylaw on ecological network or appropriate assessment has been adopted to this day, making the implementation in practice impossible.

As for the Birds Directive, Section VI regulates the issue of wild birds, fully transposing the provisions of the Directive.

10.2.1 TRANSPOSITION

The main legal instrument that regulates issues of nature protection in FBiH is the **Law on Nature Protection** ("Official Gazette of FBiH", no. 66/13). The Law provides provisions on protection of species and habitats and protection on wild birds, and ensures conditions and methods for restauration, protection, preservation and sustainable development of all components of nature in the territory of FBiH.

Apart from the Law, FBiH also adopted a number of bylaws that further create a legal framework for the protection of nature and transposition and implementation of the Nature Directives, such as the ***Regulation on Natura 2000 Programme – protected areas in Europe*** ("Official Gazette of FBiH", no. 41/11).
However, the Approximation Programme of the Laws of Federation of Bosnia and Herzegovina with the EU acquis communautaire in the area of environment identified certain deficiencies in transposition of the Directives, such as lack of some definitions, as well as lack of transposition of the accompanying annexes of the Nature Directives[107].

As for the competent authorities, coordinator of activities for harmonisation with the acquis communautaire on nature is the Ministry of Environment and Tourism, while management of protected areas (categories III-VI) at the level of certain cantons falls under the competence of public companies formed for this purpose[108]. At the cantonal level, nature protection matters are in the competence of the Cantonal Ministries for Environment and Cantonal Nature Protection Bureau[109].

107 Approximation Programme of the Laws of Federation of Bosnia and Herzegovina with the EU acquis communautaire in the area of environment, Sarajevo, December 2016, p. 64.
108 Ibid, p. 65.
109 Law on Nature Protection ("Official Gazette of FBiH", no. 66/13), Art. 9.

The Habitats Directive has been transposed into the following legislation:

- Law on Nature Protection ("Official Gazette of FBiH", no. 66/13);
- Law on Environmental Protection ("Official Gazette of FBiH", nos. 33/03, 39/09);
- Law on Hunting ("FBiH Official Gazette", nos. 4/06 and 8/10);
- Regulation on Natura 2000 Programme – protected areas in Europe ("Official Gazette of FBiH", no. 41/11);
- Rulebook on establishing and managing the information system for protection of nature and for conducting monitoring ("Official Gazette of FBiH", no. 46/05);
- Rulebook on establishing the system of intentional keeping and killing of protected animals ("Official Gazette of FBiH", no. 46/05);
- Rulebook on new measures for investigation or conservation in order to prevent the significant negative influence on animal species by intentional capture or killing ("Official Gazette of FBiH", no. 65/06);
- Rulebook on the contents and method of preparation of the protected areas management plan ("Official Gazette of FBiH", no. 65/06);
- Rulebook on conditions of access to protected areas ("Official Gazette of FBiH", no. 69/06);
- Rulebook on the contents and the method of keeping the register of protected areas ("Official Gazette of FBiH", no. 69/06);
- Rulebook on measures for protection of strictly protected species and subspecies and protected species and subspecies ("Official Gazette of FBiH", no. 21/20);
- Rulebook on ways, methods and technical means that least interfere with wild species/subspecies or the habitats of their populations, and limiting encroachment into the habitats of populations of animal species in the time that coincides with their vital periods ("Official Gazette of FBiH", no. 87/21);
- Rulebook on the prohibition of the use of means and methods for killing birds and hunting from means of transport ("Official Gazette of FBiH", no. 102/22);
- Rulebook on the prohibition of the use of means for catching or killing wild animal species and methods of transport ("Official Gazette of FBiH", no. 102/22);
- Red List of wild species and subspecies of plants, animals and fungi ("Official Gazette of FBiH", no. 7/14).

Neretva River,
Bosnia & Herzegovina
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Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Section IV of the Law on Nature Protection regulates the conservation of habitat types and ecologically important areas. **Article 58 of the Law** states that the Government of FBiH shall adopt an act by which the European ecological network of special areas of conservation (Natura 2000) would be formed.

Article 4(1) of the Habitats Directive has been transposed under **Article 59 of the Law** that notes that the Government shall adopt a regulation that will include a list of habitat types and species present in the territory of FBiH.

Once the areas of importance to the EU are identified, the Government of FBiH shall mark these areas as special areas of conservation, not later than 6 years. The Government shall establish priorities in the light of the importance of the sites for the maintenance or restoration. As soon as a site is placed on the list of importance to the EU, it shall be subject to the provisions of the law that prescribe corresponding provisions as those referred to in Article 6(2)(3) and (4) of the Directive. Therefore, this Article directly transposed the provisions under **Art. 4(2)-(5) of the Habitats Directive. However, such a regulation has not yet been adopted**.

In 2011, the Government adopted the **Regulation on Natura 2000 Programme – protected areas in Europe**, which further transposes provisions of the Nature Directives. **Article 4 of the Regulation** sets the criteria for selecting sites eligible for identification of habitat types and species. This provision directly transposed criteria prescribed under **Annex III (Stage I) of the Habitats Directive**.

Article 64 of the Law regulates conservation of habitat types and defines types of endangered habitats as habitat types determined by the Red list of habitats in FBiH.
The Federal Ministry shall adopt the Red List of habitats based on the determined scientific basis[110], however such **a document has not yet been adopted**.

Under **Article 65 of the Law**, areas of endangered and rare habitats are ecologically important areas, which are further defined in Article 67 of the Law.

The Government of FBiH shall prescribe ecologically important areas, ecological network and ecological corridors. However, this has not yet been carried out.

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

Article 60 of the Law fully transposed requirements under **Article 6 of the Habitats Directive**. **Articles 60(1)-(3)** oblige the Government of FBiH to establish the necessary conservation measures together with the appropriate management plans, specifically designed for the site or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the habitat types. The Government is also obliged to establish necessary measures to avoid the deterioration of habitat types and species, as well as to avoid disturbance of species for which the areas have been designated, as far as such disturbances could have significant consequences.

However, it seems that these measures have not yet been prescribed.

Under Article 66 of the Law, the Ministry of Environment and Tourism shall prescribe (via the rulebook) measures for conservation of habitat types in a favourable state. These measures shall be included in the spatial plans and plans for the management of protected areas. All legal and natural persons that conduct activities in these areas are obliged to respect these measures.

Protection of the ecologically significant areas is ensured through implementation of set measures and conditions of nature protection. Interventions and actions that may lead to destruction or some other significant or permanent damage in an ecologically significant area are not permitted (**Art. 68 of the Law**).

However, no bylaw on appropriate assessment has yet been adopted that would allow for proper implementation.

Article 12 of the Regulation on Natura 2000 Programme – protected areas in Europe envisages preparation of management plans in Natura sites that

110 The Ministry of Environment and Tourism currently lists on its website 57 Natura 2000 for FBiH sites https://www.fmoit.gov.ba/bs/okolis/zastita-prirode/ekoloska-mreza-natura-2000/popis-natura-2000-federacije-bih. In 2013, the Red list of flora, fauna and fungi in FBiH was prepared. See Red List of wild species and subspecies of plants, animals and fungi ("Official Gazette of FbiH", no. 7/14), available at: https://www.fmoit.gov.ba/upload/file/2020/7__Crvena%20lista%20ugro%C5%BEenih%20divljih%20vrsta%20i%20podvrsta%20biljaka%2C%20%C5%BEivotinja%20i%20gljiva%20(Slu%C5%BEbene%20novine%20Federacije%20BiH%2C%20broj%207_14).pdf. See Book 2 – Red list of flora: https://www.fmoit.gov.ba/upload/file/okolis/Crvena%20lista%20Flore%20FBiH.pdf, Book 3 – Red List of fauna: https://www.fmoit.gov.ba/upload/file/okolis/Crvena%20lista%20Faune%20FBiH.pdf, Book 4 – Red List of fungi: https://www.fmoit.gov.ba/upload/file/okolis/Crvena%20lista%20gljiva%20FBiH.pdf

would include all the measures for conservation of each Natura site, and lists all the necessary elements that each plan needs to include. The plans shall be adopted for the period of five years **(Art. 13 of the Law)**.

Article 60(3)-(6) of the Law directly transposed **Article 6(3) and 6(4) of the Habitats Directive**, prescribing the obligation to subject plans or projects not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, to the appropriate assessment. However, **no bylaw on appropriate assessment has yet been adopted that would allow for proper implementation**.

PROTECTION OF SPECIES

Article 71 of the Law forbids the deliberate disturbance of wild animals, or their capture, injuring or killing, deliberate removal of wild plants and fungi from their habitats, reducing their populations, or destroying them in any other way, deliberately damaging or destroying habitats of wild species.

Article 80 of the Law states that the Government shall adopt a regulation that would establish necessary measures for the establishment of strict protection of animal species in accordance with Article 12 of the Habitats Directive, while Article 81 notes the same for protection of plant species from Article 13 of the Habitats Directive. However, these regulations have not yet been adopted.

The Rulebook on measures for protection of strictly protected species and subspecies and protected species and subspecies sets measures and activities for the management of these populations.

Article 16 of the Habitats Directive has been fully transposed into **Article 84 of the Law**.

Birds Directive

Article 87 of the Law states that the Government of FBiH shall take the requisite measures to maintain the population of the species at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level. The article thus fully transposed **Article 2 of the Birds Directive**.

Article 88 of the Law transposed **Article 3 of the Birds Directive**, where it is stated that – in the light of maintaining or re-establishing a sufficient diversity and area of habitats for all the species of birds – the following specific measures shall be taken by the Government of FBiH. ***The Red List of wild species and subspecies of plants, animals and fungi*** provides a proposed list of bird species.

Article 89 and Article 90(2) of the Law transposed **Article 4(1) of the Birds Directive. Article 89** provides for which species of wild birds shall be subject to special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, whilst **Article 90(2)** requires to classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land areas where the Directive applies.

Articles 4(2) and 4(4) of the Directive that require the introduction of similar measures for migratory species and steps to avoid pollution or deterioration of habitats have been transposed in **Article 90 of the Law**.

Article 91 of the Law directly transposes **Article 5 of the Birds Directive** on the general system of protection for all species of birds.

> **Article 9 of the Birds Directive** that allows for derogations from protection of birds species in certain situations has been transposed in **Article 112 of the Law**. However, the reading of **Article 112** does not directly refer to the protection of species, but rather to protected plant and fungi species and strictly protected animal species. Because of this, it is not clear what is the difference between this system of derogation from the one prescribed under **Article 84 of the Law** that transposes **Article 16 of the Habitats Directive**. Thus, this should be further amended under the Law.

Article 13 of the Directive that provides for the measures not to lead to the deterioration as regards to the conservation of the species of birds, has been transposed into **Article 98 of the Law**.

10.3 Implementation

As shown above, the level of transposition of the Nature Directives is significant, although the proper implementation is crucial for full protection of species and their habitats, which is still at its early stage.

In Republika Srpska, systematic collection and analysis of biodiversity data that would monitor its status in practice does not exist, and the primary data is mainly contained in a private data base. That means that the current data on flora, fauna, ecosystems and habitats is incomplete[111]. Nevertheless, some steps have been taken in the last period, such as the adoption of the ***Regulation of the Red List of protected species of flora and fauna of Republika Srpska*** ("Official Gazette of RS", no. 124/12) that, however, does not include the category of endangerment of the listed species, nor does it follow the International Red List of the IUCN and its methodology of use[112]. Part of these shortcomings has been remedied with the adoption of the ***Regulation on strictly protected and protected wild species*** ("Official Gazette of RS", no. 65/20).

111 Strategy of Environmental Protection of Republika Srpska 2022-2032, (n 89), p. 42.
112 Ibid., p. 45.

In the Federation of Bosnia and Herzegovina, the ***Red List of wild species and subspecies of plants, animals and fungi*** ("Official Gazette of FBiH", no. 7/14) associated with the R***ed Books of flora fauna and fungi species*** was adopted.

Based on the **Spatial Plan of Republika Srpska until 2025** ("Official Gazette of RS", no. 15/15), it was indicated that, based on its potential, 15% to 20% of the area of Republika Srpska is seen as optimal for being put under legal protection until 2025. However, only 2.76% of the territory is under protection (data until September 2022)[113], while in the Federation of Bosnia and Herzegovina that number is 3.98%[114]. Thus, the percentage of protected areas is relatively low, and significantly less than the European average.

Following the implementation of the project **Support to implementation of the Birds and Habitats Directives in Bosnia and Herzegovina (2012-2015)**, analyses on habitats and species distribution and a Proposal of potential locations for the Natura 2000 were carried out. Within the project, a data base containing the habitats types within selected 122 Natura 2000 sites and their status for the entire territory of BiH was prepared. The locations of the potential Natura 2000 sites were included in the Spatial Plan of Republika Srpska as a basis for the creation of the Ecological Network of Republika Srpska. By the end of 2015, **122 areas (956,776.59 ha) were proposed, which comprises around 20% of the overall territory of Bosnia and Herzegovina**[115]. However, as explained above, no Regulation on ecological networks was adopted in either of the entities to initiate the official setting of ecological networks.

Similarly to the ecological networks, the Governments of both entities have also never adopted any **bylaws that would regulate the issue of appropriate assessment when approving plans and projects that can have an impact on potential Natura sites, Emerald sites or other protected areas, as well as habitats and species**.

113 Ibid., p. 44.
114 Federal Environmental Strategy 2022-2032, (n 96), p. 55.
115 Strategy of Environmental Protection of Republika Srpska 2022-2032, (n 89), p. 46.

PLANNED CONSTRUCTION OF THE HPP "ULOG" AND SEVEN MORE PLANTS PLANNED FURTHER UPSTREAM IN THE UPPER NERETVA CANDIDATE EMERALD SITE

CASE STUDY

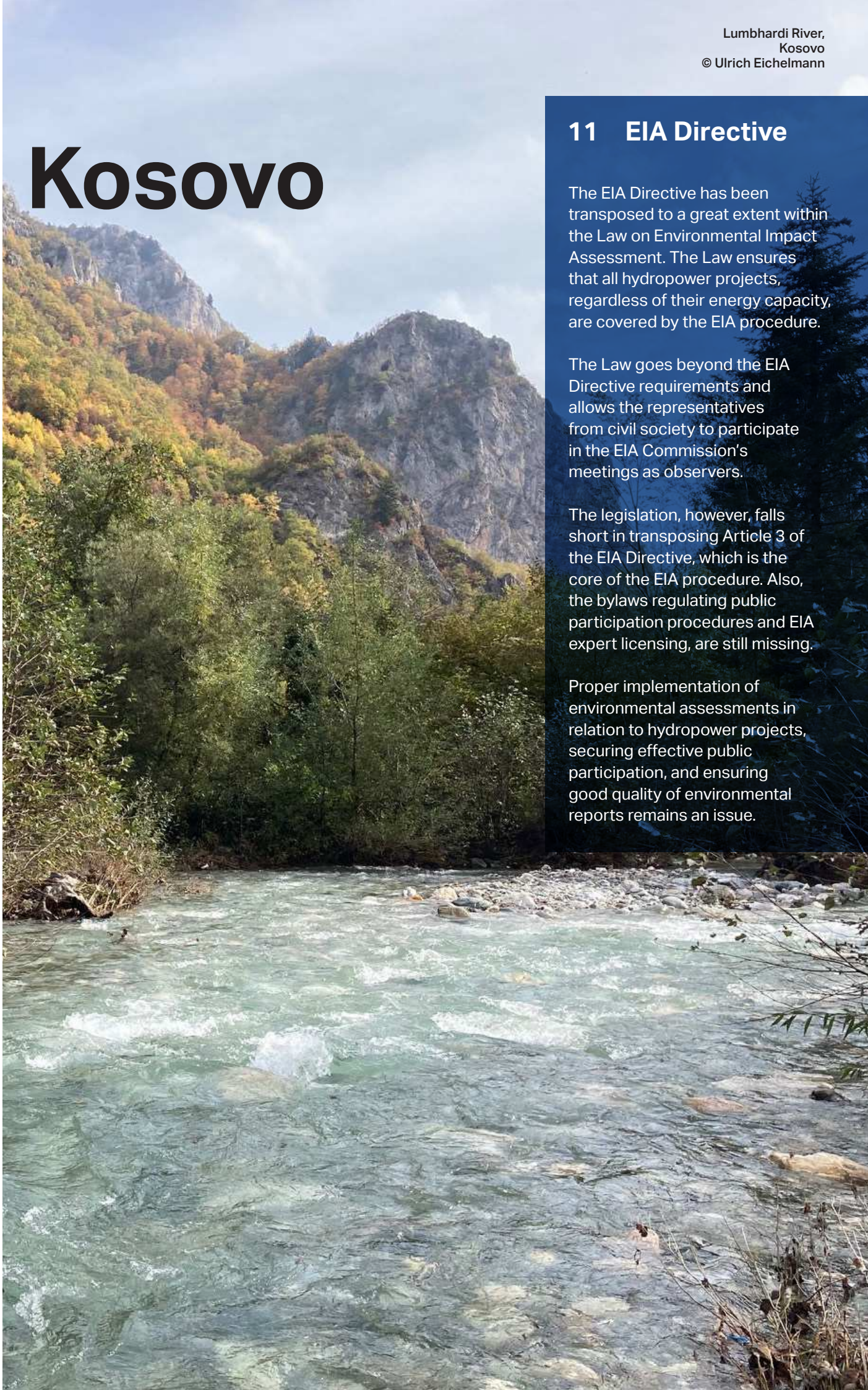
On a project level, one of the most significant nature cases in the past period are the complaints submitted by several national and international NGOs in 2020 to the Bern Convention and to the Energy Community Secretariat regarding the planned construction of the HPP "Ulog" and seven more plants planned further upstream in the Upper Neretva candidate Emerald site, threatening to destroy one of Europe's most precious and valuable river systems.

Although the environmental impact assessment studies for the Ulog project and the other Upper Neretva hydropower projects identified several significant species such as otters and crayfish being present, the government of the Republika Srpska concluded that these projects would not have a negative impact on the environment and could be implemented. Apart from the impacts on the candidate Emerald site, the complainants also argued that approval of the projects was breaching the EIA Directive, that the quality of the EIA reports was poor, and the there was no proper assessment of the cumulative impact of all the planned projects on the river, habitats and species[116].

Following the complaint, the Bern Convention carried out a so-called On the Spot Appraisal (OSA) in October 2022, and in December 2022 the members of the Standing Committee agreed to demand from Bosnia and Herzegovina to halt all hydropower projects and review works, and declare large parts as protected areas instead[117].

116 BERN CONVENTION DEMANDS BOSNIA-HERZEGOVINA TO STOP ALL DAM PROJECTS ON NERETVA RIVER, December 2022, https://riverwatch.eu/en/balkanrivers/news/bern-convention-demands-bosnia-herzegovina-stop-all-dam-projects-neretva-river

117 Recommendation No. 217 (2022) of the Standing Committee, adopted on 2nd December 2022, on the possible negative impact of hydropower plant development on the Neretva River (Bosnia and Herzegovina) https://rm.coe.int/2022-rec-217e-bih-neretva/1680a94963



Lumbhardi River,
Kosovo
© Ulrich Eichelmann

Kosovo

11 EIA Directive

The EIA Directive has been transposed to a great extent within the Law on Environmental Impact Assessment. The Law ensures that all hydropower projects, regardless of their energy capacity, are covered by the EIA procedure.

The Law goes beyond the EIA Directive requirements and allows the representatives from civil society to participate in the EIA Commission's meetings as observers.

The legislation, however, falls short in transposing Article 3 of the EIA Directive, which is the core of the EIA procedure. Also, the bylaws regulating public participation procedures and EIA expert licensing, are still missing.

Proper implementation of environmental assessments in relation to hydropower projects, securing effective public participation, and ensuring good quality of environmental reports remains an issue.

11.1 Transposition

Transposition of the EIA Directive was done through the adoption of the **Law No. 08/L-181 on Environmental Impact Assessment** ("Official Gazette of the Republic of Kosovo", no. 2/6 January 2023) ('Law'), and the following bylaws:

- Administrative Instruction MESP- No. 10 /2017 on licencing compilers of environmental impact assessment reports;
- Administrative Instruction MESP - No. 16/2015 on information, public participation and interested parties in the proceedings of environmental impact assessment;
- Administrative Instruction No. 08/2012 on determining of documentation for application for environmental consent according to nature of the project.

Article 2(1) of the EIA Directive is transposed by **Article 7(1)** and **7(4-6) of the Law**, which state that the EIA is required for each public or private project listed in **Annex I** or **Annex II of the Law**, which may have significant effects on the environment due to its nature, size or location, and that a construction permit or any other permit shall not be issued and the execution of the project cannot start until the environmental consent is issued.

> **Article 3 of the EIA Directive has not been transposed to the national legislation**. Although **Article 2(1) of the Law** states that the provisions of the Law '*shall be mandatory for all natural or legal persons whose activity directly or indirectly affects the environment, human health, biodiversity, land, soil, water, air, climate, material assets, cultural heritage and landscape…*', the provision does not transpose the core of the EIA procedure, which is to identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the listed factors, including the expected effects, deriving from the vulnerability of the project, to risks of major accidents, and/or disasters that are relevant to the project concerned. This obligation is distinct from the rest of the obligations laid down in the EIA Directive: to collect and exchange information, consult, publicise and guarantee judicial appeal.

Annex I of the Law lists projects which always require an EIA. The list includes dams and other reservoirs designed for collecting or storing water, where the additional amount of water is **greater than five million cubic metres.** This is more stringent that the EIA Directive, which requires an EIA when the amount of water held back or stored exceeds ten million cubic metres.

Annex II of the Law lists projects which are subject to a case-by-case screening procedure to assess whether an EIA is needed or not. **All hydropower plants not included in Annex I are subject to this procedure**. The criteria for determining whether the projects listed in Annex II should be subject to an environmental impact assessment are provided in **Annex III of the Law**.

According to the **Article 4 of the Law**, the Ministry of Environment is the competent authority for the implementation of the EIA procedures. **Article 5 of the Law** states that the review of applications for an EIA; examination and assessment of the comments and opinions received from the public and relevant authorities; and drafting the proposal of decision with a professional opinion on the EIA report, is done by the EIA Commission composed of five members who are

appointed by a decision of the Secretary General of the Ministry. The representatives from civil society may also participate in the Commission's meetings as observers, which strengthen public participation in EIA procedure, however **the bylaw determining the detailed procedures for the participation of civil society in the meetings of the Commission has not yet been issued**.

The screening procedure of projects under **Annex II of the Law** is transposed in **Article 10 of the Law**. For projects listed in **Annex II of the Law**, the applicant provides information on the features of the project, the possible consequences for the environment, and the measures envisaged to avoid or prevent negative environmental consequences. The list of information to be provided is set out in **Annex IIA of the Law**. The complete request for review shall be published in the public notice bulletin in the relevant municipality and on the official website of the Municipality and Ministry, five days from the date when the applicant submits all the information required.

Based on the information presented and the criteria set out in **Annex III of the Law**, the EIA Commission determines whether the proposed project may have significant effects on the environment and whether it should be subject to an EIA. The decision together with main reasons is published in the public notice bulletin in the relevant municipality, and on the official website of the Municipality and Ministry, five days from the date of issuing the decision.

The representatives from civil society may also participate in the Commission's meetings as observers, which strengthen public participation in EIA procedure, however the bylaw determining the detailed procedures for the participation of civil society in the meetings of the Commission has not yet been issued.

If an EIA report is not required, the designated municipality may initiate the procedure for issuing a municipal environmental permit. According to **Article 32 of Law**, for activities and projects not requiring an EIA, but which could cause environmental devastation, the municipal environmental permit shall be issued.

Article 5(1) and Annex IV of the EIA Directive are well transposed. **Article 11 of the Law**, together with Annex IV, lists the information that must be included in the EIA report.

Article 12 of the Law requires that the EIA report is compiled by licensed natural or legal persons. The new bylaw determining the procedures and criteria for the licensing of natural or legal persons for drafting an EIA report has not yet been adopted.

According to the **Article 16 of the Law**, the public and the interested parties shall be informed electronically and through a public announcement, and shall be enabled to participate in all stages of the EIA process, including providing comments on request for the screening procedure.

Upon the publication of the announcement for public debate, the EIA report shall be published on the website of the Ministry, in order for the public and interested parties to provide their comments in writing. The public consultation for the EIA report cannot be shorter than 30 days. The Ministry shall be responsible for the organisation and planning of the public debate, which

shall be done in cooperation with the applicant and the municipality where the project takes place. The Ministry shall prepare the notification for holding the public debate. Immediately after receiving the notification from the Ministry, the applicant shall publish it in a printed or electronic daily newspaper. The announcement shall also be published on the website of the Ministry and the municipality where the project is being implemented. The municipality where the project is being implemented shall also publish the announcement in the bulletin board of the Municipality.

All public debates shall be held in public institutions of the municipalities where the project is to be implemented. The public debate shall be held in person and virtually. The new bylaw determining procedure for planning and organising the public consultations for the EIA report has not yet been issued.

Although **Article 24 of the Law** contains requirements on transboundary consultations, these are general and require detailed arrangements for implementing in order to ensure a full transposition of **Article 7 of the EIA Directive**.

Article 15 of the Law states that the Ministry may, when necessary, contract national or international experts who have proven experience in EIA. The report shall be sent for comments and control of data validity to the Kosovo Environmental Protection Agency and to the Regional River Basin Authority. If a negative opinion is issued, then the report must be revised and supplemented based on their comments. In the case of a second negative opinion, the EIA process is stopped and the request is rejected.

The procedure on reviewing the EIA report and accompanying documents is described in **Articles 17 of the Law**. **Article 18 of the Law** states that the decision for environmental consent contains information on:

- a reasoned conclusion of the significant effects of the project on the environment, taking into account the result of the examination of the EIA report and any supplementary information provided, as well as any relevant information received through the consultation process with the public and relevant authorities concerned;
- environmental conditions related to the decision; and
- monitoring measures.

The decision on environmental consent and attached conditions shall be published in the official website of the Ministry and relevant municipality, five days from the date of issuing the decision. The Ministry repeals the decision for environmental consent in case it is confirmed by the environmental inspectorate that the measures foreseen in the EIA report and the conditions defined in the decision for environmental consent have not been implemented. It is not clear, however, what are the consequences of such repeal.

According to **Article 21 of the Law**, the validity of the decision for environmental consent is terminated if, within two years from the date of receipt of the decision for environmental consent, the applicant fails to obtain the construction permit or the approval for the realisation

of the project, and if the location where the project is to be implemented has not been prepared nor have any operational activities been launched. If the validity of the environmental consent decision has been terminated, the applicant or its successor **may not commence works on the site without applying to the Ministry for a new environmental consent**. Thus, the Law transposes **Article 8a(6) of the EIA Directive** by setting **a timeframe for the validity of the reasoned conclusion** by its connection to the development consent, as encouraged under **Article 8a(6)**; however, it should further ensure that the authorities are satisfied that the reasoned conclusion is up-to date, regardless of the provided time-frame.

Moreover, **According to Law No. 04/L-110 on construction** ("Official Gazette of the Republic of Kosovo", no. 18/03 July 2012), **Article 21(6-7)**, the construction permit shall become void if the applicant does not begin construction within one year from the date of issuance of the construction permit. The period of validity of the construction permit may be extended for one year at the request of the applicant.

According to **Article 20 of the Law**, appeal is allowed against **any decision for refusal of a consent, permit or another final decision** according to the Law, based on the **Law No. 05/L-031 on General Administrative Procedure (**"Official Gazette of the Republic of Kosovo", no. 20/21 June 2016). The competent body that reviews complaints under this article is the Complaints Commission established by the decision of the Minister. However, it is advisable to rephrase **Article 20 of the Law**, removing the limiting phrase 'for refusal' to unequivocally permit appeals against any decision – whether granting or refusing consent, permits or other final decision. This amendment would align the law more closely with the likely legislator's intent and ensure that access to judicial review is not unduly restricted, thus bringing it in line with the Law on General Administrative Procedure.

11.2 Implementation

The shortcomings of the environmental impact assessment implementation were raised in the 2023 Energy Community Treaty Implementation Report[118]. The Report states that the existing institutional capacity, which remains unchanged and insufficient to effectively fulfil the obligations stemming from the new legislation, hinders Kosovo's ability to timely and efficiently examine an EIA.

CASE STUDY

HYDROPOWER PLANTS IN THE AREA OF DEÇAN AND SHTERPCE

On 3 February 2021, the Kosovo Ombudsperson published an ex-officio **Report with Recommendations no. 365/2018**, concerning the issue of lawfulness of procedures with regards to hydropower plants in the country and access to documents related to hydropower plants[119]. The Report was a result of the Ombudsperson's

118 2023 Implementation Report Energy Community Treaty, Kosovo, https://www.energy-community.org/implementation/report/Kosovo.html, p. 65.

119 Report with recommendations Ex officio 365/2018 Against the Ministry of Economy and Environment Regarding the issue of lawfulness of the procedures concerning the hydropower plants in the country as well as access to documents related to hydropower plants, https://oik-rks.org/en/2021/02/03/report-with-recommendations-ex-officio-3652018-against-ministry-of-economy-and-environment-regarding-the-issue-of-lawfulness-of-the-procedures-concerning-the-hydropower-plants-in-the-country-as-we/

investigations regarding cases related to the issue of operation of hydropower plants in the area of Deçan and Shterpce. During the investigation, the Ombudsperson identified uncertainties regarding the legality of operation of hydropower plants, which was a consequence of the lack of transparency and accountability of the competent bodies. While the dissatisfaction and reactions of citizens and civil society has increased regarding these projects, the authorities have never managed to provide clear explanations on the legality of hydropower plants' operation. The Recommendation Report aims to draw attention to the Ministry of Economy and Environment, the Municipality of Deçan, and the Municipality of Shterpce, as well as other competent authorities, on respecting the right to inform the citizens by providing access to documents related to hydropower plants, as well as respecting the right of the public in decision-making processes and access to justice[120].

The Ombudsperson considers that the judicial system in the country, not only in this case but also in all cases related to the environment, does not meet the principle of legal certainty as an important element of rule of law to ensure a fair and timely trial. Cases initiated in courts by both natural and legal persons are not shown to be effective remedies. The lack of implementation of the above-mentioned laws has affected the failure to achieve the effect of principle of legal expectation, which should have been produced by the provisions in question[121].

Moreover, the Ministry of Environment, Spatial Planning and Infrastructure, in June 2023, issued a report dealing with administrative procedures with regards to the hydropower plant projects in Kosovo. The report highlights the deficiencies in EIA procedures citing a lack of defined and appropriate standards. EIA reports generally exhibit low quality, offering only cursory treatment of critical aspects such as acceptable ecological inflow, flood management, and fish passage[122].

Although the developers of the hydropower plant projects in Decan, (Brezovice and Kacanik) claimed that the EIA reports have been prepared and that the public debates have been carried out, as required by the Law on Environmental Impact Assessment, based on the files received through access to information requests, as well as the claims in the lawsuits filed by the NGOs, no clear evidence of public debate was found. During the evaluation of the Ministry of Environment and Spatial Planning files, calls for public debate were found on projects along the Lepenci River in the Municipality of Strpce (projects in Brezovice and Kacanik), which was planned to be held on 08.05.2013, but based on the documentation provided, no minutes of such an event were provided, as well as the remarks and suggestions given by citizens or interested persons that allegedly participated at the public debate. Moreover, no clear evidence were provided on whether any comments have been taken into account by institutions during the decision-making process. Lastly, although most of the inhabitants of the area (about 60%) are Serbs, the call was published only in the Albanian language, thus preventing an effective public consultation.

120 Ibid, p. 3.
121 Ibid., para. 95.
122 Report of the Working Group on the review of Administrative Procedures applied for Hydropower Plants and their impact on water and the environment, June 2021, https://preportr.cohu.org/repository/docs/Raporti_i_grupit_punues_p%C3%ABr_hidrocentrale_dhe_ndikimin_e_tyre_n%C3%AB_uj%C3%ABra_dhe_mjedis_881036.pdf

In addition to the procedural shortcomings with regards to the public participation in decision-making, the civil society organisations found that the report drawn up by the developer for the three projects in the municipality of Deçan, did not contain necessary data on the area's biodiversity, and thus did not offer specific measures that are appropriate to the area where the projects are developed[123].

12 SEA Directive

The currently binding Law on strategic environmental assessment does not fully transpose the SEA Directive, however in June 2023 the Government of Kosovo approved the draft Law on Strategic Environmental Assessment which, if adopted by the Assembly, would transpose the SEA Directive to a great extent.

The draft Law fails, however, to ensure access to justice against the decisions deriving from the SEA procedure, as required by the Guidance of the European Commission and set case law of the ECJ.

Moreover, the secondary legislation related to the consultation process in the SEA procedure is not yet adopted.

There are obvious deficiencies in the implementation of the SEA procedure. The draft Energy Strategy 2022–2031, as well as the NECP, were not subjected to the SEA procedure.

12.1 Transposition

The currently binding **Law No.03/L –230 on strategic environmental assessment** ("Official Gazette of the Republic of Kosovo", no. 83/29 October 2010) ('SEA Law'), does not fully transpose the SEA Directive. As outlined in the 2022 Implementation Report of the Energy Community Treaty, the requirement for mandatory scoping of the SEA report, as set by the SEA Directive, is not stipulated by the Law. Concerning the impacts on biodiversity, the SEA Law does not regulate the content of the SEA report with regard to protected areas until the establishment of the NATURA 2000 network. It stipulates that the SEA report and the outcome of the consultations, including transboundary consultations, should be taken into account in the preparation of the plans and programmes before their adoption, however it does not provide a legal procedure therefor[124].

However, in June 2023 the Government of the Republic of Kosovo approved the **draft Law on Strategic Environmental Assessment**[125] that shall be analysed for the purposes of this report.

123 HPP cascade projects on Decan river, Kosovo, Environmental Impact Assessment report, 23.03.2011.
124 2022 Implementation Report Energy Community Treaty, https://www.energy-community.org/news/Energy-Community-News/2022/12/07.html, p. 81.
125 https://kryeministri.rks-gov.net/wp-content/uploads/2023/06/Projektligji-per-Vleresimin-Strategjik-Mjedisor.pdf

Sharr Mountain National Park, Kosovo
© Ulrich Eichelmann

Article 3 of the SEA Directive was transposed by **Article 2 of the draft Law**, which states that the SEA shall be mandatory for plans and programmes initiated by local and central authorities which are likely to cause significant environmental impact for agriculture, forestry, fishing, energy, industry, transport, waste management, water management, telecommunications, tourism, city and country planning or land use, and which set the framework for the future development approval of the projects listed in Annex I and Annex II of the Law on Environmental Impact Assessment; or which are likely to have an impact on the nature protection areas, identified NATURA 2000 areas, and other areas in accordance with the relevant Law on Nature Protection.

Furthermore, **Article 6 of the draft Law** provides that plans and programmes which determine the use of small areas at a local level and minor changes and modifications to plans and programmes, as well as plans and programmes which set the framework for future development consent of projects, other than those listed above, shall be made subject to SEA based on screening procedure. The screening procedure is conducted through a case-by-case examination, taking into account relevant criteria set out in **Annex II of the draft Law** (which transposed **Annex II of the SEA Directive)**.

In the case-by-case examination, the authorities concerned must be consulted. According to the Article 7 of the draft Law, the authority for drafting the plans and programmes is obliged to submit an application on the implementation of the SEA. In cases when the plan and programme is subject to screening, the authority is obliged to submit an application with a proposal to implement, or not, the SEA. The applications are published on the website, and on the public notice board of the authority. The information disclosed should include the decision, explanation on the plan or programme to be adopted, and outline of the impacts on the environment. The SEA decisions adopted by the Ministry/SEA Commission, are published on the internet portal of the Ministry, and the notice board of the Ministry (Article 8.6 of the draft Law). The bylaw determining the format and method for access to information and public participation has not yet been adopted.

According to the **Article 4** and **Article 5 of the draft Law**, the Ministry on the Environment is the competent authority for reviewing the SEA. The review of the SEA applications and supporting documents, the draft SEA report, and the review of the SEA process shall be done by the SEA Commission that is appointed by the General Secretary of the Ministry. The SEA Commission can request a written opinion from the external national or international experts on some aspects of the SEA.

The requirements regarding the content of the SEA report are provided in **Article 9** and **Annex I of the draft Law**, and are transposing **Article 5** and **Annex I of the SEA Directive**. The SEA report is drawn up by a natural or legal person equipped with an SEA licence from the Ministry **(Article 4(2) of the draft Law)**.

The public consultations procedures on the SEA report are described in **Article 10 of the draft Law**. The plan or programme and the prepared SEA report shall be made available to the authorities concerned likely to be affected by the development of the plan or programme and to the public. The plan and organisation of the debate shall be the responsibility of the competent authority that has drafted the plan or programme. The competent authority for plans and programmes shall inform the public through electronic means and on the public notice board on the organisation of the public debate, no less than thirty days before the public debate. The competent authority shall submit all remarks and comments received and the answers to the SEA Commission, together with the updated draft SEA report following the public consultation. The Commission shall review the remarks and comments from the public debate, as well as the answers provided by the drafter, and prepare the proposal of decision on SEA for the Minister who issues the decision approving or rejecting SEA.

The procedure for transboundary consultations are described in **Article 11 of the draft Law**. When the Ministry considers that the implementation of a plan or programme that is being prepared is likely to have an effects on the environment of another state, it shall forward, prior to the approval, a copy of the plan or programme and the SEA report to the affected state. When the affected state is asked to enter into consultations at the beginning of such a process, the parties shall agree on a reasonable time limit for their duration.

According to **Article 12 of the draft Law**, the SEA report, the opinions and comments gathered during the consultation process, including the cross-border consultations, must be taken into account during the preparation of the plan or programme and before its adoption or submission. Once the plan or programme is adopted, it shall be published on the website of the Ministry and on the website of the authority competent for drafting the plan or programme, and on authority's notice board, together with:

- the statement summarising how the environmental considerations were integrated into the plan or programme, and how the SEA report, and the opinions and comments received during the consultation process, including the cross border consolations, were taken into account; and
- the reasons for choosing the plan or programme as adopted, in light of the reasonable alternatives dealt with, together with the monitoring measures.

According to Article 12(3–4), the Ministry decides on the approval or rejection of the decision proposal on SEA, where the authority responsible for preparation of the plan and programme must comply with the decision of the Ministry in order to adopt the plan or programme. However, it is not clear if the Ministry's decision falls under the definition of a decision that can be challenged

by the public concerned. Therefore, it is recommended that the draft Law establishes a clear review procedure before a court or other independent impartial body to challenge the substantive or procedural legality of decisions which are subject to public participation.

12.2 Implementation

Although the draft SEA Law is attempting to transpose the provisions of the SEA Directive, in practice clear deficiencies in implementation of the SEA procedure are present. Namely, the draft Energy Strategy 2022 – 2031 was not made subject to the SEA[126], and no SEA procedure was carried out for the National Action Plan for Renewable Energy Sources of the Republic of Kosovo 2011 – 2020. The procedure for drafting the NECP covering the period 2025-2030 is ongoing, and the SEA procedure for the plan has not started.

Moreover currently binding SEA Law is inconsistent with **Law. No. 04/L-174 on Spatial Planning**, which governs the relationship between local and central government regarding spatial planning. Although the communal-level spatial planning process includes a strategic environmental assessment, subsequent review procedures by the central authority may introduce changes that were not addressed in the initial assessment report.

For instance, **Article 11 of Law on Spatial Planning** specifies that the responsible Municipal Authority for spatial planning and management must submit the Municipal Development Plan and the Zonal Map of the Municipality to the Ministry for verification of compliance with the Spatial Plan of Kosovo, the Zonal Map of Kosovo, and the technical standards of spatial planning. Also, the Ministry of Environment, Spatial Planning, and Infrastructure has the authority to request revisions to communal-level plans. Thus, the interaction between authorities at different levels may result in ineffective strategic environmental assessment practices, as communal-level spatial planning documents may undergo approval procedures without fully addressing potential negative impacts arising from changes made during the review and public debate processes.

The draft Law on SEA does not address this issue.

13 Environmental Liability Directive

The Environmental Liability Directive has been only partly transposed by the Law on Environmental Protection. In 2023, the Secretariat of the Energy Community opened a case against Kosovo on its failure to comply with the Treaty by failing to adopt and apply the laws necessary to comply with the Environmental Liability Directive (ELD).

126 Ibid.

Kosovo transposed the ELD to a very minor extent in **Law No. 03/L-025 on Environmental Protection** ("Official Gazette of the Republic of Kosovo", no. 50/06 April 2009) in Articles 65-72.

Article 66 of the Law provides for the polluter pays principle. **Article 67** allows the exclusion of responsibility for damage caused if the polluter proves that adequate measures have been applied for the prevention and minimisation of damage, in the case of: damage caused by a third person; damage caused by force majeure; damage caused as consequence of armed conflict.

Articles 68 and 69 of the Law provide for the obligations and responsibilities. A polluter causing environmental pollution by its acting or non-acting shall be obliged to undertake foreseen measures based on the plan of prevention from the ecological accidents sanitation plan and rehabilitation plan, and is responsible for all the expenditures for damage assessment and its avoidance. This is, however, not in line with the ELD which obliges the operator to take, without delay, the necessary preventive measures, and where environmental damage has occurred, to take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and take the necessary remedial measures.

However, the environmental damage is not defined in the Law, and the provisions on preventive and remediation measures enabling to request the competent authority to take action are not transposed.

Due to the lack of transposition and implementation, the Secretariat of the Energy Community referred a case to the Ministerial Council in July 2023, and the Ministerial Council adopted the Decision on failure to comply with the Treaty by falling to adopt and apply the laws necessary to comply with the ELD in December 2023[127].

14 Water Framework Directive

Transposition and implementation of the WFD requires further work. The draft Law on Water Management Resources, submitted by the Government for consultations, aims to transpose the WFD, however, provisions regarding environmental objectives need to be amended. Also, the relevant bylaws must be adopted in order to fully transpose the Directive.

The implementation of the provisions related to water protection and management need to be significantly strengthened.

14.1 Transposition

The Law 04/L-147 on Waters of Kosovo ("Official Gazette of the Republic of Kosovo", no. 10/29 April 2013), currently in force, does not fully transpose the WFD Directive, i.e. the environmental objectives are not set. However, in February 2023, the Government of the Republic of Kosovo submitted the **draft Law on Water Management Resources**[128] for consultations, which aims to

127 Decision 2023/08/MC-EnC on the failure by Kosovo* to comply with the Energy Community Treaty in Case ECS-11/23.
128 Draft Law accessible on this link: https://mmphi.rks-gov.net/Document/Announcements?type=16

transpose a number of EU Directives in the area of water management and protection, including the WFD. Therefore, the draft Law will be analysed for the purposes of this report, bearing in mind that it may undergo changes during the consultation process.

RIVER BASIN MANAGEMENT PLANS

Under **Article 7 of the draft Law**, the territory Kosovo is divided into three river basin districts:

- the basin district of the Drini River, which includes the Drini i Bardhë River Basin, and the Plava River Basin;
- the basin district of the Danube River, which includes the basin of the Ibër River and the basin of Morava e Binçës River; and
- the basin district of the Vardar River, which includes the basin of the Lepenc River.

The boundaries of the river basin districts shall be determined by a decision of the Ministry responsible for the management of water resources, following the adoption of the law.

The Agency for Water Resource Management ('Agency') is responsible for the management of water resources in Kosovo. According to **Article 39 of the draft Law**, the Ministry is responsible for the proposal of RBMPs, which shall be approved by the Government. The Ministry shall define the detailed content of the RBMP, the methodology for analysing the features of river basin districts, including the content of the economic analysis of water use, the content of the Programme of measures, and the content of the data for the institutions responsible for the implementation of the Plan.

Under **Article 43 of the draft Law**, the quality standards of surface waters and ground waters shall be determined in the bylaw issued by the Ministry. The bylaw shall contain, among others: criteria for determining the objectives of the protection of the water environment, criteria for determining the ecological flow, chemical and ecological parameters, criteria for classifying the status of surface waters and groundwaters, and criteria for defining sensitive and vulnerable areas.

ENVIRONMENTAL OBJECTIVES

Environmental objectives are poorly transposed by the draft Law. The non-deterioration of surface waters provision expressed in Article 4(1) of the WFD is not reflected in the draft Law. The objectives for achieving good status, good ecological potential and good chemical status of surface waters and good status of groundwaters, as well as for achieving the objectives and standards for protected areas, shall be achieved within twelve years from the entry into force of the draft Law.

Article 4(2) of the WFD, providing that where more than one of the objectives relates to a given body of water, the most stringent shall apply, is not transposed.

Article 58(1)(2) of the draft Law allows determination of a water body as heavily modified in the RBMP where, due to the lack of technical feasibility, or disproportionate costs in this regard, it is not possible to achieve the environmental objectives in terms of good status or good ecological potential of the body of water, while according to the WFD, such determination is allowed only upon conditions set up in **Art. 4(3) of the WFD**.

There are no conditions provided for extending the deadlines to achieve environmental objectives **(Art. 58(1)(2) of the draft Law)**, while according to the **Art. 4(4) of the WFD**, several conditions must be met.

The draft Law allows for derogations from achieving environmental objectives 'through the determination of easier environmental objectives for a certain body, which has been subjected to human activity to such an extent, or that the natural conditions are such that the achievement of the environmental objectives is unattainable or at disproportionate cost' **(Art. 58(1)(3) of the draft Law)**, while according to the WFD, such derogations are allowed only upon conditions set up in **Article 4(5), 4(6) and 4(7**) of the WFD.

There is no provision in the draft Law ensuring that the derogations do not permanently exclude from achieving environmental conditions, as provided in **Article 4(8) of the WFD**.

Water monitoring is determined in **Articles 45 and 46 of the draft Law**. The monitoring programme shall be drafted by the Agency in cooperation with the institution responsible for hydrometeorological activities and approved by the Minister. Monitoring shall be carried out by the institution which performs the hydrometeorological activity according to the monitoring programme. Based on the results of the monitoring, the Agency shall draft an annual report which interprets and analyses the results of the monitoring, and determines the changes in terms of water quality and quantity.

REGISTER OF PROTECTED AREAS

According to the **Article 49 of the draft Law**, protected areas shall include: sanitary protected areas of drinking water resources; areas suitable for the protection of aquatic organisms of economic importance; protected ecological areas whose protection is required by the legislation on nature protection; areas for bathing and recreation; areas sensitive to eutrophication, and areas vulnerable to nitrates.

The register of protected areas shall be compiled by the Agency and be an integral part of the River Basins Management Plan.

PROGRAMME OF MEASURES

According to the **Article 49 of the draft Law**, a Programme of measures for the protection of surface waters and groundwaters shall be drafted for each river basin district, and shall be integrated as part of the RBMP. **Article 50** provides for basic measures that are the minimum measures that should be implemented within the Programme of measures.

Article 11(5) of the WFD has not yet been transposed.

PUBLIC PARTICIPATION

Under **Article 41 of the draft Law**:

- the calendar and work programme for the drafting of an RBMP, including the plan for consultations with the public, is available for stakeholders and the public at least three years before the commencement of the period for which the RBMP is approved;
- the overview of important water issues in the river basin district at least two years before; and
- the draft of the RBMP at least a year before.

The stakeholders should be offered a period of at least six months for providing written comments on the RBMP. Within three months from the receipt of written comments, the Agency shall draft a written report on the comments received and the extent to which those comments were taken into account.

Article 84, paragraph 10 of the current Law on Waters guarantees the public participation in the procedures of issuing water permits. This is followed also by the Administrative Instruction no. 03/2018 on Procedures for Water Permit in its **Article 25**; whereas the draft Law does not foresee any provision guaranteeing the public participation in this procedure.

14.2 Implementation

No river basin management plan is in yet in force; the plans are in initial phases of drafting and public consultation.

In May 2017, the ***Work programme and calendar of activities for the preparation of 'River Basin Management Plan for "Drini i Bardhe" – time period 2021-2025***' was adopted. The River Basin Region Authority, responsible for drafting RBMPs, has been established.

According to the European Commission's Kosovo 2023 Report on EU Enlargement policy[129], Kosovo needs to urgently set up the monitoring systems with data available to the public, and water protection zones need to be enhanced. The river basin district authorities need to become operational as a matter of urgency. The management plan for the White Drin basin has to be adopted, and the preparation of the other river basin management plans should be accelerated. The Commission further urged Kosovo that any small hydroelectric power plants need to be built in full respect of the environmental legislation and undergo appropriate environmental assessments.

129 Commission Staff Working Document Kosovo* 2023 Report Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy, p. 115, https://www.eeas.europa.eu/sites/default/files/documents/2023/SWD_2023_692%20Kosovo%20report_0.pdf

White-clawed Crayfish,
Upper Neretva River,
Bosnia & Herzegovina
© Vladimir Tadic

Shortcomings in regards to the impacts of hydropower projects on water bodies has been problematic in recent years in Kosovo. Despite statutory requirements mandating concessions for commercial water exploitation, the hydropower plant projects were granted water rights, bypassing the concession process and issued water permits instead, thereby breaching the Law on Waters of Kosovo. A fundamental disparity between a concession and a water permit lies in the former being subject to competitive bidding, whereas the latter is not. Not only has the prescribed concession procedure not been adhered to, but the issuance of water permits for hydropower plants has also violated the subordinate legislation governing water permits, pertaining to required documentation and permit content. Furthermore, the issuance of water permits for hydropower projects on the Lumbardhi River in Deçan and Lepenci River in Kacanik and Strpce have proceeded without requisite comprehensive and professional assessments, lacking their basis in planning documents. Consequently, permits have been granted and hydropower plants constructed even in areas earmarked for other hydrotechnical projects where the upstream cascade would use the same water source, endangering the realisation of other projects such as the Lepenci hydro system[130].

Despite municipal jurisdiction over construction permits for hydropower plants under 10 MW capacity, construction permits for the Hydropower Plants cascade in Deçan were issued by the Ministry of Environment as the central institution. This was facilitated by merging the two HPPs (“Deçani” and “Belaja”) under a single construction permit, due to their combined capacity exceeding 10 MW, and including HPP "Lumbardhi", with the dam not even constructed, in order to justify the issuance of the permit by the Ministry. Virtually all HPPs have been constructed in close proximity to watercourses, contravening Kosovo's Water Law, which prohibits construction within 30 metres of full lines of watercourses[131].

With regards to existing hydropower plants projects on the Lumbardhi River in Deçan, and Lepenci River in Kacanik and Brezovica, according to documents received by the Ministry of Environment through access to information procedure, none of the concession procedures explained above have been followed.

130 Report of the Working Group on the review of Administrative Procedures applied for Hydropower Plants and their impact on water and the environment, June 2021, https://preportr.cohu.org/repository/docs/Raporti_i_grupit_punues_p%C3%ABr_hidrocentrale_dhe_ndikimin_e_tyre_n%C3%AB_uj%C3%ABra_dhe_mjedis_881036.pdf

131 Ibid.

15 Nature Directives

Transposition of the Nature Directives in Kosovo is partially done through the adoption of the Law Nature Protection in 2010. The Law is, however, outdated and not aligned with Laws on EIA and SEA.

The implementation process is at a very early stage. The Administrative Instruction for proclamation of wild species, protected and strictly protected is approved and provides alignment with the Habitats Directive, however no procedure for appropriate assessment is adopted. Although Administrative Instruction on proclamation of the ecological network was adopted, the ecological network areas with conservation objectives and guidelines for protection measures have not been drafted.

There are currently no provisions transposing the Birds Directive.

15.1 Transposition

Transposition of the Habitat Directive was partially done through the adoption of the **Law No. 03/L–233 on Nature Protection** ("Official Gazette of the Republic of Kosovo", no. 85/9 November 2010) ('Law'), and the following bylaws:

- Administrative Instruction GRK no. 18/2013 on proclamation of the ecological network;
- Administrative Instruction MEE – No. 12/2020 for proclamation of wild species protected and strictly protected;
- Administrative Instruction No. 12/2011 – for the sources of natural habitat types, natural habitat map, threatened and rare natural habitat types, as well as safeguard measures for conservation of natural habitat types;
- Administrative Instruction No.19/2013 on assessment of acceptability of plan, programme or intervention of an ecological network;
- Administrative Instruction MSPP No. 24/2014 for classification of nature conservation values by importance;
- Administrative Instruction No. 14/2013 on the manner of development and implementation of risk assessment study for the introduction, re-introduction and cultivation of wild species;
- Administrative Instruction No. 07/2012 on the content and manner of keeping a nature protected values register.

Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Article 8 of the Law lists the types of protected values, which include protected areas, protected species and protected minerals.

The protected areas are:

- strict nature reserve;
- national park;
- special area – SPAs and SAC;
- nature park;
- nature monument;
- protected landscape;
- monument of park architecture.

The protected species are:

- strictly protected wild species;
- protected wild species;
- protected native domesticated species.

Under **Article 7 of the Law**, an ecological network is defined as a system of connected important ecological areas which, based on the bio-geographic balanced distribution, visibly contribute to the conservation of habitats and species and biological diversity, and are included in the System of Important Ecological Areas of the EU "NATURA 2000".

An important ecological area is defined as a territory which evidently contributes to the conservation of biodiversity in the Republic of Kosovo, while special areas are defined as:

- Special Protected Areas, which are declared as areas in accordance with the EU Birds Directive, as the most suitable territories in number and size for the conservation of species listed in Annex I, and for regularly occurring migratory species; and
- Special Areas of Conservation, which are sites of Community importance, declared through legal administrative measures and/or contractual act, where the necessary preservation measures are implemented for the maintenance or restoration to a favourable conservation status of the natural habitat type, and/or population of species for which the area was declared .

Under **Article 63 and 64 of the Law**, ecologically important areas "NATURA 2000" are separately defined, and they constitute the ecological network. **It is not clear from the text of the Law if SPAs and SACs, named together as special areas, are in fact ecologically important areas as they are regulated separately**.

According to the **Article 64 of the Law**, 'the criteria for selection of "NATURA 2000" areas are similar as in ***Annex III of the Habitats Directives***' and for more suitable territories in terms of number and size of the Wild Birds Directive. However, beside sating this, the Law does not list any criteria.

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

The management of ecologically important areas must include conservation measures aimed at maintaining favourable conditions for natural habitats and species of interest to the European Union. The authorities should ensure the implementation of measures to prevent deterioration caused not only by human activities, but also by natural phenomena. The activities and developments which could cause destruction, or any visible and permanent damage to the important ecological areas "NATURA 2000", are forbidden.

The appropriate assessment for an ecological network is described under **Articles 34–43 of the Law**. If the plan, programme and/or intervention, which itself or in combination with another plan, programme and/or intervention could have an important impact on conservation purposes and integrity of important ecological area, the appropriate assessment for ecological network shall be carried out.

The content, time and manner of implementing the appropriate assessment in relation to the objectives of conservation and the integrity of network area, and the manner of informing the public, shall be regulated in the bylaw issued by the Minister. **However, such a bylaw has not yet been adopted**.

Procedures for appropriate assessment for the area of ecological network consist of:

- preliminary deliberation of the appropriateness;
- main deliberation of the appropriateness of other suitable alternatives; and
- the definition of major public interest and compensating conditions.

In the preliminary deliberation, likely significant effects shall be assessed. **In case of doubt about the significance of the effect, the plan or project has to be rejected**. If, during the preliminary deliberation procedure, it is proved that the planned intervention has no significant effects on the area of the ecological network, the Ministry of Environment and Spatial Planning issues the certificate on the acceptability of the intervention.

If it is proven that the intervention could have significant effects on the area of ecological network, **the Ministry shall reject to authorise the plan or project in the first phase**. The decision shall not be issued if the EIA procedure applies. **In such cases, the Ministry shall provide an opinion which becomes mandatory in the EIA procedure**. In such a case, the Ministry shall give an opinion on the obligation to follow the procedure for the main deliberation. This is, however, not aligned with the EIA Law since the latter does not contain any provisions on the appropriate assessment procedure.

Article 38 of the Law states that, if during the appropriate assessment it is shown that the planning intervention can have harmful impacts on the ecological network and there are no other suitable solutions without visible impact, the intervention will be undertaken if there are existing imperative reasons of major public interest, including those of a social and economic nature.

If in the area of ecological network reside habitat type and/or species from the **Register of important habitats types, and particularly endangered species** (which has not been set up yet)[132], the major public interest that would permit the planning intervention are those of human health and public safety, establishment of significantly more favourable environmental conditions, or other major public interests, with decisions made by the Government and involving public participation. The decision shall also determine the compensation conditions that aim to preserve the ecological network connection.

PROTECTION OF SPECIES

Administrative Instruction for proclamation of wild species protected and strictly protected lists protected and strictly protected species.

Under **Article 95 of the Law,** the use of any devices for capturing and killing wild species, as well as the use of any devices that may cause local extinction or serious disturbance of the populations of such species, is prohibited. The provision lists further prohibited devices.

Article 97 of the Law prohibits harvesting, collection, destruction, cutting or uprooting, keeping or trading of the wild -growing strictly protected plants and mushrooms. **Article 97 of the Law** further transposed **Article 12 of the Habitats Directive,** however the deliberate disturbance, especially during times of breeding, rearing, migration and wintering, is prohibited if the disturbance is significant in relation to conservation objectives.

Article 98 of the Law transposes **Article 16 of the Habitats Directive** on derogations.

Birds Directive

Although **Article 2 of the Law** states that it regulates the conservation of all species of naturally occurring birds in the wild state (birds, their eggs, nests and habitats), **specific provisions on the Birds Directive have not yet been transposed**.

132 There in an inconsistency in secondary legislation: Administrative Instruction MEE – No. 12/2020 for proclamation of wild species protected and strictly protected was adopted under Article 25 of the Law, while the adoption of the Register of important habitats types and particularly endangered species is required in Article 28 of the Law, although both lists should serve for the same interest.

15.2 Implementation

Although Kosovo has taken steps to start inventories of natural habitats and species, the designation of potential Natura 2000 sites is at a very early stage. The designated areas continue to be polluted and poorly maintained, and illegal activities such as construction, hunting, and logging need to be addressed. Effective measures are necessary to ensure the protection of critically endangered species[133].

The **Administrative Instruction for proclamation of wild species protected and strictly protected** is approved and provides alignment with the Habitats Directive. No procedure on appropriate assessment has been adopted. Although the **Administrative Instruction on proclamation of the ecological network** has been adopted, the ecological network areas, with conservation objectives and guidelines for protection measures, have not been drafted.

> According to the Energy Community Implementation Report, no draft has been formulated to address the deficiencies of the Law on Nature Protection, which remains unaligned with the updated EIA and SEA procedures. There have been no new designations for protection, and the problem of hydropower development within nature-protected areas remains unaddressed[134].

Following the Law on Nature Protection in Kosovo, the establishment of two national parks, the "Bjeshkët e Nemuna" National Park and the "Sharri" National Park, was accomplished through dedicated legislation. This legislation, namely Law No. 04/L-08 and Law No. 04/L-087 aim to delineate park boundaries and establish protective measures, with specific details to be addressed through spatial planning and management plans. Regulation of land use, utilisation methods, and the safeguarding of park territory relies on a professional database prepared by the Ministry, together with tailored spatial plans. Moreover, the legislation provides that the management plans shall be aligned with the spatial strategies, defining the development approaches, protection methodologies, utilisation guidelines and management practices, while taking into account the conservation needs of local communities.

However, despite these legislative provisions, the practical implementation falls short, leading to a disparity between the theory and reality. For instance, for the "Bjeshkët e Nemuna" National Park, which endured nearly a decade without a Spatial Plan after the law was enacted in 2013, approval of the plan was granted only in 2023. Consequently, the park lacked tangible protection against degradation, exemplified by the proliferation of unauthorised constructions[135].

Similarly, despite the existence of spatial and management plans, the "Sharri" National Park faces analogous challenges. The practice has shown that in this case the presence of the protective measures, without appropriate implementation, were unsuccessful in preventing environmental crimes, as unlawful activities within the protected area were identified[136].

133 Ibid., p. 116.
134 2023 Implementation Report Energy Community Treaty, (n 118), p. 65.
135 Koha.net, 'Unauthorised constructions, without ownership, and without criteria in the Accursed Mountain', 13 September 2020, accessible link: https://www.koha.net/arberi/237178/ndertime-pa-leje-pa-pronesi-e-pa-kritere-ne-bjeshket-e-nemuna
136 Albinfo, 'The degradation of Brezovica due to numerous unauthorised constructions', accessible link: https://10.100.1.253/UserCheck/PortalMain?IID=D87581E9-4D5B-233C-65B3-04F12BC60900&origUrl=aHR0cHM6Ly93d3cuYWxiaW5mby5jaC9kZWdyYWRpbWktaS1icmV6b3ZpY2VzLW1ILW5kZXJ0aW1ILXRlLXNodW10YS1kaGUtcGEtbGVqZS8

Montenegro

11 EIA Directive

Transposition of the EIA Directive in Montenegro has been done to a great extent within the Law on Environmental Impact Assessment and associated bylaws, such as the Regulation on projects that require the EIA.

The most significant transposition shortcomings identified concern the 1 MW threshold provided in the List II of the Regulation on projects that require the EIA, that exclude hydropower plants below 1 MW from the screening procedure. Considering that there is no proper transposition of Article 2 of the EIA Directive, the 'salami slicing' of small hydropower plants in not excluded in theory.

Komarnica River, Montenegro

16.1 Transposition

Implementation of the EIA Directive in Montenegro was enacted through the adoption of the **Law on Environmental Impact Assessment** ("Official Journal of Montenegro", no. 75/18), and a number of bylaws, including:

- Regulation on projects that require the EIA ("Official Journal of Montenegro", nos. 20/07, 47/13, 53/14, 37/18);
- Rulebook for content of the EIA study ("Official Journal of Montenegro", no. 19/19);
- Rulebook on the content of the documentation for the EIA screening procedure ("Official Journal of Montenegro", no. 019/19).

Under **Article 7 of the Law**, the EIA is being conducted for: 1) projects that always require an elaboration on impact assessment ('elaboration'); and 2) projects for which the EIA can be requested. The competent authority decides on the need for an EIA on a case-by-case basis.

Article 8 of the Law links the EIA procedure with the appropriate assessment procedure, stating that the appropriate assessment procedure should be done within the EIA procedure, where appropriate.

Under **List I** of the **Regulation on projects that require the EIA**, *dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres*, always require the EIA. Under **List II**, for *projects for production of hydro energy* ***over 1 MW capacity*** *and dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored does not exceeds 10 million cubic metres*, the EIA can be requested.

Article 15 of the Regulation lists other types of projects that are subject to the screening procedure. These are:

- all projects from List II located in the protected areas and cultural sites;
- amendments and extensions of the projects from List I and List II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment;
- projects from List I and List II that are developed specifically for the development and assessment of new methods or products, as well as projects that are not in use for more than 2 years.

The addition from **Article 15 of the Regulation** that mentions projects from List II located in protected areas and cultural sites, as types of projects subject to the screening procedure, is confusing and misleading. This is because the List II projects are always subject to screening, regardless of their location in the protected area, which means that this provision needs to be amended.

As shown above, the **Regulation** also **excludes the hydropower plants below 1 MW from the EIA screening procedure,** as these are not considered as List II projects. Establishment of a threshold or criteria is limited by the obligations set out in **Article 2(1) of the Directive,** by which it is not possible to exclude projects from screening based mainly on their size, but the nature and location need to be considered as well. The Law, however, does not clearly transpose **Article 2 of the EIA Directive,** which means that the practice of 'salami slicing' is not prevented by the law.

On the other hand, the **Rulebook on the content of the documentation for the EIA screening procedure** provides a list of documents that the developer needs to provide for the screening procedure transposing **Annex IIA of the Directive**. The **Rulebook** further explains in **Article 7** that the requirements regarding the documents that the developer needs to provide are also the screening criteria that shall be taken into consideration during the screening procedure.

When the developer submits the request for the screening procedure, the competent authority is obliged to notify all interested public bodies – as well as the public – which can submit their opinions within 5 days **(Article 13 of the Law)**.

The submitted opinions, stated above, need to be considered by the competent authority in the decision-making process. The decision also needs to be notified to the public and contain:

- **In the case where the competent authority decides that the EIA is necessary:** reasons on which the decision was made, a description of the location, project, and possible impacts on the environment;

- **In the case where the competent authority decides that the EIA is not necessary:** reasons on which the decision was made, a description of the location, project, and possible impacts on the environment, as well as the protection measures for prevention and reduction of adverse impact on the environment (Article 14 of the Law).

An appeal can be submitted to the Ministry against this decision.

During the scoping procedure, the interested public can submit their comments, which need to be considered during the decision-making procedure. **This decision can also be challenged before the Ministry (Article 16 of the Law)**.

If the developer is obliged to carry out the EIA procedure, the competent authority shall organise the public consultations within 5 days from the day they received the request for approval of the elaboration. The duration of the public consultations is minimum of 30 days from the date of notification.

Article 5 and Annex IV of the Directive that regulate the content of the EIA Report have been transposed in **Article 15 of the Law** and in the **Rulebook for content of the EIA study**. However, both **Article 15** and the **Rulebook** state that a description of the relevant aspects of the current state of the environment shall be done for projects located in protected area cultural areas, touristic projects and complex engineering projects, whilst for other projects in accordance with the decision of the competent authorities. Such a limitation does not exist in the Directive.

Morača River, Montenegro
© Jan Pirnat

The Law also introduces the Commission for Impact Assessment ("Commission") that is obliged to determine the scope and content of the elaboration and assess it **(Article 21 of the Law)**. The Law states that the members of the Commission can be comprised not only from within the competent authority, but also among other professionals. The **Internal Rulebook on formation of the Commission**[137] further regulates the procedure for formation of the Commission and public tender for selection of members, external to the competent authority. **The Law thus allows even for the member of civil society to be part of the Commission**.

The Commission can return the elaboration to the developer a maximum two times in order to carry out necessary amendments, after which the Commission is obliged to assess the elaboration as it is. The Commission is obliged to submit to the competent authority, within 25 days, the report on the assessment of EIA, decision on rejection or approval of the elaboration as well as the reasons for accepting and rejecting the opinions received **(Article 22 of the Law)**.

Article 24 of the Law lists the content of the decision on approval of the EIA elaboration and the decision on rejecting the approval. The decisions need to be notified to all public bodies, organisations and the public, by publishing it on the website. **The decisions can be challenged before the Ministry.**

Article 25 of the Law states that the decision on approval of the EIA elaboration ceases to be valid if the developer fails to obtain a construction permit, or notifies the start of the construction, or approval or any other consent for development of the project, within two years. Thus, the Law sets a timeframe for validity of the reasoned conclusion, as encouraged under **Article 8a(6) of the EIA Directive,** but does not require from the competent authority to be satisfied that the reasoned conclusion is up-to date regardless of the set timeframe.

137 https://epa.org.me/wp-content/uploads/2022/06/interno-pravilo-1.pdf

16.2 Implementation

KOMARNICA HYDROPOWER PROJECT

CASE STUDY

One of the most significant hydropower developments in Montenegro in recent years was the 172 MW **Komarnica hydropower project**. The project would feature a 171m-high concrete arch dam that would impound a 17.6km long reservoir. The project would flood part of the Komarnica candidate Emerald Site (ME000000P) and the Dragišnica and Komarnica Regional Park. The area is also part of three potential Natura 2000 sites: Bukovica Valley and Vojnik Mountain under the Birds Directive and the Komarnica and Pridvorica sites under the Habitats Directive. Moreover, the Komarnica River has been identified as a potential area for the expansion of the Durmitor National Park and UNESCO site, but so far has only been awarded a weaker 'Regional Park' status. The area is home to numerous protected species, including wolves, bears, Balkan chamois, otters, stone crayfish, golden eagles, rock partridges and corncrakes. According to the civil society, the full extent of the likely damage by the project is not yet known due to only partial fieldwork having been conducted. Moreover, unique caves and cliffs would be flooded before their biodiversity is even properly researched[138].

The EIA study, published in February 2022 was of poor quality, admitting that the hydropower plant will damage biodiversity, but that the harm done by the project would supposedly be outweighed by its economic and social benefits[139]. There was no appropriate assessment carried out in order to assess the impact of the project on protected areas and species and habitats, whilst the potential Natura 2000 sites Bukovice Valley and Vojnik Mountain and Komarnica i Pridvorica were not even mentioned in the study. Issues around failure to properly assess the cumulative impact with other projects, alternatives and climate change have also been raised by the civil society. As a result, a complaint to the Bern Convention was submitted by the NGO Montenegrin Ecologists Society[140].

Within the EIA procedure, the Ministry formed a Commission for the evaluation of the EIA elaboration for the construction of the Komarnica hydropower plant. The Commission prepared the Report on 20.05.2022, with 87 remarks, suggestions, and comments, and the main conclusion that the **EIA elaboration cannot be accepted until the stated deficiencies are eliminated**. The Commission set the deadline of 855 days from the date of receipt of the Commission's Report. According to the Government Report to the Bern Convention complaint, the final decision on the construction of the Komarnica hydropower plant by the Government will be directly related to the results of the evaluation of the Environmental Impact Assessment (EIA elaboration)[141]. Thus, the definite answer to the question whether or not the Komarnica hydropower plant will be constructed is yet to be realised.

138 Komarnica hydropower plant, Montenegro, available at https://bankwatch.org/project/komarnica-hydropower-plant-montenegro

139 Ibid.

140 Hydropower plant development on Emerald Network site Komarnica, available at https://www.coe.int/en/web/bern-convention/-/hydropower-plant-development-on-emerald-network-site-komarnica

141 Hydropower plant development on Emerald Network site Komarnica (ME000000P) (Montenegro), New complaint (pending): 2022/04, Government Report, CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE AND NATURAL HABITATS Standing Committee 43rd meeting Strasbourg, 28 November – 1 December 2023, available at https://rm.coe.int/files10-2023-komarnic-hpp-montenegro-govt-report/1680aa9060

17 SEA Directive

Transposition of the SEA Directive in Montenegro has been done in a great extent with adoption of the *Law on Strategic Impact Assessment.*

The Law provides some good solutions considering that the Law lists the criteria based on which the decision on approving or rejecting the SEA needs to be made. This is a very positive addition to ensure legal certainty.

Although the Law incorporates the majority of provisions from the SEA Directive, there are no provisions on access to justice against any of the decisions deriving from the SEA procedure.

17.1 Transposition

The transposition of the SEA Directive in the national law of Montenegro has been done through the adoption of the **Law on Strategic Impact Assessment** ("Official Journal of Montenegro" nos. 80/05,73/10, 40/11, 59/11,52/16).

The majority of the provisions from SEA Directive have been transposed. **Article 5 of the Law** lists the plans and programmes that are always subject to the SEA, and the plans and programmes that are subject to the screening procedure.

The plans and programmes that always require the SEA are **(Article 5(1) of the Law)**:

- Plans and programmes in the area of agriculture, forestry, fisheries, hunting, energy, industry, including mining, traffic, telecommunications, tourism, regional development, urban and spatial planning, or land use, coastal zone management, water management and waste management;
- Plans and programmes that scope the development of future projects that are subject to the EIA in accordance with other laws;
- Plans and programmes that, considering the scope of their execution, are likely to have an impact on the protected areas, natural habitats and protection of wild flora and fauna.

Plans and programmes that are subject to the screening procedure are **(Article 5(2) of the Law)**:

- Plans and programmes which determine the use of small areas at a local level;
- Minor modifications to plans and programmes;
- Plans and programmes not mentioned above that provide the scope for development of projects that are subject to the EIA.

Article 13 of the Law fully transposed a list of criteria provided in Annex II of the SEA Directive on which the competent authority needs to base their case-by-case examination.

If the competent authority decides that the SEA is not necessary, it shall issue a decision containing:

- The type of plan or programme;
- Reasons for not carrying out the SEA;
- Criteria on which decision that there is no likelihood of significant impact on the environment;
- Other relevant information.

The authority competent for preparation of the plan or programme shall submit the Report on SEA, together with the Report on public consultation, to the Ministry competent in the area of environment for consent. The Ministry can seek the opinion of other competent organisations or professionals for certain areas, or it can form a Commission for assessment of the Report **(Article 21 of the Law)**.

Article 21 of the Law further lists criteria based on which the assessment of SEA Report was made. These are, among others:

- **Criteria regarding the plan or programme** – such as relationship with other relevant plans or programmes, or environmental issue that are present in the preparation of the plan or programme;
- **Status of the environment** – such as the present and future state of the environment;
- **Possible solutions** – such as reasons for choosing the most favourable solution;
- **Environmental Impact Assessment** – such as impact on environmental factors (e.g. water, air, soil, climate, nature, habitats, biodiversity, population, health etc.);
- **Measures and monitoring programme** – such as guidelines for the EIA;
- **Report on strategic assessment** – all the elements from Article 15 of the Law are included;
- **Public participation** – such as opinions of the public and the way it was decided thereon.

Although the Law incorporates the majority of provisions from the SEA Directive, **there are no provisions on access to justice against any of the decisions deriving from the SEA procedure**.

17.2 Implementation

KOMARNICA HYDROPOWER PROJECT

CASE STUDY

A Strategic Environmental Assessment on the Draft Detailed Spatial Plan for the Area of the Multipurpose Reservoir on the River Komarnica was carried out in 2019-2020. This refers to the 172 MW Komarnica hydropower project, which would feature a 171m-high concrete arch dam that would impound a 17.6km-long reservoir, as explained in the EIA section of the Report.

The public consultation on the SEA was reportedly held from 06.11.2019 to 17.12.2019 and two live consultations were held – in Plužine on 28.11.2019 from 12:00-14:00 and in Šavnik on 02.12.2019 at the same time. Once the first round of public consultations in Montenegro was complete, an updated SEA report and report on public consultations was published in March 2020.

At this point, Montenegro also notified Bosnia and Herzegovina about the SEA and invited comments on the transboundary impacts. On 2 April 2020, the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska published a notice inviting public comments on the Plan and its SEA. The Centre for Environment from Banja Luka submitted comments to the Republika Srpska Ministry on 30.04.2020.

On 27 May 2020, the Agency for the Protection of Nature and the Environment of Montenegro issued an SEA approval decision. It notes the delivery of comments – without stating from whom exactly – and states that the SEA study was improved by incorporating them, particularly with regard to transboundary impacts, but does not provide any more details on what the comments were, who submitted them, or how the study was adjusted as a result.

Montenegro's notification of Bosnia and Herzegovina can be considered as good practice and precautionary, considering that there is an existing Piva dam downstream of the Komarnica River, so some of the impacts would only be indirect. However, more detail should have been given in the SEA approval decision on how the comments were taken into account.

There were also serious issues with the SEA content. Only very rapid field research in the Komarnica canyon had been carried out, and the biodiversity baseline data was restricted to flora/habitats, invertebrate riverbed fauna (bentos), fish and mammals. The authors acknowledged that other groups such as amphibians, reptiles, birds etc. would be affected, but did not name individual species or explain the impacts.

The SEA stated that one of the problems in carrying out the study was "... the insufficient number of literary data for individual groups of organisms, so individual teams of experts had to conduct rapid field research in order to identify as many taxa and habitats as possible (...). Due to the harshness of the terrain mentioned above, these studies were limited to parts that were relatively easily accessible, and then the experts gave their estimates for species in each of the groups they deal

CASE STUDY

with. We believe that this was sufficient and the only possible level of data that met the needs of this strategic assessment."

In response to the KOD NGO's comments that these kind of estimates were not sufficient, the study authors claimed that proper field research would have taken 2–3 more years, required a significant number of people, raised the certainty around the data by only 10–15 percent and potentially endangered the researchers due to the harsh terrain.

Therefore, as showcased in the separate sections, these deficiencies were not restricted to the SEA, but also persisted at the EIA stage.

18 Environmental Liability Directive

Montenegro has been active in transposition and implementation of the Environmental Liability Directive in recent years. The *Law on Environmental Liability* was adopted in 2014 and amended in 2016, transposing considerably the Directive.

The implementation of the Directive is also underway, where around between September 2022 and May 2023, twenty-seven procedures for environmental damage have been initiated, whilst this number is still growing.

18.1 Transposition

The **Law on Environmental Liability** ("Official Journal of Montenegro", nos. 27/14, 55/16) was adopted (2014) and amended (2016) in the light of obligations prescribed by the Environmental Liability Directive. The Law in a great extent incorporates the provisions of the Directive.

Article 2 of the Law obliges all natural and legal persons that in the conducting their occupational activities cause damage or imminent threat of such damage to implement measures for prevention and remediation of said damage in accordance with the law.

The compensation for environmental damage is based on two main principles, namely the polluter pays principle, and principle of mandatory insurance for natural and legal persons conducting the occupational activity **(Article 3 of the Law)**.

The definition of environmental damage in **Article 4 of the Law** directly transposed the definition from the **Article 2 of the Directive**. However, the provision excludes from its scope:

- **damage to protected species and habitats** caused by activities of the operator based on a permit of competent authority in accordance with the nature legislation;

- **damages to water** caused after the implementation of measures for mitigation of consequences on water bodies, impacted by activities taken in the public interest, in the case where it was not technically possible or financially justifiable to choose a more ecologically acceptable measure.

With regards to the scope of the application, the environmental damage can arise from the:

- damage or imminent threat caused by any of the occupational activities listed in **Article 7 of the Law**;

- damage or imminent threat to the protected species and habitats caused by any occupational activity, other than those listed in **Article 7 of the Law**, if it was caused by a breach of law or professional standards, internal business regulations or negligence;

- damage and immediate threat to the damage caused by pollution of diffuse character, if it is possible to establish an operator that caused that damage or imminent threat.

Article 7 of the Law lists the occupational activities that can cause environmental damage. This provision fully transposed the activities from **Annex III of the Directive.**

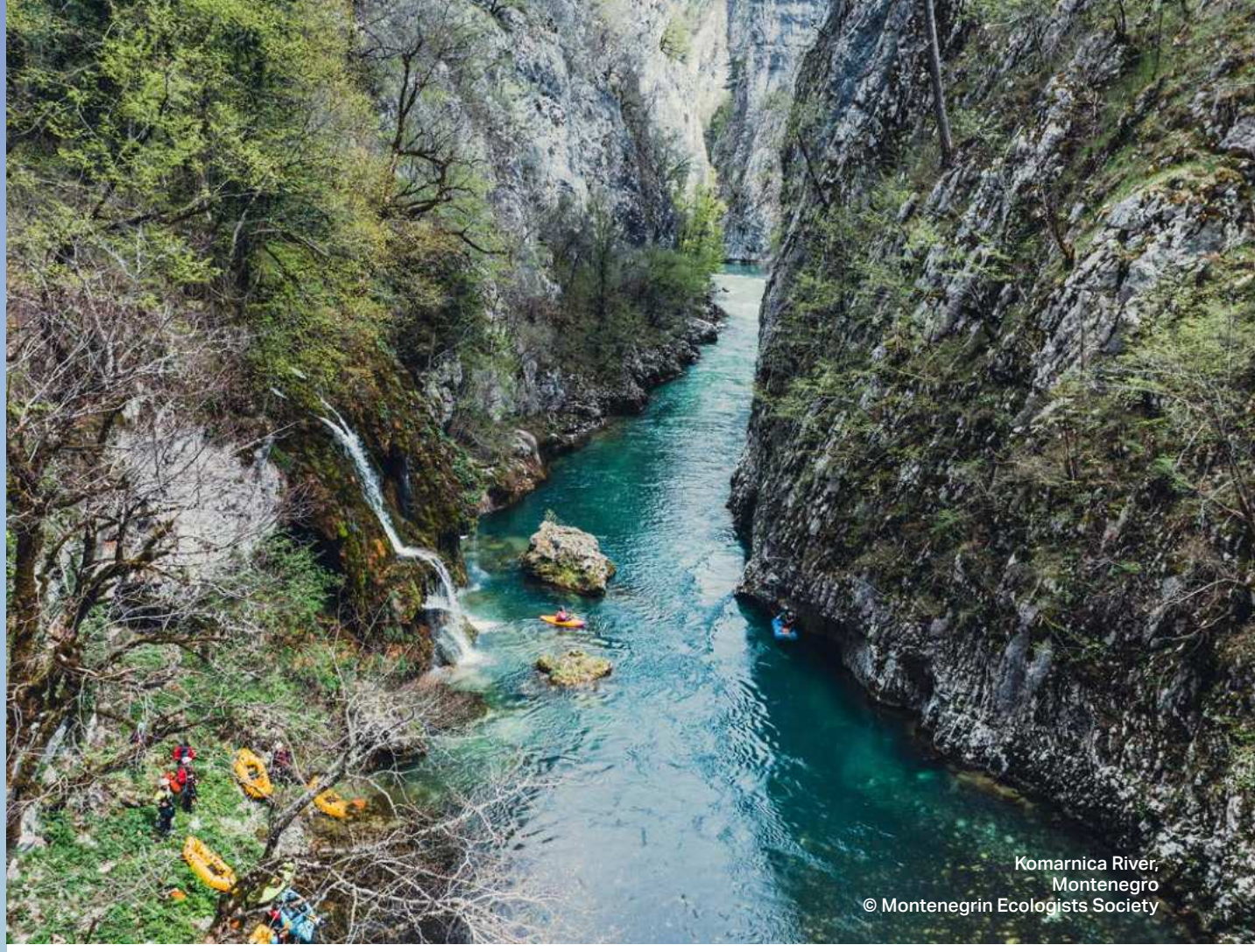
The procedure for determining the environmental damage can be triggered by submitting a request to the competent authority for the environment, and ex officio.

Under **Article 9(3) of the Law**, every person that becomes aware of any damage to the environment or immediate threat of that damage, is obliged to without delay notify the competent authorities. This means that the provision only prescribes a *duty to notify, without the right to request from the competent authority to take action* under the **Article 12 of the Directive**. This goes against the real objective of public participation in the case of environmental damage provided by the Directive. Furthermore, this provision does not ensure access to a court or other independent and impartial public body, in accordance with the **Article 13 of the Directive**, although general rules of administrative procedure and dispute might be applicable in this case.

In accordance with the Directive, the baseline conditions for assessing the significance of the effect of the damage need to be based on the criteria set out in **Annex I. Article 15 of the Law** transposed all of the necessary criteria for assessment; however, there is no clear provision that the damage with a proven effect on human health must be classified as a significant damage.

Preventive measures that need to be taken in the case where the environmental damage has not yet occurred, but there is an imminent threat thereto, are transposed in **Article 16 of the Law.** Similarly, remedial action in the case where the environmental action has occurred is provided in **Article 17 of the Law**.

The proposal of the remedial measures needs to be submitted by the operator to the competent authority for approval. The proposal will further be submitted for an opinion to the affected and possibly affected individuals, interested public, and owners of the immovable property where the remediation measures will take place. These opinions, together with the risks for human health, nature, scope and difficulty of damage, will be taken into account by the competent authority, when granting an approval. For this purpose, the competent authority shall form a Commission for approval. The Commission shall consist of specialists in each area of the environment,



Komarnica River, Montenegro
© Montenegrin Ecologists Society

representatives of the competent authority and Ministry, as well as the representatives of relevant institutions for the environment **(Article 19 of the Law)**.

The competent authority needs to make a decision on approval within 5 days from the day when the Commission submitted their opinion. **This decision can be challenged before the Ministry. Article 13 of the Directive** refers to the review procedure before *a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive,* which means that a review by the Ministry would not essentially satisfy the test of impartiality, except if the general rules of administrative procedure and dispute would apply in this case, and thus ensure the right to a review procedure before a court, following the Ministry's decision.

The remediation measures from **Annex II of the Directive** are transposed in **Articles 21-27 of the Law. Articles 21-24 of the Law** define primary, complementary and compensatory measures, while **Article 25 of the Law** lists best available techniques (BAT), in accordance with the **Annex II section 1.3.1.**

Furthermore, although **Article 27 of the Law** regulates remediation measures for land damage, there is no clear differentiation for water damage, which should thus be amended.

Finally, **Article 31 of the Law** clarifies the polluter pays principle by stating that the operator that caused the damage or imminent threat of damage to the environment shall bear the costs of implementation of the preventive or remediation measures.

18.2 Implementation

As showcased above, the transposition of the Environmental Liability Directive in Montenegro is high. In comparison to the other countries in the region, the implementation of the Directive is also underway. According to the 2023 Implementation Report by the Energy Community Secretariat, between September 2022 and May 2023, twenty-seven procedures for environmental damage have been initiated[142], whilst this number is still growing[143].

Regarding rivers, there are currently 6 cases on approval of remediation measures, namely in the case of industrial activities on the rivers Tara[144], Zeta[145], Paljevinska, Kolašinska (Svinjača)[146], Vezišnica and Ćehotina[147], and 4 decisions confirming the damage to the Morača River by gravel exploitation[148].

19 Water Framework Directive

Montenegro has fully transposed the provisions of the Water Framework Directive under the Water Law.

The Government of Montenegro has adopted the River Basin Management Plans for the Danube and Adriatic Basin with the Programme of measures in March 2022, which means that the implementation of the Directive is at its early stage.

The term 'overriding public interest' as prescribed in Article 4(7) of the WFD is replaced with 'public interest' under the national law, which is a clear mis-transposition of the Directive. Moreover, it is not clear if the proper assessment of projects on water bodies is being done in practice, which can be seen in an example of the Komarnica hydropower plant.

142 2023 Implementation Report, Energy Community Treaty, Montenegro, https://www.energy community.org/implementation/report/Montenegro.html, p. 93.
143 Information on the open procedures for environmental damage is available here: https://epa.org.me/obavjestenje-odgovornost/
144 https://epa.org.me/wp-content/uploads/2022/05/bemax2605.pd, Decision of Approval by EPA: https://epa.org.me/wp-content/uploads/2021/08/crbc1308.pdf Proposition for remediation by CRBC: https://epa.org.me/wp-content/uploads/2021/04/ChinaRoadandBridgeCorporation1604.pdf dated 16.04.2021. https://epa.org.me/wp-content/uploads/2020/12/crbc1150.pdf
145 https://epa.org.me/wp-content/uploads/2021/09/bemax2209.pdf
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147 https://epa.org.me/wp-content/uploads/2020/06/epcg1206.pdf
148 Dated 02.08.2023. for: Company name: Montenegro Petrol: https://epa.org.me/wp-content/uploads/2023/08/Obavjestenje-za-javnost-Montenegro-Petrol.pdf, Company name: Beton Montenegro: https://epa.org.me/wp-content/uploads/2023/08/Obavjestenje-za-javnost-Beton-montenegro.pdf, Company name: Bemax: https://epa.org.me/wp-content/uploads/2023/08/Obavjestenje-za-javnost-BEMAX.pdf, Company name: Cijevna komerc: https://epa.org.me/wp-content/uploads/2023/08/Obavjestenje-za-javnost-Cijevna-komerc.pdf

19.1 Transposition

The WFD has been transposed into the following legislation:

- Water Law ("Official Gazette of Montenegro", no. 27/07, as amended) ('Law');
- Regulation on the content and means of preparation of a river basin management plans on the area of river basin or its part ("Official Gazette of Montenegro", no. 39/09);
- Regulation on classification and categorisation of surface and groundwater ("Official Gazette of Montenegro", no. 02/07);
- Rulebook on means and deadlines for determining the status of surface waters ("Official Gazette of Montenegro", from 2019);
- Rulebook on means and deadlines for determining the status of groundwater ("Official Gazette of Montenegro", from 2019).
- River Basin Management Plans

Under **Article 21 of the Water Law**, Montenegro is divided into two river districts, namely the River District of the Danube Basin and the River District of the Adriatic Basin.

Water management is in the competence of the Government of Montenegro, namely the Ministry of Agriculture, Forestry and Water Management. The operational and management works are carried out by the Water Agency.

Article 24 of the Water Law lists the necessary content of the RBMP which is transposing the **Annexe VII of the WFD**. **Regulation on the content and means of preparation of river basin management plans on the area of a river basin or its part** also contains the list of elements that need to be included in the RBMP.

According to **Article 24a of the Law**, international river basins shall be managed based on the RBMPs of countries on which territory the parts of those basins are situated. If such a plan is not made, then that area shall be managed based on the general RBMP from **Article 24 of the Law**.

Under **Article 25 of the Law**, the RBMPs are required to be updated every six years. However, **Article 26 of the Law** envisages the possibility to revise the RBMP even before the expiry of six years if, during its implementation, significant changes of conditions occur.

Article 29 of the Water Law prescribes the SEA procedure for the RBMP and Strategy on Water Management.

ENVIRONMENTAL OBJECTIVES

Environmental objectives from Article 4 of the WFD have been fully transposed within the Water Law. **Article 73 of the Water Law** lists the environmental objectives in accordance with Article 4.1 of the WFD.

Article 73b of the Water Law transposed **Article 4(2) of the WFD**, ensuring that the most stringent environmental objective apply where more than one of the objectives relates to a given water body.

Article 4(3) of the WFD sets strict criteria for the designation of artificial or heavily modified water bodies. This Article has been fully transposed under **Article 83c of the Water Law**.

Article 73c of the Water Law envisages the possibility of extension of a deadline for the achievement of environmental objectives in accordance with **Article 4(4) of the WFD**, whilst **Article 73a of the Water Law** sets the conditions for the modification of environmental objectives, and fully transposed obligations under **Article 4(5) of the Directive**. Temporary deterioration from achieving a good status is possible under **Article 83d of the Water Law**.

Derogations in cases of a new modifications or a new sustainable human development activities **(Article 4(7) of the WFD)** are possible under **Article 83e of the Water Law**. However, the wording of **Article 83e** is not properly transposing the wording of the Directive since it states that the reasons for change of the water status need to be in a 'public interest', and not in an '**overriding public interest**', as prescribed by the WFD. It is important to note that **not all public interests can automatically be 'overriding'**, and thus it is important to distinguish between 'public interest' and 'overriding public interest', which **Article 4(7)(c) of the WFD** is trying to address. 'Overriding' practically means that the other interest overrides achieving the objectives of the WFD[149], which does not refer to every public interest project.

Additionally, it is important to point to the **Article 3** of the Montenegrin **Law on Energy** ("Official Gazette of Montenegro", nos. 05/16, 51/17, 82/20), which states that all energy projects are of public interest. When applying the principle of 'overriding public interest', Member States are allowed a certain margin of discretion for determining whether a specific project is of such interest (See Case C-346/14 Commission v Austria); however in relation to hydropower projects, it was concluded that not all of them are automatically of overriding public interest just because it would generate renewable energy. Each case has to be assessed on its own merits[150].

Concerning Articles 4(8) and 4(9) of the Directive, only Article 4(8) has been fully transposed into Article 83f of the Water Law.

149 'Common Implementation Strategy for the Water Framework Directive and the Floods Directive', Guidance Document No. 36 Exemptions to the Environmental Objectives according to Article 4(7) New modifications to the physical characteristics of surface water bodies, alterations to the level of groundwater, or new sustainable human development activities, 2017, p. 59.

150 Ibid. Under Article 16f of the DIRECTIVE (EU) 2023/2413 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 (RED III Directive), *Member States shall ensure that, in the permit-granting procedure, the planning, construction and operation of renewable energy plants, the connection of such plants to the grid, the related grid itself, and storage assets are presumed as being in the overriding public interest and serving public health and safety when balancing legal interests in individual cases for the purposes of Article 6(4) and Article 16(1), point (c), of Directive 92/43/EEC, Article 4(7) of Directive 2000/60/EC and Article 9(1), point (a), of Directive 2009/147/EC*. The RED III Directive is not applicable to the Western Balkan countries, however considering they are in the process of EU accession, it might be relevant in the future.

REGISTER OF PROTECTED AREAS

Article 74a of the Water Law states that for each water area, areas of special protection of water are being set ('protected areas') for the protection of surface and groundwater, or protection of habitats of flora and fauna that directly depend on water. The protected areas shall be included in the register of protected areas. However, it seems as such register has not yet been set up.

PROGRAMME OF MEASURES

Under **Article 32 of the Water Law**, a Programme of measures includes basic and supplementary measures.

Regulation on the content and means of preparation of river basin management plans on the area of a river basin or its part provides a list of measures that should be included in the Programme of measures and RBMPs in accordance to the Directive.

PUBLIC PARTICIPATION

Article 14 of the WFD that ensures that the public is involved in the preparation of an RBMP and its update has been fully transposed into the **Articles 30 and 31 of the Water Law**.

19.2 Implementation

The Government of Montenegro adopted the River Basin Management Plans for the Danube and the Adriatic Basin with the Programme of measures in March 2022[151].

Both Plans mention projects that are subject to derogation under Article 4.7 of the WFD. Namely, the RBMP for the Adriatic Basin states that surface water body "Zeta_2" will not be able to reach good ecological status by 2033 due to the canalisation of the river for production of electricity, which means that it will have to derogate from environmental objectives[152]. Similarly, the RBMP for the Danube Basin states that the Piva River will not be able to reach the good status by 2033 due to the impacts of hydropeaking from hydropower plants[153].

151 The River Basin Management Plans are available here: https://www.gov.me/dokumenta/91ffc8ea-bcf5-4c45-b805-855f2bb446d6
152 RBMP for Adriatic Basin, p. 884.
153 RBMP for Danube Basin, p. 359.

Concerning the implementations of the derogations from environmental objectives from Article 4(7) of the WFD, it is important to note that it is not clear if such practice has been done thus far. Concerning the case of hydropower plant Komarnica explained in the EIA and SEA sections of the report, it seems as no analysis was carried out under Article 4(7) of the Water Framework Directive for this specific project. The study authors appear to mix the concept of 'public interest', which according to Article 3 of the Law on Energy applies to any electricity generation project, and 'overriding public interest', which according to the Water Framework Directive must be assessed on a case-by-case basis. Among others, a lack of feasible alternatives to the proposed project must be proven[154].

20 Nature Directives

Transposition of the Habitats Directive has been done to a great extent within the Law on Nature Protection and associated bylaws; however, the *Regulation on the ecological network* has still not been adopted.

The provisions of the Birds Directive which oblige the Member States to set special conservation measures to ensure the survival and reproduction of protected bird species were not transposed.

The work on establishment of the Natura 2000 network is still ongoing, whilst thus far Montenegro adopted only a Red List of Birds. The main issue is the lack of proper management of the protected areas, while the appropriate assessment to assess the impact of projects on protected areas is not being carried out.

20.1 Transposition

The Nature Directives have been transposed into the following legislation:

- Law on Nature Protection ("Official Gazette of MNE", nos. 54/16, 18/19)[155];
- Rulebook on criteria for the establishment of an ecological network ("Official Gazette of MNE", no. 45/17);
- Rulebook on the content of appropriate assessment study ("Official Gazette of MNE", no. 45/17).

154 Common Implementation Strategy for the Water Framework Directive and the Floods Directive, (n 149).
155 Work is underway on a new Law on nature protection, which would enhance the alignment of national legislation with the Birds and Habitats Directives, see 2023 Implementation Report for Montenegro, https://www.energy-community.org/implementation/report/Montenegro.html, p. 11.

Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Article 20 of the Nature Protection Law lists types of protected natural goods, which include protected areas and areas of ecological network. The protected areas are:

- Strict nature reserves;
- National park;
- Special nature reserve;
- Nature park;
- Nature monument; and
- Region of outstanding features.

Under **Article 41 of the Law**, the area of the ecological network shall be established to protect and conserve certain habitat types and species of interest to Montenegro and the EU. Areas of the ecological network are: a) areas important for the conservation of bird habitats and species; and b) areas important for the protection of habitats and species of wild plants and animals, as well as natural corridors.

According to this Article, habitats types, priority habitat types, lists of plants and animal types with priority types, including bird species, shall be determined by the Ministry.

Under **Article 42 of the Law**, the administrative authority in cooperation with professional and scientific institutions, collects data and forms the database and documentation for the establishment of an ecological network. Based on this data, the authority proposes the ecological network. Closer criteria for the establishment of the ecological network are listed in the **Rulebook on criteria for the establishment of an ecological network**.

Under **Article 43 of the Law**, the Government acts a competent authority for the establishment of an ecological network, based on the declaration act. The Act needs to determine the ecological network areas with the borders for each area, data on target species and habitats, name of the manager, as well as the general measures for protection and conservation of the ecological network. The Nature Protection Agency has the authority to propose areas of the ecological network.

The Regulation on the ecological network **has still not been adopted**. Based on the *National Strategy with Action Plan for Transposition, Implementation and Enforcement of the EU acquis on the environment and climate change (NEAS, 2016-2020), the Regulation was supposed to be adopted by 2020*, or by the date of accession.

Skadar Lake National Park, Montenegro © Gregor Subic

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

Under **Article 45 of the Law**, protection and conservation of ecological network shall be done through:

- implementation of protection measures and conservation of the area;
- avoidance of deterioration of the status of key habitat types and species of plants, birds and other animals, for which the area was designated;
- avoidance of disturbance of the key species, for which the area was designated;
- implementation of the appropriate assessment procedure for the ecological network.

According to **Article 58 of the Law**, a management plan is a planning document that lists measures and activities for protection and conservation of the protected natural area and is a basis for its management and use. The plan shall be adopted for five years. **Article 59 of the Law** lists the necessary content of the management plan.

Articles 6(3) and 6(4) of the Habitats Directive have been transposed into **Articles 46-53 of the Law**.

Under **Article 46 of the Law**, appropriate assessment for an ecological network shall be carried out when a plan, programme, project, individually or in combination with other plans,

programmes and projects can have a negative impact on the conservation objectives and negative impact on the ecological integrity of the ecological network.

The appropriate assessment (AA) is divided into two parts: preliminary assessment and main assessment. The Law establishes a connection between the EIA and SEA procedures and the appropriate assessment procedure. For plans, programmes and projects for which the SEA or EIA are not being carried out, the request for main appropriate assessment is necessary **(Art. 47(1) of the Law)**. For plans, programmes for which the SEA is being carried out, the request for the main assessment shall be requested before the decision on the need for SEA. For projects for which the EIA is needed, the request for AA shall be requested at the same time as request for the EIA screening decision **(Art. 47(2) and (3))**.

During the preliminary procedure, the competent authority shall issue a decision that the main assessment is not necessary if it can conclude with certainty that the plan, programme or project cannot have a significant negative impact on the conservation objectives and negative impact of the ecological integrity of the ecological network. If the authority cannot conclude with certainty that the plan, programme or project cannot have a significant negative impact on the conservation objectives and negative impact of the ecological integrity of the ecological network, it shall issue a decision that the main assessment is mandatory **(Art. 47 of the Law)**.

Article 48 of the Law regulates the main assessment procedure and lists the necessary elements of the study. The closer content of the study is regulated by the Rulebook on the content of appropriate assessment study. During the main procedure, the competent authority for preparation of the plan or programme for which no SEA procedure is being carried out, or the developer of a project for which no EIA procedure is being carried out, shall submit a request for approval of the AA Study to the competent authority. For plans or programmes for which the SEA is being carried out, and for projects for which the EIA procedure is being carried out, the AA Study shall be submitted with the documentation for the Report on the SEA procedure, or the EIA elaboration.

Under **Article 50 of the Law**, the assessment of the AA Study shall be performed by the commission formed for that purpose. The administrative authority is obliged to organise a public consultation on the Study.

If, based on the report of the commission, it is determined that the plan, programme or project cannot have a significant negative impact on the ecological integrity of the ecological network, the authority shall grant consent on the study. However, if the report determines that the plan, programme or project can have a significant impact, the authority shall not consent to the study **(Art. 51 of the Law)**.

The authority responsible for the preparation of the plan and programme, or the project developer, cannot adopt the plan, programme, or cannot realise the project without the consent on the AA Study **(Art. 52 of the Law)**.

Articles 52 and 53 of the Law regulate the derogation procedure from the negative appropriate assessment study. The provisions fully transpose the requirements from **Article 6(4) of the Habitats Directive**.

Under **Article 53 of the Law**, the compensation measures have to be implemented before the realisation of the plan and programme, or project. The compensation measures can be:

- setting a new area that has the same features as the damaged area of the ecological network;
- setting another ecological network area significant for the protection of the same objectives of habitat types or key species;
- setting favourable conditions within an existing ecological network for key habitat types and key species.

PROTECTION OF SPECIES

Article 91 of the Law forbids disturbance of wild animals, or their capture, injuring or killing, especially during the period of breeding, rearing, hibernation and migration, as well as other means of disturbance listed under **Article 12 of the Habitats Directive**. However, the main difference between the requirements of the Directive is that **Article 91 of the Law** does not require such disturbance to be deliberate.

Article 91 of the Law also forbids deliberate removal of wild plants and fungi from their habitats, reducing their populations, or their destruction in any other way, deliberately damage or destruction of habitats of wild species.

Derogations from species protection regulated under **Article 16 of the Habitats Directive** have been fully transposed into **Article 92 of the Law**.

Birds Directive

Articles 87 and 88 of the Law regulate the protection of birds. **Article 87(2) of the Law** partially transposed **Article 3 of the Directive**, where it is stated that the protection of wild birds shall be conducted through:

- taking measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds;
- the creation of ecological network;
- the upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;
- the re-establishment of destroyed biotopes;
- taking measures to avoid pollution or deterioration of habitat or any other disturbance that impacts birds in the ecological network.

Therefore, this article does not mention as one of the main protection measures the creation of biotopes, but just the re-establishment of destroyed ones.

Article 87(11) of the Law provides that based on the monitoring of their size and population, bird species shall be categorised as follows:

- species in danger of extinction;
- species vulnerable to specific changes in their habitat;
- species considered rare because of small populations or restricted local distribution;
- other species requiring particular attention for reasons of the specific nature of their habitat.

This provision does not follow the requirement from **Article 4(1) of the Birds Directive** considering that the provision obliges Member States to set special conservation measures to ensure survival and reproduction of bird species. In connection to this, a special account shall be taken of the categorises of birds listed above. Therefore, **Article 87(11) of the Law** does not make it clear if any special conservation measures shall be taken, but simply lists different categories of birds, which was not the main point of the requirement stated in the Directive.

Articles 4(2) of the Directive that requires the introduction of similar measures for migratory species and steps to avoid pollution or deterioration of habitats has been transposed in **Article 87(12) of the Law**.

Article 4(4) of the Directive has been transposed into **Article 87(2) of the Law**, where it is listed as one of the protection measures – taking measures to avoid pollution or deterioration of habitat or any other disturbance that impacts birds in the ecological network. However, this provision does not mention if, outside of these protected areas, the authorities shall strive to avoid pollution or deterioration of habitats.

Article 88 of the Law partially transposed **Article 9 of the Birds Directive** that regulates the procedure of derogations from provisions on protection of birds. In comparison to the Directive, **Article 88 of the Law** lists necessary content of the request for the derogation permission that shall contain as follows:

- information on the applicant;
- the means, arrangements or methods that would be used;
- type of birds;
- reasons for carrying out the activities;
- duration of activities;
- means and deadlines for informing the competent authority about the realisation of the permit.

Therefore, the Article does not mention anything concerning the risks or controls which would be carried out, as required by the Directive. Moreover, the Article does not specify if any bylaw would be adopted that would regulate this matter in more detail.

20.2 Implementation

Harmonisation and transposition of the Nature Directives in Montenegro was part of different projects, however the most prominent one was the project finances by the EU – Establishment of the Natura 2000 network in Montenegro. The main goal of this project was the implementation of activities necessary for the establishment of the future Natura 2000 network. In this process, 33 potential SPA were identified, which covers 53.5% of the country's territory. The work on establishment of the Natura 2000 network is still ongoing, whilst thus far Montenegro has adopted only a Red List of Birds[156].

The national network of protected areas currently amounts to 13.22% of the land and 1.87% of the sea territory of Montenegro. There are currently 80 protected areas, however the main issue identified is the lack of proper management of the sites. Out of 80 sites, only 53 have an allocated manager of the site. In addition, a protection study was conducted only for 22 out of 80 protected areas (27.5%), whilst the revision studies is needed for 63 protected areas (79%)[157].

CASE STUDY

DEVELOPMENT OF PORTO SKADAR LAKE

Currently, one of the most significant cases against Montenegro before the Bern Convention concern the development of Porto Skadar Lake, the planned construction of two touristic complexes, namely Porto Skadar Lake and White Village in the national park Skadar Lake, based on the complaint from 2016 by NGO Green Home and the citizens association from Virpazar. The joint mission of the Bern and Ramsar Convention both shared their concerns about the impact that these and other pressures are likely to have on the protected area. One of the recommendations was the cancellation of the planned projects, which to date has not been done.

156 Shadow Report for Chapter 27: 'Progress on Pause', https://www.greenhome.co.me/predstavljanje-izvjestaja-iz-sjenke-za-poglavlje-27-progres-na-pauzi/, p. 49.
157 Ibid., pp 53–54.

CASE STUDY

HYDROPOWER PLANT KOMARNICA

The second most significant case before the Bern Convention was the planned development of hydropower plant Komarnica, following the complaint from 2022 by the Montenegrin Ecological Society and Association of Young Ecologists from Niksic. As explained in the previous sections, the project would flood part of the Komarnica candidate Emerald Site (ME000000P) and the Dragišnica and Komarnica Regional Park. The area is also part of three potential Natura 2000 sites: the Bukovica Valley and Vojnik Mountain under the Birds Directive and the Komarnica and Pridvorica sites under the Habitats Directive. However, there had been no appropriate assessment carried out in order to assess the impact of the project on the protected areas and species and habitats, whilst the potential Natura 2000 sites were not even mentioned in the study.

This matter is still ongoing, however the Bern Convention Secretariat has already expressed their concerns about the 30 years old data used in the development of the EIA study for development of the project.

North Macedonia

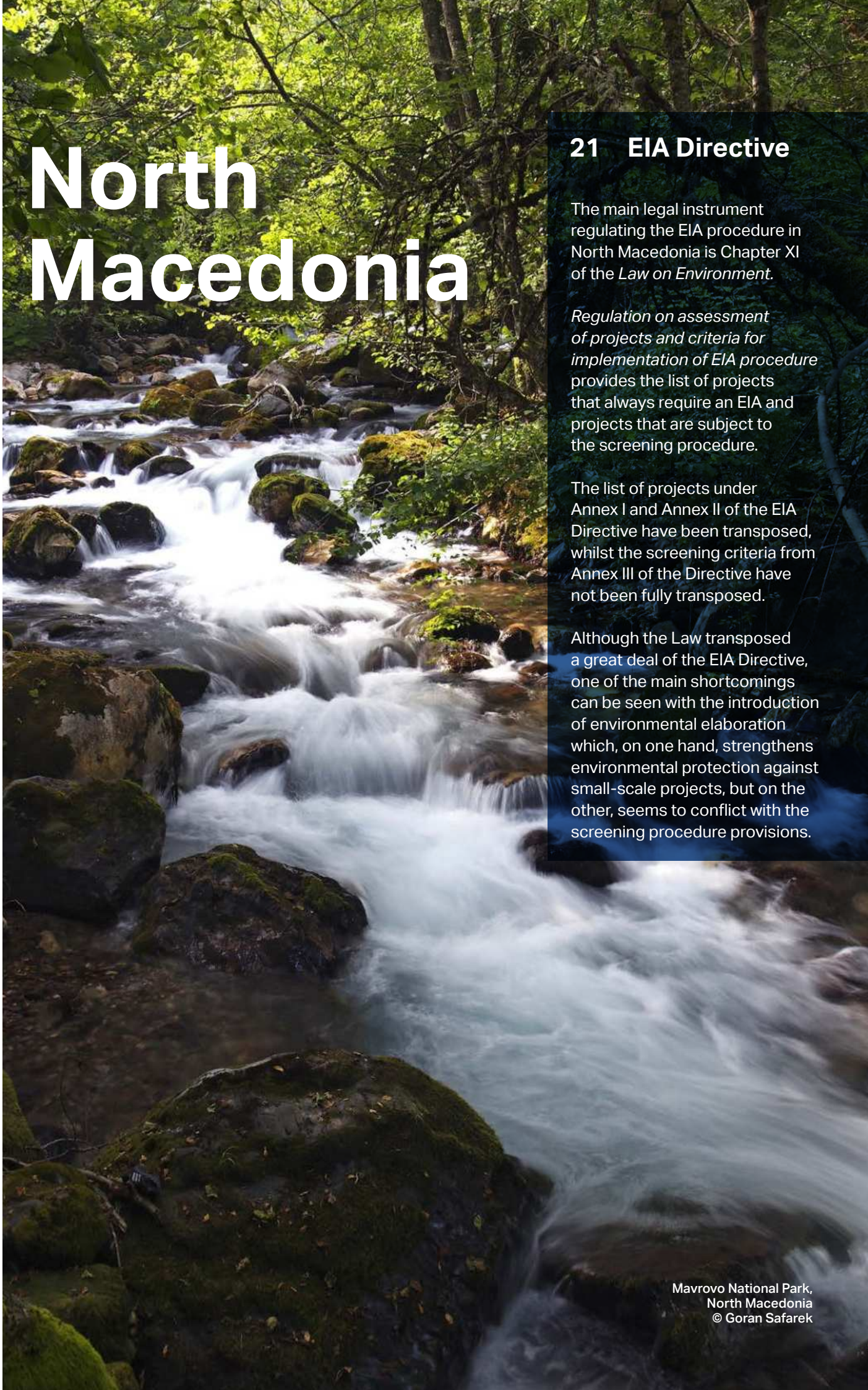
21 EIA Directive

The main legal instrument regulating the EIA procedure in North Macedonia is Chapter XI of the *Law on Environment.*

Regulation on assessment of projects and criteria for implementation of EIA procedure provides the list of projects that always require an EIA and projects that are subject to the screening procedure.

The list of projects under Annex I and Annex II of the EIA Directive have been transposed, whilst the screening criteria from Annex III of the Directive have not been fully transposed.

Although the Law transposed a great deal of the EIA Directive, one of the main shortcomings can be seen with the introduction of environmental elaboration which, on one hand, strengthens environmental protection against small-scale projects, but on the other, seems to conflict with the screening procedure provisions.



Mavrovo National Park, North Macedonia
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21.1 Transposition

The EIA procedure in North Macedonia has been partially transposed in **Chapter XI of the Law** on Environment ("Official Gazette", no. 53/2005, as amended) ('Law'), and a number of bylaws.

Article 76(1) of the Law transposed **Article 2 of the Directive** by stating that the subject of the EIA are the projects defined in **Article 77 of the Law** which, by virtue of their nature, size and location, are likely to have significant effects on the environment.

Article 77(1) of the Law stipulates a bylaw that shall determine projects for which the EIA procedure shall be mandatory, and a list of criteria for determining whether the EIA is necessary for other projects that are likely to have an impact on the environment, and the criteria for changes of existing projects.

Article 77(2) of the Law stipulates that the need to conduct an EIA can also be determined by case-by-case examination, and based on the character, scope and the location of the project, in accordance with the set criteria, '*and taking into account the latest scientific and technical knowledge and solutions in the regulations that specify the lowest emission limits in the environment*'.

Based on this, the **Regulation on assessment of projects and criteria for implementation of EIA procedure** (nos. 74/05, 109/09, 164/2012, 202/2016, 175/2022) **(Regulation)** was adopted and provides the list of projects that always require an EIA, and projects that are subject to the screening procedure.

Under **Annex I(12) of the Regulation**, hydro-technical installations designed for the holding back of water in order to create permanent or temporary accumulation of water or liquid substances in a liquid state, with at least 5 m in height, or that can accumulate more than 100,000 m3, and a dam with the height of at least 10 m, that also fulfils one of the following requirements:

- the length of the crown of the dam is more than 500 m thicker;
- the volume of the accumulation is greater than 1,000,000 m^3;
- maximal leakage of the spillway is greater than 2,000 m^3/s;

require a mandatory EIA. This requirement is stricter than that which is required under the Directive, requiring a mandatory EIA for dams that accumulate more than 10 million cubic metres.

Under **Annex II Section 3(ж)**, hydroelectric power plants, and under **Section 10(e)**, projects for the construction of dams and other hydro-technical objects for holding of water (not included under Annex I), are all subject to the screening procedure.

Under **section 16 of the Regulation**, any change or extension of projects listed in both annexes, already authorised, executed or in process of being executed, which may have significant adverse effects on the environment, are also subject to the screening procedure.

The **Regulation** also sets the criteria that need to be taken into account during the screening procedure. These are divided into the criteria with regards to the characteristics of the project, location, and possible significant impacts of the project on the environment.

The criteria set in **Annex III of the Directive** are to a great extent transposed, however with a couple of inconsistencies. **Article 6 of the Regulation** that lists the criteria for the characteristics of the project does not include the assessment of risks of major accidents and/or disasters caused by climate change **(Annex III, 1(f))**, and the risk on human health **(Annex III 1(g)** of the EIA Directive), whilst **Article 9 of the Regulation** that regulates the type and characteristics of the potential impact does not include provisions **3(g) and (h) of the Annex III of the Directive** with regards to the cumulating of the impact with the impact of other existing and/or approved projects and possible reduction of impact.

Under **Article 81 of the Law**, when environmental authorities make a decision that the EIA procedure is needed, they will notify the investor that is then obliged to submit a request for the scoping decision that will specify the scope of the EIA study. Against this decision, an investor, natural and legal persons, as well as the associations of citizens formed for the protection of the environment can submit an appeal within 8 days from the day when the decision was published to the *State Commission for Decision-Making in the administrative procedure and a second-instance employment relations* (**'State Commission'**).

However, **Article 81 of the Law** does not state whether a decision that an environmental impact assessment is required, or not, would state the main reasons for requiring, or not requiring, such assessment, with reference to the relevant criteria listed in **Annex III of the Directive**, in accordance with **Article 4(5) of the Directive**.

The investor is obliged to prepare the EIA study and submit it to the competent authority for approval. The study needs to be signed by at least one person from the list of experts referred to in **Article 85 paragraph (1) of the Law**, who is the responsible person for its quality. After the study is published, it is subject to public participation in accordance with **Article 91 of the Law**.

The Rulebook on the content of the requirements for the EIA study (no. 33/06) provides for the content of the EIA Study that to a great extent follows the requirements from the Directive. However, the **Rulebook** only lists the content of the study, without going into great detail on each of the elements, as required under **Annex IV of the Directive**.

Following the public debate, the competent authority shall prepare the report on the appropriateness of the EIA study by taking into account all the opinions obtained during the procedure (**Article 86(3) of the Law**). The report determines whether the assessment study of the project's impact on the environment meets the requirements as prescribed by the Law, and proposes the conditions to be determined with the permit for the implementation of the project as well as the measures for preventing and reducing the harmful effects **(Article 86(4) of the Law)**.

Based on the EIA study, the report on the appropriateness of the EIA study, public hearing referred to in **Article 91 of the Law**, and the received opinions, the competent authority shall issue a decision by which it grants consent or rejects the request for the implementation of the project **(Article 87 of the Law)**.

The affected legal entities or natural persons, as well as citizens associations for the protection of the environment can – within 15 days from the day when the decision was published – appeal to the State Commission **(Article 89 of the Law)**.

The same parties also have the right to appeal against the decision in the second instance, within 15 days from the day when they learned about the adopted decision, where the competent

authority failed to act in accordance with **Articles 90 and 91 of the Law**. This means that even when the competent authority failed to follow the procedure for public participation, the affected and interested parties shall have the right to appeal **(Article 89(2) of the Law)**.

Article 89(4) of the Law further provides that the affected legal entities or natural persons, as well as citizen associations established for the protection and promotion of the environment, shall be entitled before the competent court **to submit a request for interim measure** that would prohibit the implementation of the project within 15 days from the day they learned about the adoption of the permit.

Although the above provisions seem to considerably follow the procedure prescribed by the EIA Directive, there are some inconsistencies in the national law that need to be addressed. Under **Article 24 of the Law**, legal and natural persons that carry out activities that do not fall under the projects that are subject to the EIA procedure are obliged to prepare an environmental protection report before realisation of the project (the so-called 'elaboration').

Under Section V(4) of the **Regulation on the activities for which an environmental elaboration is mandatory and it gets approved by Ministry of Environment and Physical Planning** (nos. 80/2009, 36/2012, 233/2022) (**'Regulation on activities'**), hydropower plants with installed capacity up to 10 MW are listed as types of projects that always require the elaboration.

Article 2(1) of the Regulation again states that for projects for which no EIA is being determined under the **Regulation on assessment of projects and criteria for implementation of EIA procedure**, the elaboration needs to be prepared.

The Rulebook on the form and content of the environmental elaboration[158] sets the necessary requirements that an elaboration needs to include. **There are no any obligations for public consultations during the elaboration procedure**.

The competent authority is obliged to issue a decision on approving or not approving the elaboration within 15 days from the moment it received the report. Under **Article 10 of the Law**, legal and natural persons can submit an appeal[159] within 15 days from the day of issue against the decision to the State Commission.

With the aforementioned wording, it is not clear what the exact relationship is between the elaboration from **Article 24 of the Law**, and the EIA screening procedure from **Article 81 of the Law**, especially considering that **Regulation on the activities** lists similar projects as the **Regulation on assessment of projects and criteria for implementation of EIA procedure**.

158 The full name of the Rulebook is: *Rulebook on the form and content of the environmental elaboration, in accordance with the types of activities for which it is drawn up, as well as in accordance with the performers of the activity and the scope of the activities performed by legal and natural persons, the procedure for their approval, as well as the way of keeping the register for approved environmental elaborations ("Official Gazette of North Macedonia*", no. 44/13 from 22.03.2013.

159 Article 10 of the Law does not clearly specify whether the environmental NGOs have access to justice against the elaboration. NGO Front 21/42 submitted a Complaint under the term 'legal persons' and the Second Degree Commission rejected them. The NGO then submitted a Lawsuit to the Administrative Court that ruled in their favour, confirming that environmental NGOs have a right to a Complaint against such Decision for the elaboration.

Namely, under the above bylaws all hydropower plants are subject to the EIA screening procedure, while plants with installed capacity up to 10 MW need to have an elaboration. Thus, it is not clear when does the developer need to prepare an elaboration. Is it before the request for a screening decision, or **are the hydropower plants up to 10 MW actually excluded from the EIA screening procedure, and only need to be followed up with the elaboration**, which seems to be a general practice, as it will be shown in the Implementation part of the Report.

Based on the analysis, it seems as the use of the environmental elaboration should only be accepted in cases of:

- projects that are not listed under the EIA Directive (e.g. Annex I and Annex II), where such projects are likely to have an impact on the environment;
- projects falling under Annex II of the EIA Directive that, following the screening procedure, it was decided that the EIA Report is not needed.

Otherwise, there would be a breach of the EIA Directive.

21.2 Implementation

SMALL HYDROPOWER PLANTS WITHIN THE NP MAVROVO

CASE STUDY

One of the most significant examples of failure to implement the EIA Directive in regards to the permitting of hydropower projects was in case of ***small hydropower plants within the NP Mavrovo.***

In 2015, the Ministry of Environment and Physical Planning issued Decisions for approval of the environmental elaborations for construction of four[160] small HPPs within NP Mavrovo. Within the legally defined deadline of 15 days, the NGO Front 21/42 submitted a Complaint to the Ministry against the issued Decisions claiming, among others, that the environmental elaborations did not contain a detailed description of the habitats and species, nor did it include an assessment of their endangerment, and that the authorities **did not carry out a screening procedure**[161].

After several interventions by Front 21/42, in May 2017, the Ministry adopted a Decision rejecting Front 21/42's Complaint as untimely and inadmissible, claiming that Front 21/42 was not a party in the procedure and had no right to submit a complaint against Decisions for approval of the environmental elaborations.

160 One of the approvals has been cancelled in the meantime.

161 By issuing these Decisions, the Ministry acted contrary to the Bern Convention Recommendation 184 from 2015: '*Suspend the implementation of all government projects, in particular the hydropower plants foreseen and related infrastructure, within the territory of the Mavrovo National Park, until a Strategic Environmental Assessment will be completed taking into account the following point of the Recommendation, putting specific emphasis on cumulative effects of all planned development activities on the territory of the Park…*'

CASE STUDY

Within the legally defined deadline, Front 21/42 submitted a Complaint to the Second Degree Commission. In April 2019 (after several interventions), the Second Degree Commission adopted a Decision rejecting the complaint as unfounded, stating that only the natural and legal persons who submitted a request for the approval of the environmental elaboration have the right to complain, agreeing with the Ministry's determination that Front 21/42 is not a Complainant in the procedure.

In May 2019, Front 21/42 submitted a Lawsuit to the Administrative Court against the Second Degree Commission's Decision.

In May 2022, the Administrative Court upheld the Lawsuit and annulled the Commission's Decision. Consequently, the Commission had to adopt a new Decision bearing in mind the Court's instructions. The Decision has not been adopted to date and the court case in this regard is pending.

The issue around not subjecting small hydropower plants to the EIA procedure was also highlighted in the Energy Community 2022 Implementation Report for North Macedonia. The Report underlined that according to the State Audit Report on small hydropower plant (HPP) projects, none of the small HPPs was made subject to an EIA. The location and the impacts criteria from Annex II of the EIA Directive are not duly taken into account in the screening of hydropower plants with an installed capacity of less than 2 MW. They are routinely not made subject to an EIA only because of the size of the project[162].

On 30 November 2021, the Ministerial Council of the Energy Community Treaty established the failure of North Macedonia to transpose the Environmental Impact Assessment (EIA) Directive 2014/52/EU, urging the Government to adopt the necessary amendments and improve the EIA procedure[163]. The same was confirmed in the Energy Community 2023 Implementation Report for North Macedonia[164].

Apart from not subjecting small hydropower plants to an EIA, failure to subject Annex I projects to the mandatory EIA occurred in the ***Construction of highway Corridor 8 and Corridor 10***. In 2021, the Assembly of North Macedonia adopted the **Law on the determination of public interest and the nomination of a strategic partner for the implementation of the project for the construction of the infrastructure Corridor**[165], or so called 'Bechtel and Enka Law' – based on the company duo that would construct the highways of the corridors. According to the civil society, the contract was signed without a public tender, it was labelled as classified document, and additionally accompanied by many scandals, one of which was the opening of the case by the Public Prosecutor[166].

162 2022 Implementation Report, Energy Community Treaty, North Macedonia, https://www.energy-community.org/implementation/report/reports/IR2022.html, p. 14.
163 Ibid.
164 Available here: https://www.energy-community.org/implementation/report.html, p. 107.
165 Law on the determination of public interest and the nomination of a strategic partner for the implementation of the project for the construction of the infrastructure Corridor "Official Gazette of Republic of North Macedonia", no. 163/21 from 16.07.2021.
166 https://jorm.gov.mk/jpdrzhavni-patishta-go-dostavi-do-obvinitelstvoto-dogovorot-za-behtel-i-enka/

One of the articles in the special 'Bechtel and Enka Law' stipulates that, for the construction of the Corridors 8 and 10D, all other laws can be violated in full, or partially[167]. Another article enables for the actual construction of sections of the envisaged highways to start prior to the finalisation of the design of the projects for these roads, which inevitably means construction without an EIA[168].

22 SEA Directive

The SEA Directive has been transposed in the Chapter X of the *Law on Environment.*

Although the Law provides for the access to justice provision against the SEA screening decision, it does not ensure the access to justice against a final decision in the procedure.

Transposition of Article 9 of the SEA Directive, providing obligations to inform about the SEA decision, is limited only to the transboundary consultations procedure.

22.1 Transposition

The SEA Directive has been transposed in **Chapter X of the Law** on Environmental Protection ("Official Journal", no. 53/2005, as amended) ('Law'), and a number of bylaws.

Article 65(2) of the Law lists the type of plans and programmes that require the SEA. These are plans and programmes in the area of agriculture, forestry, fishing, energy, industry, mining, transport, regional development, waste management, water management, telecommunications, tourism, spatial and urban planning, land use, as well as projects which set the framework for carrying out the EIA and all plans and programmes that regulate management of protected areas, or can have an impact thereon.

According to **Article 65(3) of the Law**, apart from planning documents from paragraph 2, plans and programmes which determine the use of small areas at a local level and minor modifications to plans and programmes – as referred to in paragraph 2 – shall require an environmental assessment only where the Member States determine that they are likely to have significant environmental effects or impacts on human health in accordance with the **Regulation of strategies, plans and programmes, including changes to the strategies, plans and programmes that require the strategic environmental impact assessment and life and health of people** (no. 153/07) **('Regulation on strategies')**.

167 See Article 3(4) of the Law.
168 See Article 8(1) of the Law.

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Section 3 of the Regulation of strategies lists hydro-energy projects as types of plans and projects that are subject to the SEA.

For planning documents that are not listed under **Article 65(2) of the Law**, but that set a framework for carrying out the EIA, a SEA shall be carried out only when there is a likelihood of significant impact on the environment and human health in accordance with the Regulation of strategies.

According to the **Article 65(6) of the Law**, the competent authority that prepared the plan or programme is obliged to issue a decision on carrying out, or not carrying out, the SEA that will include the arguments therefor, in accordance with the set criteria. The decision can also include the scope of the SEA and it needs to be published online.

The criteria that need to be taken into consideration during the screening procedure from **Annex II of the SEA Directive** are fully transposed by the **Regulation on the criteria used for the deciding whether certain planning documents are likely to have a significant impact on the environment and human health (144/07) ('Regulation on SEA criteria')**.

The public can submit an appeal against the screening decision within 15 days from the day when the decision was issued to the State Commission **(Article 65(11) of the Law)**.

The content of the SEA report is provided in the **Regulation on the content of the SEA report** (no. 153/07), which fully transposes the requirements from **Annex I of the Directive**.

Before the adoption of the SEA report, the relevant authority for the preparation of the planning document shall publish the report for public consultations. The competent authority responsible for the affairs of the environment, and the public bodies affected by the implementation of the planning documents, legal and natural persons and the public, may submit their opinions on the draft plan document and environmental report within 30 days **(Article 69 of the Law)**.

Opinions and comments obtained during public consultations and during the transboundary consultations need to be incorporated into the environmental report and submitted to the competent authority for adoption **(Article 72 of the Law)**.

Under **Article 73 of the Law**, findings from the environmental report, the opinions and comments received from the bodies affected by the implementation of the planning document, as well as the results of the transboundary consultations, shall be taken into consideration during the preparation of planning documents.

The competent authority for the adoption of the plan and programme is obliged to publish the decision on adoption of the plan or programme. However, in comparison to the **Article 9 of the SEA Directive** that obliges the authorities to ensure that – when a plan or programme is adopted – the public and any Member State consulted are informed and the following items are made available to those so informed:

- the plan or programme as adopted;
- a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with; and
- the measures decided concerning monitoring in accordance with Article 10.

Article 74 of the Law obliges the authorities to publish these **only during the transboundary consultations**, and not in every case.

The competent authority for the preparation of the planning documents is obliged to monitor the effects of the implementation of the plan and programme on environment and human health, in order to detect unexpected adverse effects at an early stage and to take an appropriate actions to remedy the situation **(Article 75(1) of the Law)**.

Although the Law provides for the access to justice provision against the SEA screening decision, as explained above **(Article 65(11) of the Law)**, **the Law does not ensure the access to justice against a final decision in the procedure**.

22.2 Implementation

Proper implementation of the SEA Directive in North Macedonia has been faced with a number of shortcomings. The challenges to properly implement the obligation for parallel development of the SEA report and the draft document before its adoption has been noted by the Energy Community Secretariat in their 2021, Implementation Report[169], while the European Commission continuously comments on the challenges of implementation and enforcement of existing legislation[170]. In the 2023 Implementation Report by the Energy Community Treaty, it was noted that there is a lack of synchronised development of the draft plan or programme and the SEA report, often leading to the adoption or endorsement of the plans before the SEA process is completed[171].

DEVELOPMENT OF THE GORICA NORTH URBAN PLAN

CASE STUDY

One of the most significant implementation shortcomings were evident in the development of the Gorica North urban plan. The Municipality of Ohrid published and conducted public consultations for the Draft SEA Report without publishing the actual urban plan Gorica North. The NGO Front 21/42 sent several letters to the municipality requesting the document, without which it was not possible to analyse the SEA Report properly, nor to compile meaningful comments. The Municipality responded that the procedure for the Draft Urban Plan was being conducted according to the Law on Urban Planning, and the SEA procedure according to the Law on Environment – hence the public consultations for the SEA Report were organised without publication of the actual urban plan which was the subject of the SEA.

Moreover, the SEA Report for the new urban plan Gorica North, located in the World Heritage Ohrid Region, ignored the UNESCO's recommendation[172] for an immediate moratorium of any urban or coastal transformation, and the warning that further urbanisation of the property would take the already vulnerable state of the property to a point of no return. The SEA Report failed to mention the fact that UNESCO's advisory bodies (IUCN and ICOMOS) confirmed twice (in 2019 and 2021) that the Ohrid Region fulfils the criteria to be inscribed on the List of World Heritage in

169 2021 Implementation Report, Energy Community Secretariat, https://www.energy-community.org/implementation/report/reports/IR2021.html, p, 14; See also the 2023 Implementation Report, https://www.energy-community.org/implementation/report/North_Macedonia.html, p. 107.

170 https://neighbourhood-enlargement.ec.europa.eu/system/files/2021-10/North-Macedonia-Report-2021.pdf, p. 94.

171 2023 ECT Implementation Report, (n 169), p. 11.

172 Report of the joint World Heritage Centre/ICOMOS/IUCN Reactive Monitoring mission to the World Heritage property Natural and Cultural Heritage of the Ohrid Region (the former Yugoslav Republic of Macedonia), 9–14 April 2017; Report of the joint World Heritage Centre/ICOMOS/IUCN Reactive Monitoring mission to the Natural and Cultural Heritage of the Ohrid Region (North Macedonia/Albania), 27–31 January 2020

CASE STUDY

Danger, and also ignored the part of the Management Plan for WH Ohrid Region, which states that in order to preserve the property, no urbanisation outside of the existing cities and settlements was envisaged in the plan. The SEA also failed to assess the impact on, or even mention the recently proclaimed and highly vulnerable Ramsar site Studenchishte Marsh, which borders the new urban plan.

The NGO comments related to these and other serious issues were dismissed by the Municipality, while their alarming letter received a general and meaningless reply. All the legal actions initiated by the NGO were futile, as well as the applications to the State Environmental Inspectorate and the Department of Environment, where in October 2021 the Ministry of Environment gave a positive opinion for this SEA Report, fully aware of all the legal violations[173].

The only institution which took action in relation to this SEA was the State Commission for Prevention of Corruption, which in December opened a case based on the initiative the Front 21/42 sent them[174]. The outcome of this case is still awaited.

23 Environmental Liability Directive

The Environmental Liability Directive has been partially transposed by the *Law on Environment.*

The main shortcoming are seen in the lack of transposition of provisions on granting environmental NGOs and affected or likely to be affected persons the right to access a court or other independent and impartial public body to review the procedural and substantive legality of decisions, acts and omissions of the public authorities under the Directive.

23.1 Transposition

North Macedonia has partially transposed the Environmental Liability Directive in the **Law on Environment (articles 157-159)**, and through the adoption of the **Rulebook on professional activities liable for environmental damage, criteria for determining presence of environmental damage, as well cases that exclude the liability for environmental damage** (no. 31/11) (**'Rulebook on professional activities'**) and the **Rulebook on remediation measures for environmental damage** (no. 31/11).

173 This information was confirmed to the NGO by the Municipality of Ohrid and Ministry of Environment.
174 The information was received via letter from the State Commission for Prevention of Corruption.

Under **Article 157(1) of the Law**, the environmental liability is based on the polluter pays principle, which covers prevention and remediation of environmental damage, restoration of the environment, and the introduction of measures for minimising the risk of damage to the environment.

Article 157(2) of the Law follows the same wording from the Article 3(1) of the Directive by stating that the environmental liability can derive from 'the immediate threat of environmental damage or environmental damage that has occurred as a consequence of performing professional activities determined by the law, or immediate threat of damage to protected species and natural habitats or damage to protected species and natural habitats, resulting from the performance of professional activities that are not determined by the law, if the damage is caused by fault or from the negligence of the operator'.

Annex I of the **Rulebook on professional activities** lists the activities in accordance with **Annex III of the Directive**. Furthermore, **Article 5 of the Rulebook** lists the criteria for the assessment of the environmental damage in accordance with **Annex I of the Directive**.

Articles 157(6),(7) of the Law regulate the obligation of preventive action by the operator in cases where the damage has not yet occurred, but there is an imminent threat of such damage occurring. If the operator fails to fulfil the preventive actions, the competent authority in the area of environment is obliged to carry out the measures at the cost of the operator. The articles fully transpose the obligation from **Article 5 of the Directive**.

Similarly, **Articles 157(8),(9) of the Law** oblige the operator to take specific remedial actions when the damage has occurred. The remedial actions are prescribed by the **Rulebook on remediation measures for environmental damage** (Official Gazette of Republic of North Macedonia", no. 31/11 from 14.03.2011), that fully transpose the list of remediation measures from **Annex II of the Directive**.

Under **Article 158 of the Law**, the operator bears the costs for the preventive and remedial actions pursuant to the Law; this Article fully transposed **Article 8 of the Directive**.

Article 10 of the Directive that entitles the competent authority to initiate cost recovery proceedings against the operator **has not been transposed**.

Article 12 of the Directive that enables natural and legal persons to submit a request for action has not been transposed, however under **Article 159 of the Law**, any legal or natural person, as well as the association of citizens established for the protection of environment, which are directly endangered or suffer from the environmental damage caused[175], have the right before the competent court to require the operator to:

- Restore the initial state of the environment (restitution); or
- Compensate for environmental damage, if restitution is not possible.

175 It is not entirely clear from this provision whether environmental NGOs are considered directly endangered or suffer from the environmental damage caused.

The state reserves the right to request restitution and compensation for environmental damage if there are no other persons who, in accordance with the provisions of this Law, have the right to do so.

Article 13 of the Directive, giving the same persons the right to access a court or other independent and impartial public body to review the procedural and substantive legality of decisions, acts and omissions of the public authorities under the Directive, **has not been transposed**.

23.2 Implementation

According to our research, the ELD is still not being implemented in North Macedonia.

24 Water Framework Directive

The main legal instrument transposing the WFD in North Macedonia is the *Law on Waters.*

The Ministry of Environment and Physical Planning and Department for Waters is competent for the preparation of RBMPs. Government is competent to adopt the final plans.

The environmental objectives from Article 4 of the WFD have been partially transposed. Namely, only Articles 4(6) on temporary deterioration and 4(8) on non-permanent exclusion from achieving the objectives have been fully transposed. Article 4(1) that aims to achieve good status or potential, 4(5) on the exemption from achieving good status due to infeasibility or disproportionate costs, and 4(7) on derogations for new modifications to the physical characteristics of a surface water body, have been partially transposed, whilst Articles 4(2) on the application of the most stringent objective, 4(3) on the designation of a body of surface water as artificial or heavily modified, 4(4) on extending the deadlines for achieving environmental objectives, and 4(9) providing that, despite granting derogations, at least the same level of protection as the existing Community legislation is ensured, have not been transposed.

The deadlines for achieving the environmental objectives has not been set.

24.1 Transposition

The WFD has been partially transposed into the following legislation:

- Law on Waters ("Official Gazette of North Macedonia", nos. 87/08, 6/09, 161/09, 83/10, 51/11, 44/12, 23/13, 163/13, 180/14, 146/15, 52/16, 151/21, 99/22) ('the Law');
- Law on the determination of water services costs ("Official Gazette of North Macedonia", no. 7/16);
- Decision on the determination of borders of water basins ("Official Gazette of North Macedonia", no. 107/12);
- Rules on content and means of preparation of the RBMPs ("Official Gazette of North Macedonia", no. 148/09);
- Rules on methodology for assessment in the river basins ("Official Gazette of North Macedonia", no. 148/09);
- Rules on content and means of preparation of the Programme of measures ("Official Gazette of North Macedonia", no. 148/09);
- Rules on content and means of preparation of information and mapping for activities for monitoring of waters ("Official Gazette of North Macedonia", no. 148/09).

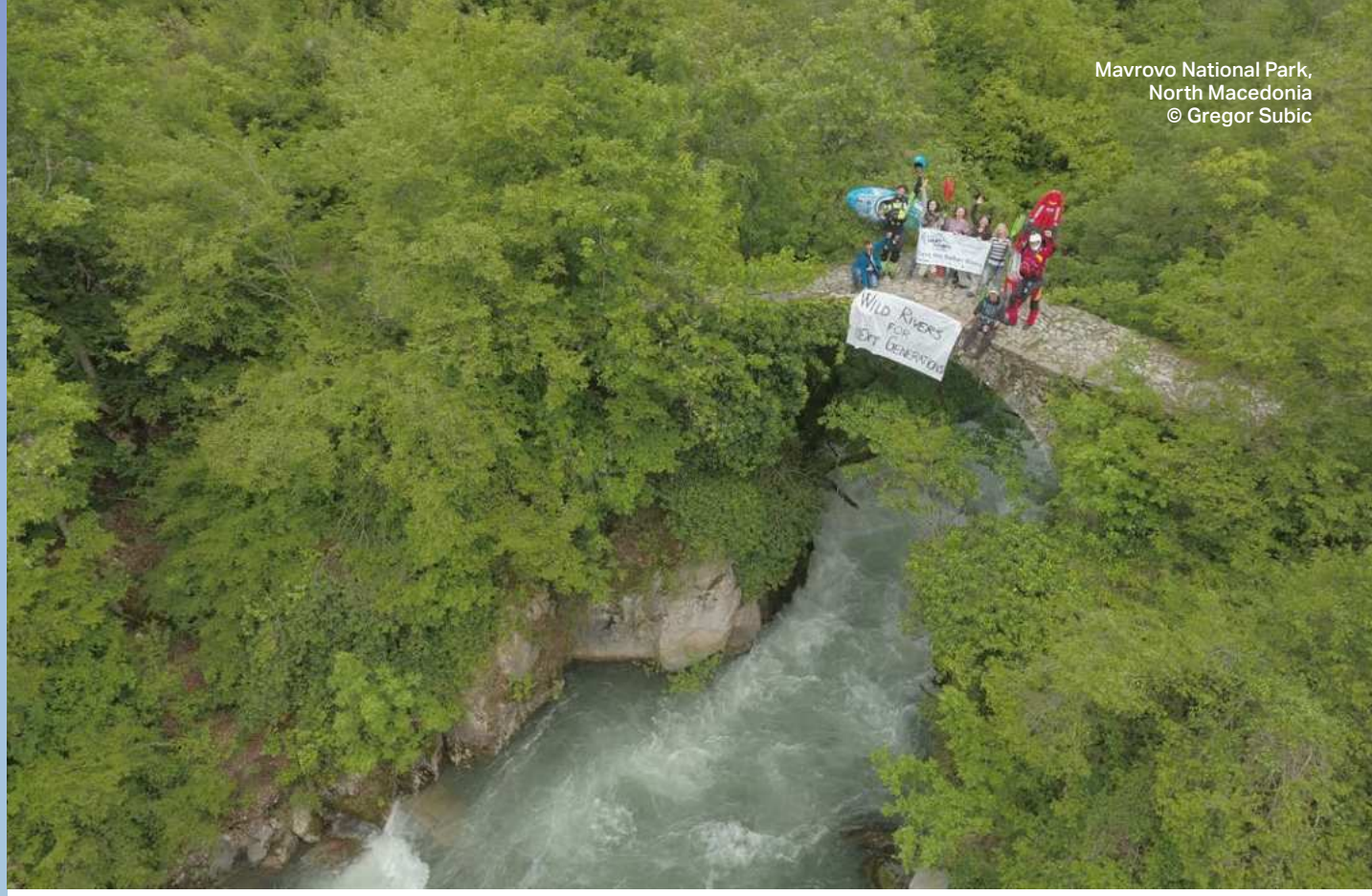
RIVER BASIN MANAGEMENT PLANS

Under **Article 7 of the Law on Waters**, North Macedonia is divided into four river basins, namely: Vardar, Crn Drim, Strumica and Juzna Morava. The **Decision on the determination of borders of water basins** further regulates this matter.

According to the **Article 66(5) of the Law**, the authority competent for environmental matters, meaning the Ministry of Environment and Physical Planning and Department for Waters, is also competent for the preparation of RBMPs and international RBMPs[176].

Under **Article 66 of the Law**, the RBMP shall be produced for each basin for a period of six years. The Government shall adopt the plan on a proposal by the Ministry. This Article also lists the necessary content of the RBMP in accordance with **Annex VII of the Directive. The Rulebook on content and means of preparation of the RBMPs** further regulates this matter.

176 The Ministry of Environment and Physical Planning is competent in the protection, improvement and planning of water management. The Department for Waters is a unit organised within the Ministry that is competent for closer implementation of matters relating to water. The Water Department is organised through the following units: the Unit for Water Planning and Development, Unit for Concessions and Inter-sectoral Cooperation, Unit for Water Rights, Unit for Vardar River Basin Management, Unit for Crn Drim River Basin Management and Unit for Strumica River Basin Management. The Ministry of Agriculture, Forestry and Water Economy manages the water for agricultural purposes as well as infrastructural facilities, such as dams, reservoirs and irrigation systems. The Hydrometeorological Service is part of the Ministry, and it is responsible for monitoring the quantity and quality of surface water and groundwater.



Mavrovo National Park,
North Macedonia
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According to **Article 68 of the Law**, the RBMPs shall be updated no later than 6 years.

Article 70 of the Law on Waters regulates the procedure for an international RBMP. In the case of an international river basin, administrative authorities shall cooperate with other countries to produce an international RBMP. In case such a plan is not produced, the authorities shall produce an RBMP covering parts that fall within the territory of North Macedonia.

According to the **Article 74 of the Law**, the competent environmental authority is obliged to:

- notify the Government at least once every three years about the implementation of the river basin management plans;
- notify the Government at least once a year about the implementation of the Programme of measures, and about the reasons for non-implementation and about the introduction of additional measures; and
- publish the river basin management plans in accordance with **Article 163 of the Law**.

The Minister of Environment is obliged to submit to the Government an initial report on:

- implementation of river basin management plans within three years of the adoption of the River Basin Management Plan; and
- implementation of the Programme of measures within one year of the adoption of the Programme of measures.

ENVIRONMENTAL OBJECTIVES

Articles 90-92 of the Law on Waters list the environmental objectives in accordance with **Article 4(1) of the WFD**. However, these Articles do not provide **a set deadline by which these objectives need to be achieved**.

The WFD provides that the objectives need to be achieved at least 15 years after the date of entry into force of the Directive. The Law does not provide for any similar deadline.

Article 90(3) of the Law on Waters provides that the deadlines shall be set by a separate bylaw. However, it seems as such a document has still not been adopted.

Article 95 of the Law on Waters provides that if the achievements of environmental objectives for a certain water body cannot be achieved, or are unjustifiably expensive, less stringent environmental goals can be set. As an exception, a derogation is allowed only if the derogation refers to a new change in the physical characteristics of a surface water body, changes in the level of groundwater bodies, or taking measures of sustainable human development that cause deterioration of the status from high to good status of the surface water. This Article thus aims to transpose **Articles 4(5) and 4(7) of the Directive**, but this is not done correctly.

The derogation must not permanently prevent or disable the achievements of environmental goals set by the law for the surface water body and other water bodies. This is the correct transposition of **Article 4(8) of the Directive**. Government is obliged to prescribe closer conditions for derogations. However, no such bylaw has as yet been adopted.

Article 4(6) of the WFD Directive that concerns the temporary derogations from environmental objectives in the case of circumstances of natural causes or force majeure have been fully transposed into **Article 119 of the Law on Waters**.

Articles 4(2), 4(3), 4(4), and 4(9) of the Directive have not been transposed.

REGISTER OF PROTECTED AREAS

Article 96 of the Law only mentions that protected areas and water bodies within each river basin requiring special protection shall be recorded and updated in the register of protected zones managed by the competent administrative authority for the environment. However, it does not provide more details on the register.

PROGRAMME OF MEASURES

Under **Article 73 of the Law on Waters**, a Programme of measures includes basic and supplementary measures, which shall be updated every six years, while **Article 74 of the Law** lists all the basic and supplementary measures that create part of the Programme of measures.

Rules on the content and means of preparation of the Programme of measures further transposed this article by listing all of the basic measures in accordance with **Article 11 of the WFD**.

Article 8(3) of the Rules on content and means of preparation of the Programme of measures envisages situations when the derogation from basic measures is allowed. The situations when this is possible corresponds to **Article 4(7) of the WFD** derogations from environmental objectives. As explained above, the Law on Waters does not transpose **Article 4(7) of the WFD** in regards to the conditions that have to be met to grant derogation, thus it is unusual to see such a provision in a bylaw in regards to the Programme of measures. As such, amendments to the Law are necessary in order to remedy this issue.

PUBLIC PARTICIPATION

Article 14 of the WFD that ensures that the public is involved in the preparation of an RBMP and its update has been transposed into **Articles 67 and 68 of the Law on Waters**.

According to the **Article 67 of the Law**, the RBMP is being developed in two phases, namely the draft of the plan and a proposed plan. In order to ensure the participation of the public in the development of the plan, the draft of the plan shall be published, based on the Government decision, and made available for public inspection, and in particular the following data:

- time schedule and work programme for drafting the plan, including the statement (list) of consultative measures to be taken – at least three years before the beginning of the period that the plan deals with;
- review of important water management issues identified at the level of the river basin – at least two years before the beginning of the period that the plan deals with; and

- the draft of the plan – samples of the river basin management plan – at least one year before the beginning of the period that the plan deals with.

The public inspection lasts at least six months from the day it was published, and during this time the competent authority is obliged to organise professional consultations of the draft plan.

The authorities are also obliged to make available to the public the data used for the preparation of the plan.

According to the **Article 68 of the Law**, amendments to the RBMP are also subject to the procedure prescribed under **Article 67 of the Law.**

24.2 Implementation

As mentioned previously, there are 4 river basins established with the Law on Waters: the River Basins of the Rivers Vardar, Crn Drim, Strumica and South Morava. According to the Law, the management plans for these river basins should have been finalised and adopted by 2014.

To date, there are only Draft Management Plans for the Vardar and Strumica Rivers. In 2020, the Watershed Management Plan for Ohrid Lake was prepared, as a sub basin of the Crn Drim River. No public consultations were organised for this plan that is now published on the Ministry's website and referenced in several documents, but it is not clear whether this plan has been adopted.

According to the Law on Waters, for the construction of hydropower plants, the investor should have a water use permit issued by the Ministry of Environment. Within the period of seven days after the Request for such permit is submitted, the Ministry is obliged to publish the Request in at least one newspaper and on its website. The public has a period of 15 days – after the Request has been published – to submit comments, however there is no provision that allows the environmental NGOs to challenge the water permit, which can only be challenged by the investor. According to the civil society, very often, especially in the cases for HPPs, the Ministry does not publish the water permits at all.

According to the civil society, for the four small HPPs within the NP Mavrovo, the Ministry did not publish the Request for water use permit on its website, so the locals were not informed in a timely manner about the projects, and did not have the opportunity to participate in the public consultation process and share their opinion.

Also, according to the Law on free access to information, the Ministry is obliged to publish the whole documentation for all issued concessions on its website – which has never happened. In February 2021, Front 21/42 notified the Agency for protection of the right to free access to public information that the Ministry does not fulfil its legal obligation for publishing these documents, and the Agency sent a formal letter to the Ministry requesting implementation of this provision. Up until now, the Ministry has not published any of the documents related to the issued concessions.

25 Nature Directives

The main legal instrument regulating transposing the Nature Directives is the *Law on Nature Protection.*

The Law provides a framework for designation of future Natura 2000 sites, as well as species protection and protection of birds. The formal designation of the Emerald network (future Natura 2000 sites) and adoption of a reference list of habitats of European significance at the national level are still pending.

One of the main shortcomings identified is the lack of appropriate assessment provisions in the Law, which is one of the most significant provisions of the Directive.

25.1 Transposition

The Nature Directives have been partially transposed into the **Law on Nature Protection** ("Official Gazette of North Macedonia", no. 67/2004, as amended) and the following bylaws:

- Lists for determination of strictly protected and protected wild species (no. 139/2011);
- Lists of affected and protected wild species of plants, fungi and animals and their parts (no. 15/2012);
- Decision on determination of species of wild birds which are useful (no. 145/2009).

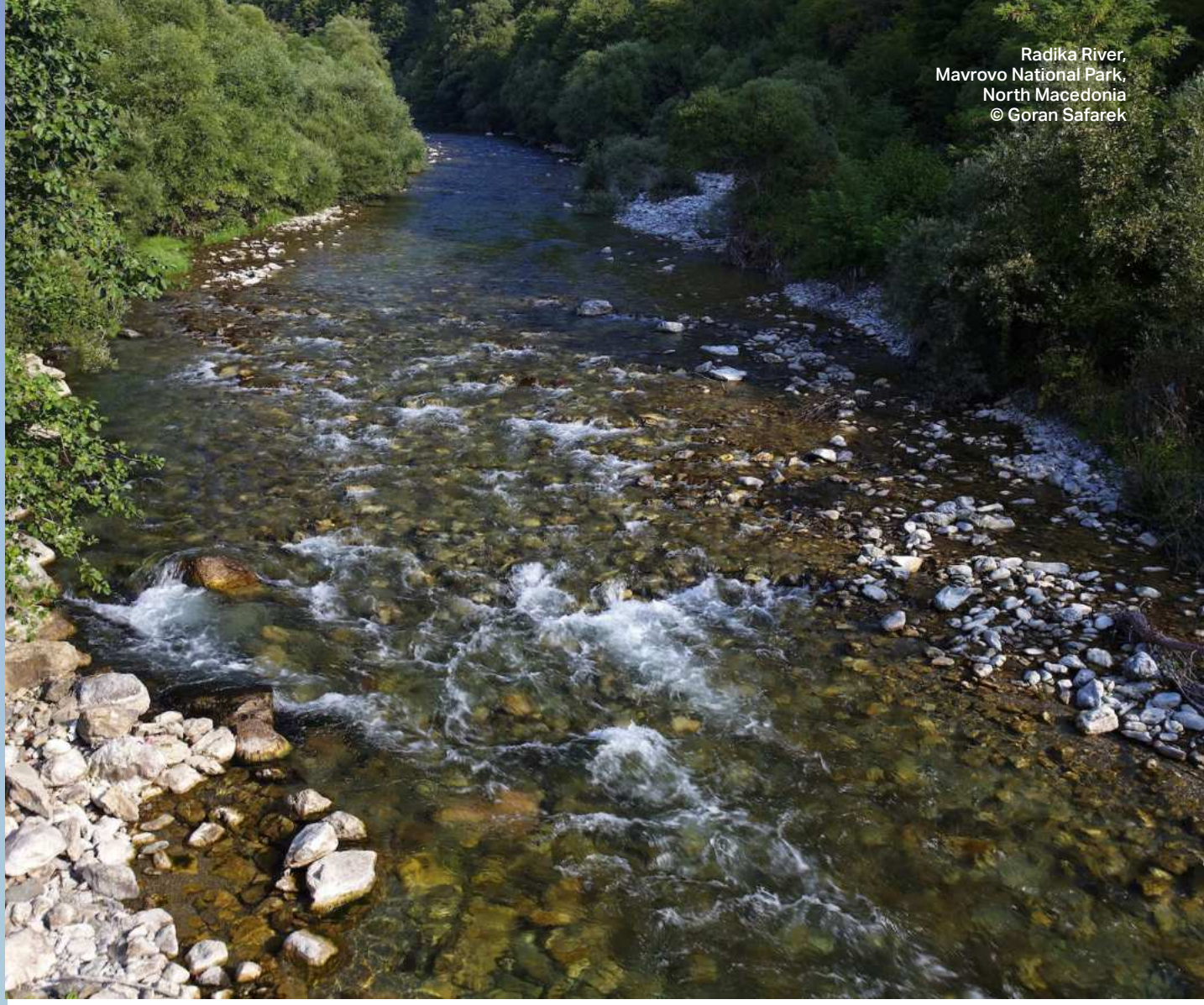
Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Under **Article 47 of the Law**, the protection of ecosystems is ensured by the protection of habitat types in a favourable conservation status. The conservation status of the habitat type is favourable, if: 1) the territory in which it is spread, and the area it covers, are stable or increasing; 2) they exist, that is, in the foreseeable future, a specific structure and functions necessary for its long-term survival will be created; and 3) the favourable condition of its species is guaranteed.

Under **Article 49 of the Law**, areas with threatened and significant habitat types are **ecologically significant** areas. **Article 51 of the Law** further regulates this matter and states that an ecologically significant area is an area that largely contributes to the protection and preservation of biological diversity in North Macedonia. Ecologically significant areas in particular are:

- areas with habitat types that are characterised by particular biological diversity and/or are well preserved;
- habitat areas with affected or endemic species;
- areas with habitat types that significantly contribute to the preservation of the natural balance;
- areas with habitat types that are threatened or significant for North Macedonia, as well as internationally and at the level of the European Union;
- areas of preserved forest units;
- habitat areas of species that are protected on the basis of international agreements ratified in accordance with the Constitution of North Macedonia, including protected species at the level of the European Union;
- areas that include roads and resorts of migratory species;



Radika River,
Mavrovo National Park,
North Macedonia
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- areas that contribute to the genetic connection of populations of certain species, that is ecological corridors, or
- areas that contribute in a different way to the preservation of biological diversity.

Ecologically significant areas are part of the national ecological network. Ecologically significant areas are determined within the protected areas by the act for the declaration of the protected area, or by the act of the minister competent in the area of nature protection, when they are located outside protected area. In ecologically significant areas it is not allowed to undertake activities that may lead to their destruction or significant or permanent damage, as well as loss of the species and/or habitats for which the area has been identified as ecologically significant.

Article 52 of the Law regulates the ecologically significant areas for the European Union – Natura 2000, which is defined as an area which is significant for the conservation of wild species of birds and other wild species of plants and animals and their habitats, as well as the types of habitats that have been declared affected and/or protected at the level of the European Union. The European coherent ecological network Natura 2000 must include special protected areas for birds and special areas for the conservation of natural habitats and wild species of plants, fungi and animals.

The Government of North Macedonia, on the proposal of the minister competent in the area of nature protection, determines the proposal of the ecologically significant areas for the European Union – Natura 2000 and the conservation objectives, the method of their management, monitoring and other rules necessary for their protection. However, no such bylaw has as yet been adopted.

Article 53 of the Law regulates the national ecological network, stating that in order to preserve, maintain or restore ecologically significant areas to a favourable state of conservation, a national ecological network is established. The national ecological network includes the ecologically significant areas, the system of ecological corridors, the system of protected areas and areas proposed for protection, and the ecologically significant areas for the European Union – Natura 2000.

The Government of North Macedonia, on the proposal of the minister competent in the area of nature protection, and after previously receiving an opinion from the National Council for Nature Protection, adopts the national ecological network, as well as measures for the protection of the areas of the ecological network. The ecologically significant areas for the European Union – Natura 2000 will be part of the National Ecological Network. However, the **National Ecological Network has still not been officially adopted**.

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

Under **Article 50 of the Law**, the measures for the preservation of habitat types in a favourable status are prescribed by the minister competent in the area of nature protection, after previously obtaining an opinion from the minister competent in the area of agriculture, forestry, hunting and fishing. Measures for the preservation of habitat types in a favourable state of conservation are included in the development of spatial and urban plans.

Section II(3)(3) of the Law regulates the management plans for protected areas. Under **Article 98 of the Law**, the minister competent in the area of nature protection prescribes the content of the management plans for the protected areas and the annual nature protection programmes[177]. Plans for the management of protected areas should be in accordance with the Spatial Plan of North Macedonia and the provisions of the law, and contain all the prescribed measures and activities for the protection of nature, which are, among others: the preparation of an overview of the protected area and the ecologically significant areas in it, with their characteristics and assessment of the situation; and protective measures and development guidelines for the protected area and ecologically significant areas.

Concerning the transposition of the appropriate assessment provision and the derogation from the conservation objectives **(Art. 6(3) and 6(4) of the Habitats Directive)**, the Law **does not contain these provisions**. Namely, **Article 18 of the Law** only briefly mentions the assessment of impact of projects on nature, without any concrete provisions. **Article 19 of the Law** discusses the possibility of compensatory measures, and the types of measures that can be introduced,

177 Rulebook on the content of the plans for management of protected areas and the content of the annual plans for nature protection ("Official Gazette of Republic of North Macedonia", no. 117/05 from 29.12.2005).

however without any concrete reference to the appropriate assessment procedure provided under the Habitats Directive.

PROTECTION OF SPECIES

Article 34 of the Law envisages a preparation and adoption of the Red List and Red Book of species. The Government of North Macedonia, on the proposal of the minister competent in the area of nature protection, and after previously obtaining an opinion from the National Council for Nature Protection, adopts a red list of wild species.

Article 38 of the Law transposed **Articles 12 and 13 of the Habitats Directive** by stating the prohibitive measures for animal, plant and fungi species. **Article 39 of the Law** provides for derogations from protection measures in accordance with **Article 16 of the Habitats Directive**.

Birds Directive

The specific protection measures concerning bird species has been included in the **Article 51 of the Law**. Under **paragraphs 4, 5 and 6 of this Article**, the areas which – in terms of their number and size – are best suited for the protection of affected and protected bird species determined in accordance with **Article 35 paragraph (3) of the Law**, taking into account:

- endangered species;
- species that are sensitive to specific changes in their habitat;
- species that are considered rare, due to small populations or limited local distribution; and
- other species that require special attention due to the specific nature of their habitat,

shall be designated as **special protected areas for birds**.

Special protected areas for birds shall also be defined as areas where migratory birds regularly appear, that are not prescribed by the lists from **Article 35 paragraph (3) of the Law**, if such areas are important for nesting, moulting or wintering of migratory birds, or represent a resting place during migration, taking into account aquatic habitats, their protection, and especially aquatic habitats of international importance.

Assessments for the determination of specially protected areas for birds will be made based on movements and variations in population levels.

25.2 Implementation

The implementation of both Directives primarily started with the establishment of the network of candidate Emerald sites under the Bern Convention in 2002. The network consists of 35 candidate Emerald sites, which covers an area of 752,223 ha or about 29% of the territory of North Macedonia.

All candidate Emerald sites are categorised into 3 types:

- **Type A:** areas important for the protection of wild birds (corresponding to the Special Protected Areas of Natura 2000)[178];
- **Type B:** areas important for other wild species and/or habitats (corresponding to Natura 2000 Special Areas of Conservation)[179];
- **Type C:** areas important for wild birds, other species and/or habitats[180].

All candidate Emerald sites are future Natura 2000 sites, meaning they will join the network when North Macedonia becomes an EU Member State. However, it is important to note that the formal designation of the Emerald network is still pending.

In recent years, the Ministry of Environment and Physical Planning started with a new process of identification of potential Natura 2000 sites. Specifically, in 2016 the first proposed Natura 2000 pilot sites were identified (9 locations proposed as potential Natura 2000; 4 locations with the 'potential for a larger location' scenario; 2 high potential for Natura 2000). Three of these have been proposed as potential Special Protected Areas (SPAs), in accordance with the Birds Directive, and six are proposed as Sites of Community Importance (SCI) under the Habitats Directive.

In 2022, a new EU funded project *Improving capacities for Natura 2000 and CITES* has started. The main objective of the project is to strengthen and improve the administrative capacities for harmonisation and implementation of the EU nature protection *acquis*. By September 2022, 12 possible Natura 2000 areas have been identified, whilst the identification and definition of other areas are envisioned.

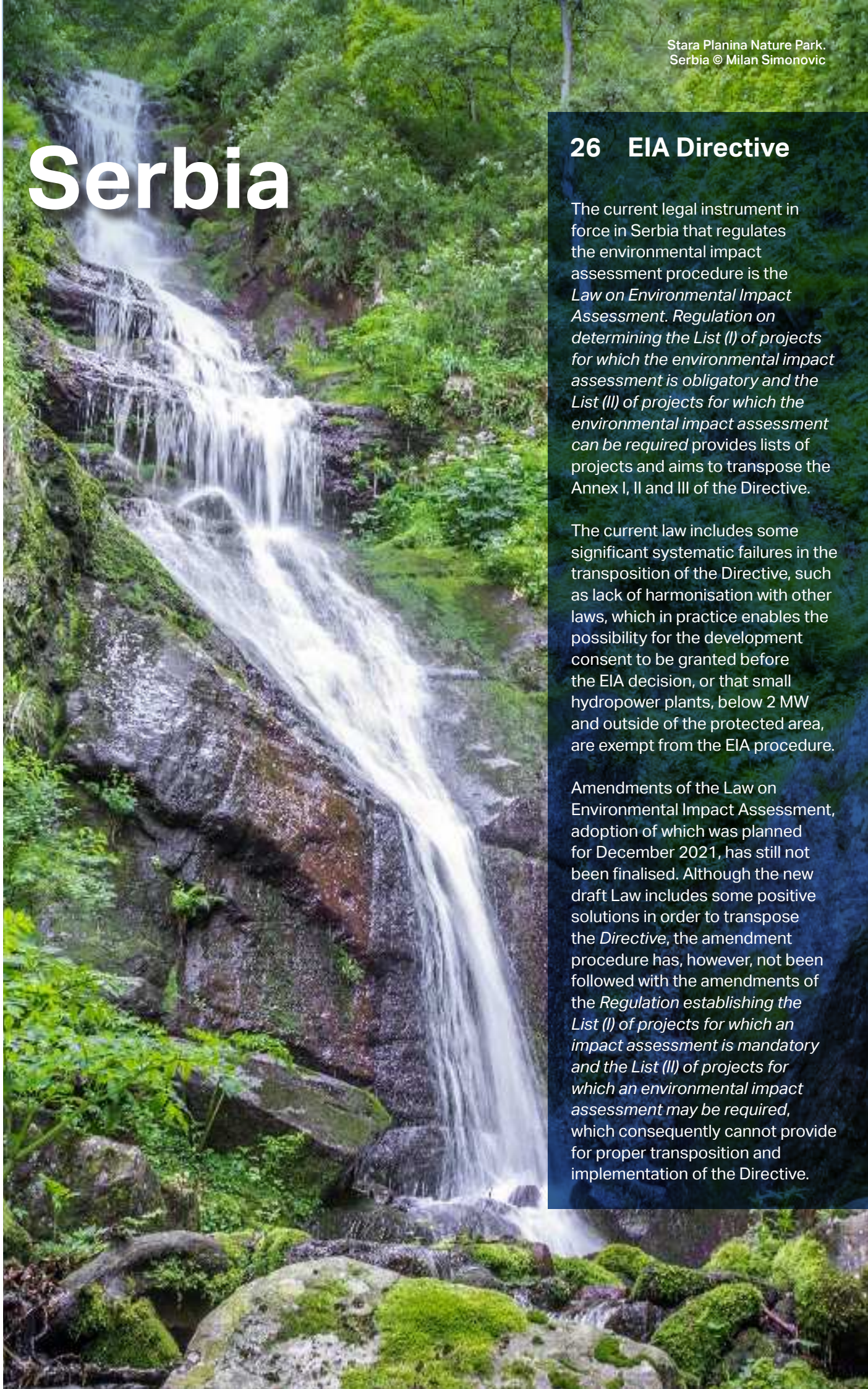
Concerning the species protection, a draft reference list of habitats of European significance at the national level (according to Annex I of the Habitats Directive) was prepared in 2016 and supplemented during 2020. In addition, during 2022, activities started for the creation of a map of habitats. The final version of this map should have been ready in the first half of 2023, however this has not been done[181]. A draft national reference lists for species was made in 2016 in accordance with Annex II of the Habitats Directive and Annex I of the Birds Directive[182].

178 There are currently 4 type A sites.
179 There are currently 5 type B sites.
180 There are currently 26 type C sites.
181 PLATFORM 27 SHADOW REPORT ON CHAPTER 27 ENVIRONMENT AND CLIMATE 2022, https://fosm.mk/wp-content/uploads/2023/01/second-shadow-report-eng-15.12-2.pdf, p. 60.
182 Ibid., p. 63.

When it comes to the implementation of the Directives on a project basis, some of the most severe breaches were highlighted in the EIA section of the Report. For example, the Gjonovica Cave, that would be impacted by the Corridor 8 A2 highway project, is one of the candidate Emerald sites and a future Natura 2000 site.

Similarly, the National Park Mavrovo[183], Lake Ohrid[184] and National Park Galicica[185], which are all future Natura 2000 sites, are important indicators of the actual implementation of the Nature Directives. All three sites are the subject of open files by the Bern Convention due to the ineffective management and a number of threats to the species and habitats protected by the Convention.

183 Home to 65 species listed in the Annexes I and II of the Habitat Directive and 19 species listed in the Bird Directive.
184 Home to 14 species listed in the Annexes of the Habitat Directive and 5 types of habitats listed in the Habitats Directive, 45 species listed in the Annexes of the Bird Directive.
185 Has at least 13 types under Annex I of the Habitats Directive, it is the home of 81 species under the Habitats Directive and 153 listed in the Birds Directive.



Stara Planina Nature Park.
Serbia © Milan Simonovic

Serbia

26 EIA Directive

The current legal instrument in force in Serbia that regulates the environmental impact assessment procedure is the *Law on Environmental Impact Assessment. Regulation on determining the List (I) of projects for which the environmental impact assessment is obligatory and the List (II) of projects for which the environmental impact assessment can be required* provides lists of projects and aims to transpose the Annex I, II and III of the Directive.

The current law includes some significant systematic failures in the transposition of the Directive, such as lack of harmonisation with other laws, which in practice enables the possibility for the development consent to be granted before the EIA decision, or that small hydropower plants, below 2 MW and outside of the protected area, are exempt from the EIA procedure.

Amendments of the Law on Environmental Impact Assessment, adoption of which was planned for December 2021, has still not been finalised. Although the new draft Law includes some positive solutions in order to transpose the *Directive*, the amendment procedure has, however, not been followed with the amendments of the *Regulation establishing the List (I) of projects for which an impact assessment is mandatory and the List (II) of projects for which an environmental impact assessment may be required*, which consequently cannot provide for proper transposition and implementation of the Directive.

26.1 Transposition

The current legal instrument in force in Serbia that regulates the environmental impact assessment procedure is the **Law on Environmental Impact Assessment** ("Official Gazette", nos. 135/2004 and 36/2009). **The Regulation on determining the List (I) of projects for which the environmental impact assessment is obligatory and the List (II) of projects for which the environmental impact assessment can be required** (Regulation no. 114/2008) (hereinafter "Regulation on establishing list of projects") provides lists of projects and aims to transpose the **Annex I, II and III of the Directive**.

Amendments of the Law on Environmental Impact Assessment, the adoption of which was planned for December 2021, **has still not been finalised**. The draft Law was presented to the public in November 2021, when the public consultations were organised, while the public debate was held in January 2022[186]. The amendment procedure has, however, not been followed with the amendments of the Regulation on establishing the list of projects, which consequently cannot provide for proper transposition and implementation of the Directive.

Considering the current legal situation, the report will not go into depth of the analysis, but will focus on some of the most significant shortcomings of the current Law, as well as positive solutions planned in the draft Law on Environmental Impact Assessment.

The Law in force contains some significant shortcomings in breach of the EIA Directive, such as the **possibility for development consent to be issued before the EIA decision, as well as the exclusion of hydropower plants below 2 MW and outside of protected areas from EIA screening procedure**.

Article 2 of the EIA Directive provides that 'Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment'. **The Law in force does not contain such a provision and, in practice, could open a possibility for 'salami slicing', and for development consent to be given before assessment of the project on the environment**.

Although **Articles 5 and 18 of the Law on EIA** ensure the obligation for conducting the EIA procedure prior to issuing of development consent, **such obligation is not in line with the relevant provisions under the Law on Planning and Construction** ("Official Gazette of Republic of Serbia", no. 72/2009, as amended), and accompanying bylaws. According to the **Rulebook on the procedure for conducting the integrated electronic procedure ("Official Gazette of the Republic of Serbia", no. 68/2019)**, a project developer is only obliged to submit the *approval of the EIA study, or the decision that the EIA is not required*[187] when submitting a request for notification of works (in Serbian: 'prijava radova'), **and not when applying for the construction permit**. In practice, this means that the competent authority can issue a construction permit before the approval of the EIA study, or issuance of the

186 'One Step Forward, Two Steps Back', Shadow Report on Chapter 27, ENVIRONMENT AND CLIMATE CHANGE JANUARY 2021 – MARCH 2022, Koalicija 27, available at: https://www.koalicija27.org/wp-content/uploads/2022/10/Shadow-_Report_Coalition-27_2022.pdf, p. 12. A draft of the new EIA Law was submitted to the Parliament for adoption, ECT 2023 Implementation Report, Serbia, p. 11, available at https://www.energy-community.org/implementation/report/Serbia.html

187 The Rulebook on the procedure for conducting the integrated electronic procedure (Pravilnik o postupku sprovođenja objedinjene procedure elektronskim putem) ("Official Gazette of the Republic of Serbia", no. 68/2019), Art. 30.

decision that the EIA is not required, which seems to be a general practice, as will be shown in the Implementation part of this report.

> **The Regulation on establishing list of projects** provides a list of projects that should be subject to the screening procedure, as well as the criteria for their assessment (List II). Under **section 3(2)**, installations for the production of electricity from hydro potentials are subject to the screening procedure if their power exceeds 2 MW, while section 15 ensures that all projects listed in the Regulation, located in the protected area, shall be subjected to the screening procedure. **Consequently, hydropower plants below 2 MW and outside of the protected area are not considered for their environmental impact at all, which is in breach of Article 2 and Annex II of the EIA Directive**.

Although still not adopted, the draft Law significantly improves the quality of the EIA procedure. **Article 8 of the draft Law** attempts to prevent the possibility of starting with the construction of the project before receiving the decision on EIA. This provision explicitly states that a decision for development of the project issued without a consent of the competent authority on the EIA study, or a decision that no EIA is needed, is considered null.

The draft Law for the first time tries to align the environmental impact assessment procedure with the appropriate assessment. For instance, **Article 11** lists – as one of the necessary documents during the EIA screening procedure – the decision on preliminary appropriate assessment for projects, works and activities that are likely to have an impact on the preservation and integrity of the ecological network, whilst **Article 16** states that a scoping request needs to include also a decision on preliminary appropriate assessment.

Moreover, **Article 14 of the draft Law** specifically states that during the EIA screening procedure, the competent authority shall especially take into account the size, specific qualities of the project, sensitivity of the environment at the location, types and characteristics of possible impacts, especially in reference to goals of conservation and integrity of the ecological network.

Article 22 of the draft Law states that the appropriate assessment procedure shall be conducted before the decision on consent on the EIA study. The EIA study itself needs to contain the direct and indirect impacts of the project on the conservation and integrity objectives of the ecological network.

Under **Article 32 of the draft Law**, if, during the appropriate assessment, it is determined that the project is likely to have significant negative impacts on the conservation and integrity objectives of the ecological network, the competent authority shall reject the request for EIA consent. In case of doubt, **it is considered that the project is likely to have a negative impact on the conservation and integrity objectives**.

Article 13 of the draft Law regulates the decision-making during the screening procedure. According to this Article, the competent authority is obliged to notify interested public and other authorities and organisations about the decision on screening. In the decision, the authority needs to include the reasons for issuing a decision on the need for an EIA, or that the study is not needed, based on the set criteria. If the developer does not start with the realisation of the project within two years, it is obliged to submit a new request for screening decision.

As mentioned above, **Article 14 of the draft Law** specifically states that during the EIA screening procedure, the competent authority shall especially take into account the size, specific qualities of the project, sensitivity of the environment at the location, types and characteristics of possible impacts, especially in reference to the goals of conservation and integrity of the ecological network.

> The list of screening criteria from **Article 13** refers to **Article 5(2) of the draft Law**, which obliges the Government to adopt the bylaw with the list of projects that always require the EIA study, and the list of projects that are subject to the screening procedure. The bylaw shall also include the screening criteria. However, as mentioned above, the new bylaw that would replace the **Regulation on establishing the list of projects** is currently not planned for legislative procedure, whilst the Regulation in force does not properly transpose the criteria from **Annex III of the Directive**. Therefore, in practice, we cannot expect a proper transposition if the two processes are not aligned.

Article 26 of the draft Law obliges the developer to ensure that the company that prepared the study is present during the public consultations in order to reply to any questions, concerns and suggestions from the public. At the public consultations, the developer is also obliged to present the information on the possible impacts of the project on the ecological network. The provision is attempting to forestall the situation where developers, or crucial participants of the public consultations, would not be present to answer questions regarding the study, as was happening in the past[188].

The draft Law also introduces the Technical Commission responsible for assessment of the EIA study. During the assessment, the Technical Commission can suggest to the competent authority the amendment of the study. If the developer does not do so, the competent authority can approve a maximum one more deadline for amendments of the study (**Article 29 of the draft Law**).

Article 30 of the draft Law states that the competent authority can decide on additional evidential inquiry and expert witnesses if needed for full environmental assessment of the impacts, if that was not possible during the EIA procedure, or to additionally determine the suitability of the proposed measures.

Article 31 of the draft Law states that the competent authority shall reject approval of the EIA study if:

- it determines, based on conducted procedure and report of the technical commission, that the proposed characteristics of the project and measures are not suitable to prevent, mitigate and remove significant direct and indirect impacts on the environmental factors identified, described and assessed during the environmental impact assessment procedure; and/or
- the project is not harmonised with prescribed requests for environmental protection; and/or

188 During the public session of Committee for Plans (Komisija za planove) for the Spatial Plan of the Trgovište Municipality, the representative of the company that prepared the study was not present at the consultations, but instead sent a written response to the objections and proposals from the NGO Pravo na vodu.

- the realisation of the project would prevent or significantly hinder realisation of environmental objectives determined in accordance with the provisions in the area of the environment.

The deadline for the start of realisation of the project cannot be longer than 3 years from the day of delivery of the EIA decision to the developer, which means that, in theory, the draft Law sets a timeframe of the validity of the decision on approval of the EIA (reasoned conclusion).

According to the **Article 37 of the draft Law**, after the expiry of the deadline for realisation of the project, a developer is obliged to submit a request for deciding on the need for a new EIA study or amendments of the existing one. The developer is also obliged to submit a request for deciding on amendments of the study if, during the construction, significant environmental factors change, or if the developer needs to deviate from the conditions set in the decision for approval of the EIA study.

The prescribed screening procedure from the Law is applicable in these instances, and the competent authority can decide on the need for carrying out a new EIA study, amendments of the old study, or that the amendments are not necessary. During the decision-making process, the competent authority is bound by the requirements of **Article 3 of the draft Law**, which is a provision that transposed **Article 3 of the Directive**.

This is a positive solution in trying to properly transpose **Article 8a(6) of the Directive** by ensuring that the reasoned conclusion is still up-to date; however, ensuring that the competent authority is satisfied that the reasoned conclusion is up-to-date, regardless of time-frames, would further bring the Law into alignment with the Directive.

Moreover, considering that **Annex III of the EIA Directive** – that lists the necessary screening criteria – has not been properly transposed in the **Regulation on establishing the list of projects**, further amendments of the Regulation would be needed for better harmonisation.

The draft Law introduces some other novelties, such as the assessment of the **found state of the environment**, for projects constructed without a construction permit or usage permit **(Art. 39)**. The developer of the project that has been constructed without a construction permit, or is being used without an usage permit, is obliged to submit a request for deciding on the need for the study on the found state of the environment, or a request for a screening decision on the need to carry out the study on the found state of the environment. Following such a procedure, the competent authority is obliged to issue a decision by which it can also determine the scope of such a study. The provision, as such, is aimed at dealing with illegally constructed facilities, especially during the time of former Yugoslavia (SFRY), but also generally with infrastructure without a valid construction or usage permit.

Although the main objective of the environmental impact assessment, based on the precautionary principle, is to require from Member States to adopt all measures necessary to ensure that, **before consent is given**, projects likely to have significant effects on the environment by virtue, among others, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects[189], the ex post assessment, or the regularisation of operations or measures which are unlawful in the light of EU law is, nevertheless, allowed[190].

189 Article 2 of the EIA Directive.
190 Cases C-196/16 - Comune di Corridonia and C-197/16 - Bartolini and Others https://curia.europa.eu/juris/document/document.jsf?text=&docid=193205&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4316529 and paras. 35-43.

However, it is not clear from **Article 39 of the draft Law** what the *ex post* study would include. Based on the set case law, in the event of failure to carry out an environmental impact assessment required under the Directive, EU law, on the one hand, requires Member States to nullify the unlawful consequences of that failure and, on the other hand, does not preclude regularisation through the conducting of an impact assessment, after the plant concerned has been constructed and has entered into operation, on condition that:

- national rules allowing for that regularisation do not provide the parties concerned with an opportunity to circumvent the rules of EU law or to dispense with applying them, and
- an assessment carried out for regularisation purposes is not conducted solely in respect of the plant's future environmental impact, but must also takes into account its environmental impact from the time of its completion[191].

Although the regularisation and assessment of the environmental impact of infrastructure and facilities constructed in the past (especially during the time of SFRY) is welcomed, the above conditions need to be explicitly stated in the Law to be compliant with the Directive.

Article 40 of the draft Law regulates the procedure for inspection of fulfilment of the conditions from the EIA decision. Although the Articles does not provide much content, it does contain a provision that the developer cannot be issued with a usage permit if it is determined that it does not fulfil the conditions from the EIA decision.

Article 44 of the draft Law introduces the obligation for the competent authority to set up a central database and central web portal within six months from coming into force of the law, for notifying the public on EIA procedures and its phases and to enable access to information electronically. Although this is a welcome provision that would ensure that the public is notified in a timely and effective manner, it is not clear from this provision whether the term 'EIA procedures' includes also decisions to carry, or not to carry out, the EIA study (screening procedure), or would only concern the second stage of the EIA procedure, which is the preparation of the EIA study.

Finally, the draft Law provides in several sections the right to legal remedy against the decisions deriving from the EIA procedure. **Article 15 of the draft Law** provides for the right to appeal against the screening decision, **Article 19** against the decision on the scope of the EIA study, and Article 35 on the decision to approve the EIA study.

191 Ibid., para. 43.

26.2 Implementation

As mentioned above, Serbia has still not adopted a new EIA Law that would remedy some of the serious shortcomings present in the current law from 2009, and in order to abide with the Decision 2016/12/MC-EnC of the Ministerial Council of the Energy Community Treaty that made the amended EIA Directive[192] binding on the Contracting Parties.

Two main shortcomings identified in the current law are the lack of screening or EIA for hydropower plants below 2 MW and outside of the protected area, and for the possibility for a construction permit to be issued before the EIA decision.

In 2020, a complaint was submitted against Serbia to the Energy Community Secretariat for the lack of screening for small hydropower projects and for the breach of Article 2 of the EIA Directive. The possibility for a construction permit to be issued before the EIA decision was also subject of the complaint in the case of the Waste-to-Energy Incinerator Vinča in Serbia. Both cases are currently before the Energy Community[193].

In its annual Implementation Reports, the Energy Community was repeatedly urging Serbia to align the national legislation with the Directive, and especially for amendments to address the possibility of issuing construction permits (development consent before the EIA decision), and to amend the secondary legislation concerning the lack of EIA screening of small hydropower projects (less than 2 MW) located outside protected areas[194].

Nevertheless, there are still many examples of systematic breaches of these provisions. As a consequence of not subjecting hydropower plants below 2 MW and outside of protected areas, in the area of Kraljevo, approximately 52 hydropower plants below 2 MW were planned[195], and according to the Local Municipality interpreting the rule 183 of the Spatial Plan and the Regulation[196], no screening was necessary for plants smaller than 2 MW and outside of the protected area, which means that the public was not aware of the permitting procedure and had no access to review procedures.

However, both Article 15 and the Rulebook state that a description of the relevant aspects of the current state of the environment shall be done for projects located in protected area cultural areas, touristic projects and complex engineering projects, whilst for other projects in accordance with the decision of the competent authorities.

192 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU.

193 Case ECS – 06/20: Serbia/environment, available at: https://www.energy-community.org/legal/cases/2020/case0620RS.html, and Case ECS - 07/20: Serbia/environment, available at: https://www.energy-community.org/legal/cases/2020/case0720AL.html

194 2022 Energy Community Treaty Implementation Report, Serbia https://www.energy-community.org/implementation/report/Serbia.html, p. 14

195 NGOs in Serbia conducted a mapping exercise and identified a number of plants inside of the protected areas, as well as those with an intake just outside of the protected areas, such as small HPP Kunara on the Gvozdačka River that flows through the Goč – Gvozdac nature reserve. Kraljevo recently received two more nature reserves, however identification of plants in these areas is still ongoing. The map is available here: https://www.google.com/maps/d/u/0/edit?mid=1wVAFb-GYWbxOnc22hFvyUPWIgPi3E3o&ll=43.442868996942906%2C20.46012621484376&z=11

196 The reply to the Access to Information Request from 27.10.2020 clearly explained that due to the threshold set under the Law and bylaws, no screening was necessary for projects smaller than 2 MW and outside of the protected area.

As explained above, the amendments to the new Law do not include amendments of the Regulation, which means that these serious shortcomings are not planned to be remedied within the draft Law.

> Examples of issuing construction permit prior to the EIA decision are also numerous. Apart from the case of the Waste-to-Energy Incinerator Vinča mentioned above, the same was the case when issuing the construction permits for a construction waste landfill in Bara Reva (Reva marsh, Krnjača) that was issued without the appropriate approval for an environmental impact assessment study[197]; construction permits for the phased construction of a flue gas desulphurisation plant within the Nikola Tesla B thermal power plant were issued to Elektroprivreda Srbije (EPS) without approval for the environmental impact assessment study[198]; and a construction permit for the construction of a copper smelter in Bor[199]; or the construction of a mine waste water treatment plant in Bor[200].

27 SEA Directive

The current legal instrument in force in Serbia that regulates the SEA procedure is the *Law on strategic environmental impact assessment.* The adoption of the new Law on strategic environmental impact assessment was announced and the draft was prepared, but the final Law has still not been adopted.

The draft SEA Law contains some very good solutions in order to fully transpose the SEA Directive, such as the harmonisation of the SEA procedure with the appropriate assessment. However, the draft Law does not ensure access to justice provision against the decisions from the SEA procedure, which subsequently does not ensure a proper implementation of the Directive.

27.1 Transposition

The SEA Directive has been partly transposed into the domestic legislation through the adoption of the **Law on strategic environmental impact assessment** ("Official Gazette", nos. 135/2004 and 88/2010). Similarly to the adoption of the new EIA Law, the adoption of a new Law on Strategic Environmental Impact Assessment was announced. The Ministry of Environmental Protection conducted a public debate regarding the draft Law on Environmental Impact Assessment and the draft Law on Strategic Environmental Impact Assessment in the period from 24 December 2021 to 14 January 2022[201]. However, **the new Law has still not been adopted**. Due to the current legal situation, the analysis will not go into detail, but will mainly look into the most significant positive and negative solutions in the Draft SEA Law.

197 Shadow Report, (n 186), p. 24.
198 Ibid.
199 Ibid.
200 Ibid.
201 Ibid., p. 13.

Zasavica River,
Zasavica Nature Reserve,
Serbia © EuroNatur

Similarly to the draft EIA Law, the draft SEA Law is successfully harmonising the SEA procedure with the appropriate assessment by incorporating the appropriate assessment procedure into different phases of the SEA procedure. For instance, **Article 9 of the draft Law** that regulates the preliminary phase of the SEA procedure, states that the decision on the need to carry out the SEA procedure includes, among others, the decision on preliminary appropriate assessment, conducted by the competent authority. **Article 14 of the draft Law** states that a Report on SEA procedure includes, among others, the decision of the competent authority on the appropriate assessment procedure, and that the Report needs to separately include information on the ecological network and measures for prevention and mitigation of negative impacts of the plan and programme on the ecological network.

Article 18 of the draft Law explicitly states that in the Report on SEA that the competent authority needs to determine, describe, value and assess the likely significant negative impacts of implementation of the plan or programme on the ecological network, separately from other impacts.

Finally, Article 31 of the draft Law states that if the appropriate assessment determines that the plan or programme is likely to have a significant negative impact on the coherence of the ecological network, it is obliged to reject giving approval on the SEA Report. In the case of doubt, it is believed that the plan or programme is likely to have a significant negative impact on the conservation objectives and a negative impact on the coherence of the ecological network. The inclusion of the appropriate assessment into the SEA procedure is a welcome addition to the new Law, ensuring proper harmonisation of different laws.

Article 5(1) of the draft Law regulates the scope of the SEA procedure which fully transposed **Article 3 of the SEA Directive**. In comparison to the SEA Directive, **Article 5(1) of the draft Law** also ensures that plans and programmes in the area of **climate change are subject to the SEA procedure**, as well as all plans and programmes that are being prepared for the energy network

that form the basis for approval of strategic energy projects for the interests of the Energy Community, and projects of significant interest according to the Ministerial Council of the Energy Community subject to the obligations of Serbia according to the special international treaty.

Article 5(2) of the draft Law fully transposed **Articles 3(3) and 3(4) of the SEA Directive** by defining plans and programmes that should be subject to the screening procedure. The screening procedure should be performed in accordance to the set criteria listed under **Annex I of the draft Law**. The list fully transposed **Annex II of the SEA Directive**.

Similarly to the EIA procedure, **Article 23 of the draft SEA Law** envisages the establishment of the Professional Commission to assess the SEA Report in accordance with the set criteria from **Annex II of the draft Law**. **Article 34 of the draft SEA Law** also envisages t establishment of a central database and web portal within 2 years from adoption of the Law, where the interested authorities, organisations and general public would be informed about the SEA procedures.

Although the draft SEA Law includes some good solutions in order to fully transpose the SEA procedure in Serbia with that of the SEA Directive, it fails to include an access to justice provision against any of the decisions deriving from the SEA procedure.

27.2 Implementation

The implementation of the SEA Directive under the current law has seen some significant difficulties. According to the *Shadow Report on Chapter 27*, issues around properly informing the public and organising effective public participation were one of the key issues during the adoption of the Spatial Plan of Serbia[202] and in drafting Amendments to the General Regulation Plan of Belgrade[203].

At the local level, during the adoption of the draft Spatial Plan for Trgovište Municipality for the period of 2022–2035 that envisaged construction of 30 small hydropower plants in the Pčinja River Basin, the local authority failed to properly reconsider the opinions of the public regarding the devastating impact that the planned projects would have on nature. Although the author of the study accepted the opinions as valid, the Planning Commission decided to disregard them due to the need to align the local plan with the Republic Plan from 2010, without considering legislation in force regarding the protection of nature and the environment[204].

The shortcomings in implementation of the SEA Directive were also highlighted in the 2022 Implementation report of the Energy Community that pointed to the failed SEA process for the National Energy and Climate Plan (NECP) that was initiated in 2021, however without the preparation of the actual SEA report and without following the set deadline for providing it, which eventually expired under the 2021 decision[205]. However, in the 2023 Implementation

202 Ibid., p. 20.
203 Ibid., p. 21.
204 Mali korak za opštinu Trgovište a veliki za spasavanje reka sliva Pčinje, Polekol, available at: https://polekol.org/2022/12/09/mali-korak-za-opstinu-trgoviste-a-veliki-za-spasavanje-reka-sliva-pcinje/
205 ECT 2022 Implementation report, (n 194), p. 14.

Report, it is stated that Serbia has now initiated the SEA process for the draft National Energy and Climate Plan (NECP) and has engaged in a transboundary process. The outcome of this consultation process is still pending[206].

One of the main issues around the SEA process in Serbia is definitely **the lack of access to justice against the decision deriving from the SEA procedure.** According to the Shadow Report, the Ministry of Environmental Protection persistently denies access to legal remedies to the public and civil society organisations in cases where they believe their rights have been violated in the process of strategic impact assessment. Namely, the Ministry of Environmental Protection denies that the decision on granting approval for a strategic environmental impact assessment is a legal act against which a legal remedy can be filed, without explaining the legal nature of the approval for the strategic environmental impact assessment[207].

As showcased in the Transposition part of the Report, this issue was not resolved in the new Draft SEA Law either, since the access to justice provision is lacking.

28 Environmental Liability Directive

The Environmental Liability Directive has transposed only certain provisions in the Law on Environmental Protection[208]. Drafting of the Law on Liability for Environmental Damage began in 2015, while the first public consultations regarding the draft Law on Liability for Environmental Damage were held in 2019, but the draft Law remains to be finalised and submitted to the legislative process[209].

29 Water Framework Directive

Serbia committed to applying the provisions of the Water Framework Directive (WFD) through its accession to the International Commission for the Protection of the Danube River (ICPDR) and the accession process with the EU. However, to date the transposition of the WFD into Serbian law remains partial.

While the *Water Law addresses* the extension of deadlines for achieving environmental objectives and the attainment of less stringent objectives, it does not outline the specific conditions stipulated in Articles 4(4), 4(5) and 4(6) of the WFD.

Article 4(7) of the WFD, which permits derogations from environmental objectives in cases involving new modifications to the physical characteristics of surface water bodies, alterations to the level of groundwater, and new sustainable human development activities, has not been incorporated into Serbian law.

206 ECT 2023 Implementation Report, (n 186), p. 11.
207 Shadow Report, (n 186), p. 19.
208 ECT 2023 Implementation Report (n 186), p. 11.
209 Ibid., p. 17.

29.1 Transposition

The WFD has been partially transposed in the following legislation:

- Water Law ("Official Gazette of RS", nos. 30/10, 93/12, 101/16, 95/18);
- Regulation on limit values for pollutants in surface waters, ground waters and sediments and timelines for their achievement ("Official Gazette of RS", no. 50/12);
- Rules on designation of surface water bodies and groundwater bodies ("Official Gazette of RS", no. 96/10);
- Regulation on the Establishment of the Water Status Monitoring Programme for the Year 2014 ("Official Gazette", no. 85/14);
- Regulation on the Establishment of the Water Status Monitoring Programme for the Year 2015 ("Official Gazette", no. 46/15);
- Regulation on the Establishment of the Water Status Monitoring Programme for the Year 2016 ("Official Gazette", no. 36/16);
- Regulation on the Establishment of the Water Status Monitoring Programme for the Year 2017 ("Official Gazette", nos. 17/2017 and 42/2017);
- Regulation on the Establishment of the Water Status Monitoring Programme for the Year 2018 ("Official Gazette", nos. 13/2018 and 52/2018);
- Regulation on establishing of annual monitoring program of status of waters for the year 2019 ("Official Gazette", no. 48/19);
- Regulation on emission limit values of pollutants in water and deadlines for their achievement ("Official Gazette of RS", nos. 67/11, 48/12 and 1/16);
- Law on Integrated Environmental Pollution Prevention and Control („Official Gazette of RS", no. 135/04 and 25/2015);
- Rules on reference conditions for types of surface water ("Official Gazette of RS", nos. 67/11 and 48/12);
- Rules on parameters for ecological and chemical status of surface waters and parameters of chemical and quantitative status of groundwater ("Official Gazette of RS", no. 74/11);
- Regulation on limit values for priority and priority hazardous substances which pollute surface water and deadlines for their achievement ("Official Gazette of RS", no. 24/14);
- Rules on establishment of the criteria for the determination of protected areas ("Official Gazette", no. 13/17);

- Rules on establishment of water bodies for surface and groundwater ("Official Gazette", no. 96/10);

- Rules on the content of the special river basin management plan ("Official Gazette", no. 9/17).

RIVER BASIN MANAGEMENT PLANS

Under Article 34 of the Water Law, the competent authority for the preparation of the River Basin Management Plan for the Danube Basin is the Ministry of Agriculture, Forestry and Water Industry, or more specifically, the State Directorate for Waters. The public Water Management Companies for each area within the basin prepare other RBMPs. The Government is the competent authority for the final adoption of the plan.
Articles 33 and 35 of the Water Law list the necessary content of the RBMP, as required under the **Annex VII of the WFD**. The content of the RBMP in a great deal corresponds to the list provided under the WFD, however since Serbia failed to transpose the derogation provision under the Article 4.7 of the WFD, as shown below, **the RBMP (as well as the amendment to the RBMP) does not need to provide the reasons and circumstances in which the Article 4(7) derogations apply**.

Article 41 of the Water Law further envisages that the competent authority can develop a 'special river basin management plan' for the specific matters in water management, and for the sub-basins under **Article 27 of the Law**. The special RBMP needs to be in accordance with the general RBMP that it refers to.

In accordance with the **Rules on the content of the special river basin management plan**, apart from the general information, the special RBMP shall also include an outline of significant impacts of human activities on the status of surface waters and groundwater, including the assessment of pollution from concentrated and dispersed pollutants, as well as the outline on the land use, assessment of the pressures on the quantitative status of the water, and its abstraction from the general RBMP.

Under **Article 35 of the Water Law**, RBMPs are required to be updated every six years.

Article 222 of the Water Law sets a strict deadline for the enactment of RBMPs and measures under **Article 40 of the Law**. Under this provision, these plans and programmes should have been enacted by 2012; however, as will be showcased in the Implementation section of the Report, the adoption of the RBMP for the territory of Serbia was only done in April 2023.

ENVIRONMENTAL OBJECTIVES

The Definitions section of the Water Law does not provide the definition of the environmental objectives that would refer to the elements under **Article 4(1) of the WFD**, however **Article 33 of the Law** ensures that some of the elements listed in **Article 4(1) of the WFD** are included in the RBMP. Accordingly, the RBMP shall contain:

- the list of environmental objectives with regards to the surface and groundwater and protected areas, including the conditions for extension of the deadline for their achievement and less stringent conditions for certain water bodies (**Art. 33(5)**);

- the outline of the adopted programmes of works and measures and the manner in which the set measures will be achieved. The measures in place include measures for protection of waters, such as, among others, the prevention of deterioration of status of the waters, prevention and control of pollutants, and measures for regulation and use of water for consumption (**Art. 33(10)**);

- the set limit values for groundwater in accordance to the regulation that sets the limit values of pollutants in surface and groundwater and deadlines for their achievement (**Art. 33(10a)**);
- the summary of the assessment of the chemical status of groundwater in accordance with the Rules that regulate the parameters of ecological and chemical status of surface waters and parameters of chemical and quantitative status of groundwater (**Art. 33(10b)**);

- the summary of the manner for the assessment of trends on the specific spots of monitoring within the water body or group of bodies of groundwater (**Art. 33(10v)**);

- the summary of the register of the protected areas with the map that marks the location of the protected areas and regulations that regulate the protected areas (**Art. 33(9)**);

- the additional measures for the achievement of environmental objectives (**Art. 33(11)**).

WFD Article 4(2) that states that where more than one of the objectives relates to a given body of water, the most stringent shall apply, irrespective of the fact that all objectives must be achieved **has not been transposed into Serbian law**.

Article 4(3) of the WFD sets strict criteria for the designation of artificial or heavily modified water bodies. **This article has not been directly transposed**, however the **Rules on designation of surface water bodies and ground water bodies** set the list of water bodies where the categorisation of artificial and heavily modified water bodies was done by reference to this Article.

Article 33(2)(5) of the Water Law that regulates the content of the RBMP provides that the RBMP shall contain information on the conditions for extension of the deadline for their achievement and less stringent conditions for certain water bodies. However, there is no separate provision transposing **Article 4(3) of the WFD**.

Article 36(2)(1) of the Water Law provides that the competent authority for the development of RBMP can (with the prior approval of the Ministry of Agriculture, Forestry and Water Industry, and Ministry of the Environment) prescribe the extended deadline for the achievement of the environmental objectives if it would be technically unfeasible, disproportionally expensive, or if the natural conditions do not allow timely improvement in the status of the water body (**WFD Art. 4(4)**).

Under Article 36(2)(2) of the Water Law, the competent authority can decide to approve the temporarily deterioration of good status or good ecological potential, if the deterioration of the status occurred due to the natural catastrophe, or force majeure, and could not have been foreseen (**WFD Art. 4(6)**).

Under Article 36(2)(3) of the Water Law, authorities can also set less stringent conditions if the water body was affected by human activity or natural conditions in such a way that the achievement of these objectives would be infeasible or disproportionally expensive (**WFD Art. 4(5)**).

Although the Water Law regulates the circumstances in which the deadline for achieving the environmental objectives can be extended, or in which the less stringent objectives would need to be achieved, it does not provide the conditions that need to be met under **Articles 4(4), 4(5) and 4(6) of the WFD**.

Article 4(7) of the WFD that allows for derogations from environmental objectives in the case of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or if the failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities, has not been transposed into Serbian law.

Articles 4(8) and 4(9) of the WFD introduce two principles applicable to all exemptions, namely that:

- exemptions for one water body must not permanently exclude or compromise achievement of the environmental objectives in other water bodies;
- at least the same level of protection must be achieved as provided for by existing Community law (including those elements to be repealed).

Under the Water Law, these conditions are limited only to the exceptions of application of less stringent conditions. **Article 36(3) of the Water Law** strictly provides that less stringent objectives under **Article 36(2)(3)** cannot compromise achievement of the objectives relating to the good status of surface and groundwater and good ecological potential in the other water bodies within the same water district and sub basin.

REGISTER OF PROTECTED AREAS

Article 6 of the WFD that obliges the Member States to establish a register of protected areas, i.e. for the conservation of habitats and species directly depending on water covered by **Annex IV(1)(v)**, lying within each river basin district, has been partially transposed into the **Rules on establishment of the criteria for the determination of protected areas**.

Under **Article 2 of the Rules on establishment of the criteria for the determination of protected areas**, areas designated for the protection of habitats or species where the maintenance or improvement of the status of water is an important factor in their protection will be designated if one of the following criteria is met:

Obedska Bara Nature Reserve, Serbia © EuroNatur

- areas and river bodies are protected in accordance with the regulations on protection of nature that sets the ecological network;
- an area is declared in accordance to the signed international agreements in the area of nature protection;
- a specific protected area is declared in accordance with the law on nature protection.

Therefore, the Rules transposed requirements on protected areas under **Annex IV(1)(v) of the WFD**.

PROGRAMME OF MEASURES

Article 40 of the Water Law lists the Programme of measures that need to be applied in order to reach the objectives set by the strategy and planning documents. However, the Programme of measures does not provide the same list of measures as **Article 11 and Annex VI of the WFD**. The Programme of measures listed under **Article 40** includes:

- measures for establishment of watercourses and protection from adverse effect on water;
- measures for arrangement and usage of water;
- measures for protection of water.

Therefore, **Article 40 of the Law** provides a general list of measures and does not specify in the exact terms measures listed under **Article 11(3)(a),(c),(d),(e),(f),(g),(k),(l) of the WFD**.

Under **Article 40(6) of the Water Law**, the Programme of measures can also include other measures that would ensure that the adverse effect on waters and aquatic and coastal ecosystem is minimised, encourages rational usage and protection of water, implements education of the population, and performance of professional and scientific and research work in the area of waters.

Article 36 of the Water Law transposed the requirements under **Article 11(5) of the WFD** that ensures that the Member States conduct certain investigation works when it becomes unlikely that the objectives under **Article 4 of the WFD** can be met.

Article 36(1) of the Water Law requires from the competent authorities to apply the following measures in cases where it is evident that the realisation of the RBMP will not be achieved due to the human activity or force majeure:

- to investigate the possible failures;
- to examine valid permits and licences that were issued in accordance with the law;
- to review monitoring programmes and to amend them accordingly;
- to include additional measures in order for objectives to be achieved.

Under **Article 40(8) of the Water Law**, review and update of the Programme of measures shall be done every six years. This is the same requirement as the one under **Article 11(8) of the WFD**.

PUBLIC PARTICIPATION

Article 14 of the WFD, that ensures that the public is involved in the preparation of RBMP and its update, has been transposed into **Article 38 of the Water Law**. Under the provision in question, the Ministry, or the public Water Management Company, is obliged to ensure active public participation in the process of preparation and development of the plan.

The competent authority is obliged to notify the public on:

- production of the plan or its update at least three years before the beginning of the period to which the plan refers;
- the current state of the plan and significant issues in the managed water area, at least two years before the beginning of the period to which the plan refers;
- draft copies of the RBMP at least one year before the beginning of the period to which the plan refers.

Article 39 of the Water Law allows for the period of six months in which the public can comment on the plan, thus allowing the active involvement of the public.

However, although the Water Law ensures the appropriate public involvement, it does not specify the requirement of allowing access to the background documents and information used for the development of the RBMP, as per **Article 14(1)(2) of the WFD**.

Finally, **Article 37 of the Water Law** ensures mandatory SEA procedure before the adoption of the RBMP.

29.2 Implementation

Within the international cooperation in the Danube Basin, a **River Basin Management Plan for the Danube Basin** was prepared in 2009 and updated in 2015 and 2021[210]. Within the Group for Tisa River, the **Integral River Basin Management Plan for the River Tisa**[211] was prepared in 2010 and updated in 2019. Within the International Sava **River Basin Commission, a second River Basin Management Plan for the Sava River** was approved in 2022[212].

In April 2023, Serbia adopted the River Basin Management Plan on the territory of Serbia until 2027. Considering that 93% of its territory is within the Danube River Basin, it was decided that the entire territory of Serbia be covered by one River Basin Management Plan. According to the Plan, this is the first RBMP for the territory of Serbia, which means that it will mainly focus on the objectives that need to be met by 2027, but will not include the exemptions according to the Articles 4(4), 4(5), 4(6) and 4(7) of the WFD, since there are not enough information and capacities for this to be done[213].

30 Nature Directives

The main legal instrument that regulates issues of nature protection in Serbia is the *Law on Nature Protection.*

The Habitats Directive was partially transposed. The structure of the Law, and incorporation of the procedure for establishment of an ecological network could be refined in order to provide a more logical link between the chapters and articles, and thus better transposition and implementation.

The section of the Law regulating the appropriate assessment procedure is significantly harmonised with the Habitats Directive, however the Government has still not adopted any bylaw on the appropriate assessment, which makes the procedure difficult, (if not impossible) in practice.

210 River Basin Management, ICPDR, https://www.icpdr.org/tasks-topics/tasks/river-basin-management .
211 TISZA RIVER BASIN MANAGEMENT: SUCCESSFUL COOPERATION FROM THE GROUND UP, https://www.icpdr.org/publications/tisza-river-basin-management-successful-cooperation-ground#:~:text=The%20Integrated%20Tisza%20River%20Basin%20Management%20Plan%20is%20a%20major,the%20people%20living%20with%20it
212 River Basin Management Plan, International Sava River Basin Commission, https://www.savacommission.org/sava-river-basin-management-planning/river-basin-management-plan/1965
213 http://www.minpolj.gov.rs/donet-plan-upravljanja-vodama-na-teritoriji-republike-srbije-do-2027-godine/?script=lat ; RBMP, http://www.minpolj.gov.rs/download/Plan_upravljanja_-vodama_do_2027-FINAL.pdf?script=lat, p. 164.

The Law fails to properly differentiate and transpose the Birds Directive, but rather includes the provisions of the protection of birds within the general rules of species protection. This is especially problematic for derogation provisions, as the two Directives clearly have different derogation requirements.

Finally, there is no clear requirement for the appropriate assessment to be carried out before the location conditions, development consent, or other forms of individual consent are issued. Moreover, the section of the Law regulating the appropriate assessment procedure does not include any access to justice provision for the public to challenge decisions deriving from the appropriate assessment procedure.

30.1 Transposition

The main legal instrument that regulates issues of nature protection in Serbia is the **Law on Nature Protection** ("Official Gazette of RS", no. 36/2009, as amended) (hereinafter, 'the Law'). In 2021, the Law was amended in order to continue the proper harmonisation with the EU Nature Directives. Amendments to the Law on Nature Protection, as well as the adoption of the Nature Protection Programme of the Republic of Serbia for the period from 2021 to 2023, were adopted the same year, however with significant criticism from the civil society organisations, as numerous errors were identified in the drafting procedure, the public discussion, as well as the content of the amendments themselves[214].

From May 2019 to November 2021, the project ***EU for Natura 2000 in Serbia*** was carried out in order to promote and reinforce the implementation of the Natura 2000 network in Serbia and as a tool to reinforce and support the authorities of the Republic of Serbia in the area of Natura 2000 conservation. The overall objective of the project was to increase the effectiveness of the Republic of Serbia in the preparation for EU accession in the area of nature protection, and to support the competent authorities to establish the first list of potential Natura 2000 sites (SPAs and SCIs), together with an information system, database and GIS for Natura 2000. The project also included recommendations for harmonisation of Serbian legislation with EU Directives related to nature protection, and technical and administrative capacity for implementation of nature protection legislation[215].

As for the competent authorities, the Ministry of Environmental Protection is the competent authority for nature protection in Serbia with the main mandate in the area of, among others, nature and biodiversity protection, sustainable use of natural resources, management of protected areas and the ecological network. Certain competences lie under the Ministry of Agriculture, Forestry and Water Industry, such as those within the Forestry Bureau, Plant Protection Bureau, Water Directory and so on.

Some competences are decentralised within the Autonomous Province of Vojvodina or local municipalities that regulate environmental protection within the provinces or municipality,

214 Shadow Report, (n 186), p. 94.
215 https://natura-2000.euzatebe.rs/en/about-project; See also, Recommendations for legislative actions for EU requirements, available for download at: https://natura-2000.euzatebe.rs/en/downloads

respectively[216]. Finally, the Nature Protection Bureau of Serbia manages the register of protected natural resources and information system on nature protection[217].

The Nature Directives have been transposed into the following legislation:

- Law on Nature Protection ("Official Gazette of RS", nos. 36/2009, 88/2010, 91/2010, 14/2016, 95/2018, 71/2021) (hereinafter, 'the Law');
- Rulebook on criteria for the separation of habitats, types of habitats, vulnerable, endangered, rare, and for the protection priority habitats and on protection measures for their conservation ("Official Gazette of RS", no. 35/10) (hereinafter, 'the Rules on criteria');
- Rulebook on the designation and protection of strictly protected and protected wild species of plants, animals and fungi ("Official Gazette of RS", nos. 05/10, 47/11, 32/16 and 98/16);
- Regulation on the ecological network ("Official Gazette of RS", no. 102/10);
- Regulation on protection regime ("Official Gazette of RS", no. 31/2012);
- Law on game and hunting ("Official Gazette of RS", nos. 18/10 and 95/18);
- Rulebook on transboundary movement and trade in protected species ("Official Gazette of RS", nos. 99/09 and 06/14).

Habitats Directive

CONSERVATION OF NATURAL HABITATS AND HABITATS OF SPECIES

Firstly, the report needs to comment on the structure of the Law on Nature Protection that could be improved. **Chapter III of the Law**, entitled *Protection of Natural Goods*, contains a list of natural goods that are covered by this term. The ecological network is not included in this list. However, **Article 38**, contained in this chapter, regulates the establishment of an ecological network. Similarly, **Chapter II of the Law**, entitled Protection of Nature, includes provisions on appropriate assessment of an ecological network, but without a clear link of this term with the regulation of Natural Goods, regulated under Chapter III. Thus, a more clear logical connection between the chapters would make the Law more practical for use and more understandable.

As mentioned above, **Article 38 of the Law** envisages the introduction of an '**ecological network**' as an area established for the protection of types of habitats of special importance, for restoration and/or improvement of damaged habitats and conservation of habitats of wild types of flora and fauna.

216 For more details on competences see https://www.ekologija.gov.rs/sites/default/files/inline-files/Program%20zastite%20prirode%20RS%202021-2023.%20godine.pdf, p. 36.
217 Ibid.

The ecological network includes **ecologically important areas**[218] and ecological corridors. Ecologically important areas include:

- areas that are important for the preservation of habitat types and habitats of species due to their biogeographic representation and representativeness, including areas for the conservation of birds at the national level in accordance with the regulations in the area of nature protection in the Republic of Serbia;
- areas of international importance that are important for conservation due to their biogeographic representation and representativeness habitat types and species habitats including bird conservation areas, in accordance with the confirmed international agreements and generally accepted rules of international law;
- areas of European importance that contribute significantly to the biogeographical region or regions to which they belong in maintenance or restoration in a favourable status of protection of natural habitat types or species, and can also contribute significantly to the coherence of the ecological network Natura 2000, and/or for the maintenance of biological diversity in the biogeographical region or concerned regions, in accordance with the obligations of the Republic of Serbia in the process of accession to the European Union.

The Article further states that the areas of European significance shall be classified based on the listed criteria. The list follows the list of criteria set under the **Annex III of the Habitats Directive**.

The Government establishes list of ecologically important areas and list of species, including birds, and their habitats, priority habitat types and priority species of European and national significance, ecological corridors, criteria for determination of parts of the ecological network, general management guidelines and financing.

The Nature Protection Bureau, together with other scientific and professional institutions, prepares documentation for the establishment of the ecological network in accordance with the Law, generally accepted rules of international law and set criteria.

The Regulation on the ecological network extends the content of the ecological network by also including in its meaning 'the protecting zone in the areas where it is necessary for the protection of ecologically important areas and ecological corridors from the possible external impacts'.

Article 2(1)(2) of the Regulation on the ecological network defines the ecological corridors as corridors that connect the ecologically important areas in Serbia, as well as the corridors of national importance and those that ensure connection with the ecological networks of neighbouring states, in accordance with the international law, as well as ecological corridors of international importance.

218 The definition of the ecologically important areas seems to include both special areas of conservation (SAC) and special protection areas (SPA). Ecologically important areas of the European Union Natura 2000 comprise special areas for conservation of habitats and species and areas of special protection for conservation of habitats of certain types of birds, in accordance with the EU law on protection of habitats and protection of birds (Article 4.1(16a)).

Under **Article 3 of the Regulation on the ecological network**, the ecologically important areas include areas where the following protection areas are located:

- specific protection areas, proclaimed in accordance with the Law on Nature Protection with the aim of conservation of biodiversity, including areas that are in the procedure of proclamation of protection and areas that are planned in the strategic documents for protection;
- areas of special interest for protection (Emerald network), identified in accordance with the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention);
- areas defined in accordance with the international programme for identification of important bird areas (IBA), important plant areas (IPA) and prime butterfly areas (PBA);
- areas listed under the Ramsar Convention on Wetlands of International Importance, or planned to be included in the list;
- special speleological objects;
- transboundary ecologically important areas that ensure connectivity with ecological networks of neighbouring states in accordance with the international law;
- special areas of habitat types of special importance, identified in accordance with the **Rulebook on criteria for distinguishing types habitats, about habitat types, sensitive, endangered, rare and priority habitat types for protection, and about protection measures for their preservation** ("Official Gazette of RS", no. 35/10);
- special habitats of wild species established in accordance with the **Rulebook on the designation and protection of strictly protected and protected wild species of plants, animals and fungi** ("Official Gazette of RS", nos. 05/10, 47/11, 32/16 and 98/16);
- other ecologically important areas determined as such in the planning documents.

Regulation on the ecological network lists in **Annex I** the ecologically important areas in Serbia, while Annex II lists the ecological corridors.

Article 130 of the Law notes that the ecological network shall be established and become part of the European ecological network Natura 2000 on the day of Serbia's accession to the European Union.

Although Articles 3 and 4 of the Habitats Directive have been significantly transposed, both the Law and the Regulation on the ecological network should provide a more clear procedure on designation of the sites, as well as procedures for establishment of the special areas of conservation (SAC) and special protection areas (SPAs). Currently, the Law provides for an extensive procedure for designation of national parks and IUCN categories of protection, rather than on the sites protected under the Nature Directives. Moreover, considering the complicated structure of the Law, it is difficult to understand the concept of an ecological network and its place under the national regime regulating nature protection. Thus, the adoption of a new Law where this would be remedied would be more than welcome.

CONSERVATION MEASURES AND APPROPRIATE ASSESSMENT

Under **Article 39 of the Law**, protection of the ecological network is ensured through implementation of all necessary protection measures relevant to the ecological requirements of the habitat type and habitat of species for which the ecologically significant areas are set, as well as with the application of the appropriate assessment procedure, in order to prevent potential impacts of the projects and plans on the ecological network. These are:

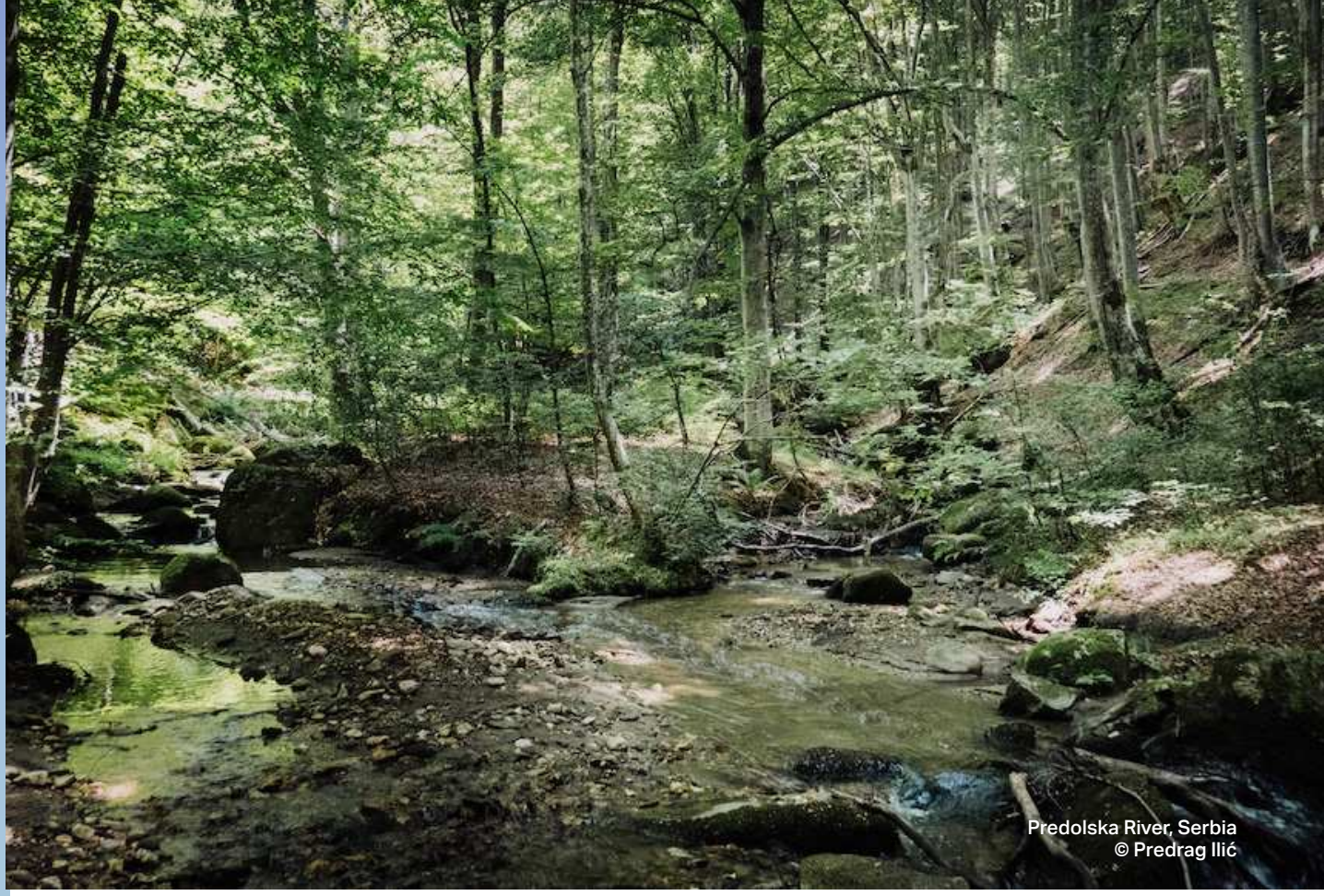
- Management plans or management mechanisms, specific for that area, or integrated into the other development plans that include conservation objectives of the ecological network;
- Legal, administrative or contractual measures according to the regulations.

Any plan or project not directly connected with the management of the ecological network, but likely to have a significant effect on the habitat types and habitats of species, for which the ecologically significant area was set, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

Article 40 of the Law further states that the area of ecological network that is at the same time a protected area, or it is located within or borders with the protected area, shall be managed by the manager of the protected area. Conversation objectives and measures shall be regulated by one management plan. For management of the ecologically important area and ecological corridor that is not put under the same protection as the protected area, the Government can establish a legal person responsible for the management of the area, following the proposal of the Ministry, autonomous region or local municipality where the area is located.

Under **Article 8 of the Law**, planning, regulation and the use of space, natural resources, protected areas and ecological network is carried out based on the spatial and urban plans, planning and project documentation, plans and programmes in management and use of natural resources and goods in

It should be stressed that the section of the Law regulating the appropriate assessment procedure does not include any access to a justice provision for the public to challenge decisions deriving from the appropriate assessment procedure.



Predolska River, Serbia
© Predrag Ilić

mining, energy, traffic, water industry, agriculture, forestry, hunting, fishing, tourism and other areas that have an impact on nature.

These plans and programmes that include a protected area which is not part of the ecological network shall be adopted with preliminary consent of the competent Ministry in the area of environment, and for the area of ecological network, after the appropriate assessment procedure has been carried out.

Under **Article 9 of the Law**, during the procedure for preparation of plans and projects referred to in **Article 8 of the Law**, it is required to obtain nature protection conditions. The conditions are mandatory for all hydropower plants, regardless of their type, installed capacity and location inside or outside of protected areas. Considering that both Articles mention the requirement to obtain the nature protection conditions and to carry out the appropriate assessment, **it is not clear from these provisions what is the exact connection between the two processes, and which of the two is required to be carried out first**.

Article 10 of the Law regulates the appropriate assessment procedure. The provision follows the wording of **Article 6(3) of the Habitats Directive**. The appropriate assessment procedure consists of two stages, namely the preliminary assessment and the main assessment.

The appropriate assessment procedure is carried out in accordance with the **precautionary principle**. This is further contextualised in the Article, where it is stated that the competent authority shall reject to give consent to the project if it determines, during the appropriate assessment procedure, that a plan, programme, project, works and activities can have a significant negative impact on the protection objectives and negative impact on the coherence of the ecologically important areas. In case of doubt, it is considered that a plan, programme, project, works and activities can have a significant negative impact on the conservation objectives and a negative impact on the coherence of the ecologically significant area.

Article 10(10) of the Law fully transposed **Article 6(4) of the Habitats Directive**, meaning the derogation procedure from the conservation objectives regulated under **Article 6(3) of the Directive. Article 10(11) of the Law** further clarifies that the existence of the overriding public interest shall be decided by the Government based on the request of the Ministry that shall contain:

- Reasons for concluding that there are no other alternative solutions;
- Reasons for concluding that the proposed compensation measures are sufficient to ensure the coherence of the ecological network and that they could be implemented in accordance with the set criteria;
- Results of notification and public participation.

The provision, however, **does not oblige the Ministry to state the reason for the overriding public interest itself**.

The Government is obliged to further regulate the appropriate assessment procedure, however the **Government has still not adopted any bylaw on an appropriate assessment procedure**, which makes the implementation of the process impossible in practice, as the details of the procedure as well as the competences of various actors therein remain unclear.

Article 10 of the Law also makes a connection to the EIA and SEA procedure, stating that for strategies, plans, programmes and projects for which the SEA and EIA procedures are being carried out, the appropriate assessment shall be conducted within these assessments, however there is no clear requirement for the appropriate assessment to be carried out before the location conditions, development consent, or other forms of individual consent are issued.

Under **Article 12 of the Law**, the developer of a plan, programme, project, works and the activities is obliged to implement compensation measures for mitigating the negative consequences that they might have on nature. For ecologically important areas of the EU Natura 2000, **the only compensation measures that can be implemented are the establishment of a new location that has the same or similar characteristics as the damaged location**. These measures shall be notified to the European Commission.

Finally, it should be stressed that the section of the Law regulating the appropriate assessment procedure does not include any access to a justice provision for the public to challenge decisions deriving from the appropriate assessment procedure.

PROTECTION OF SPECIES

Measures for protection of species under **Article 12 of the Directive** are transposed in **Article 74 of the Law** and in the **Rulebook on the designation and protection of strictly protected and protected wild species of plants, animals and fungi**.

Article 74(2) of the Law lists the protection measures for strictly protected species, by forbidding among others:

- capture, holding and/or killing of strictly protected species, damage or destruction of their development forms, eggs, nests and lairs, as well as the areas of their reproduction and resting;
- deliberate disturbance, particularly in the period of their breeding, rearing, hibernation and migration;
- cutting off of migratory routes.

Chapter VI of the Law regulates in detail the measures for protection and conservation of wild species.

Article 75 of the Law regulates the process of derogation from the measures prescribed under **Article 74 of the Law**. The wording of the derogations follows **Article 16 of the Habitats Directive**. Permission of derogation is issued by the Ministry with the preliminary opinion of the Bureau on Nature Protection. Against this decision, an administrative dispute can be initiated.

The main problem with transposition within Articles 74 and 75 is that they both refer to wild species and birds. This solution is not in line with the requirements of the Nature Directives, considering that both Habitats and Birds Directives contain within them their special derogation provisions, pursuant to Article 16 of the Habitats Directive, and Article 9 of the Birds Directive, as requirements for birds and 'non-birds' differ. Thus, this needs to be clearly reflected in the Law.

The above remark was also stressed during the EU for NATURA 2000 in Serbia project where the **Recommendations for legislative actions for the EU requirements** further criticised some of the other solutions in the Law, such as the wording in **Articles 38, 48 and 76 of the Law** that do not clearly and unambiguously provide the primacy of nature protection legislation over, in particular, game and hunting, forestry and fishery legislation, with regards to species protection. Thus, **the Nature Protection Law must be given priority with regard to strict protection of species and it must provide the guidance and orientation of the relevant sectoral legislation[219], which currently is not the case**.

Birds Directive

The Law on Nature Protection does not provide for separate provisions transposing the Birds Directive, but includes the protection of birds within the species protection examined above. As explained in the previous section, this is a problematic solution, especially with regards to the derogations provisions, considering that both the Habitats and Birds Directives include their own provisions prescribing a different protection and derogation regime. Thus, the Law should be amended to remedy this problem.

219 Recommendations for legislative actions for EU requirements, (n 215), p. 22.

30.3 Implementation

As shown above, the level of transposition of the Nature Directives in Serbia is partial, although the proper implementation is crucial for full protection of species and their habitats[220]. One of the main concerns raised in the Recommendations for legislative actions for the EU requirements within the EU for Natura 2000 in Serbia was the lack of proper harmonisation of the Nature Protection legislation within other relevant laws, such as those regulating the planning and development procedure, integrated pollution prevention and control, mining, forestry, hunting and fishing. The appropriate assessment procedure is not directly integrated in those procedures, and the Law on Nature Protection fails to strictly prescribe the obligation for planning and development authorities to withhold with adoption of the planning documents or within issuing development permits before an appropriate assessment procedure is carried out, to preserve the final decision on appropriate assessment and reject the permit application in case of a negative assessment[221].

Although the Draft EIA and SEA Laws included the provision that would link the appropriate assessment procedure with the procedure on EIA and SEA, these have still not been adopted. In order to ensure a proper implementation, national rules governing the appropriate assessment procedure must have the capacity to override any planning/development procedure and annul any plans or development consents issued to the developer circumventing the appropriate assessment requirements[222].

Regarding the mapping of Natura 2000 sites, one of the most important activities to establishing the European ecological network Natura 2000 in Serbia was performed from 2019 to 2021 through the project EU for Natura 2000 in Serbia. The most important results of the project are the identification of 277 sites of potential interest to the community (pSCI) and 85 special areas for protection (SPA)[223]. This proposal covers approximately 35% of Serbia's territory.

The ecological network of Serbia covers 101 ecologically important area of 1,849,201.77 ha, which comprises 20.93% of its territory. This is the area that includes protected areas, IPA, IBA and PBA areas, areas protected under the Ramsar Convention and Emerald sites. Apart from these, the ecological network also includes the ecological corridors[224].

220 For more details on the implementation of nature protection provisions, See: 'Заштита природе у Србији на републичком нивоу – резултати истраживања 2023', Ecological Centre Habitat, available at: https://staniste.org.rs/zastita-prirode-u-srbiji-na-republickom-nivou-rezultati-istrazivanja-2023/?fbclid=IwAR2hZbwghn83RmdVpAxJY5tBzV8uNZAwDZdfxtC9L4SXJZml8zoh5UX2fK0 .

221 Recommendations for legislative actions for EU requirements, (n 215), p. 26.

222 Ibid., p. 29.

223 https://natura-2000.euzatebe.rs/en/news/natura-2000-in-serbia-achievements-and-next-steps . Digital maps of the proposed sites are available here: https://daphne.sk/Natura2000Serbia/

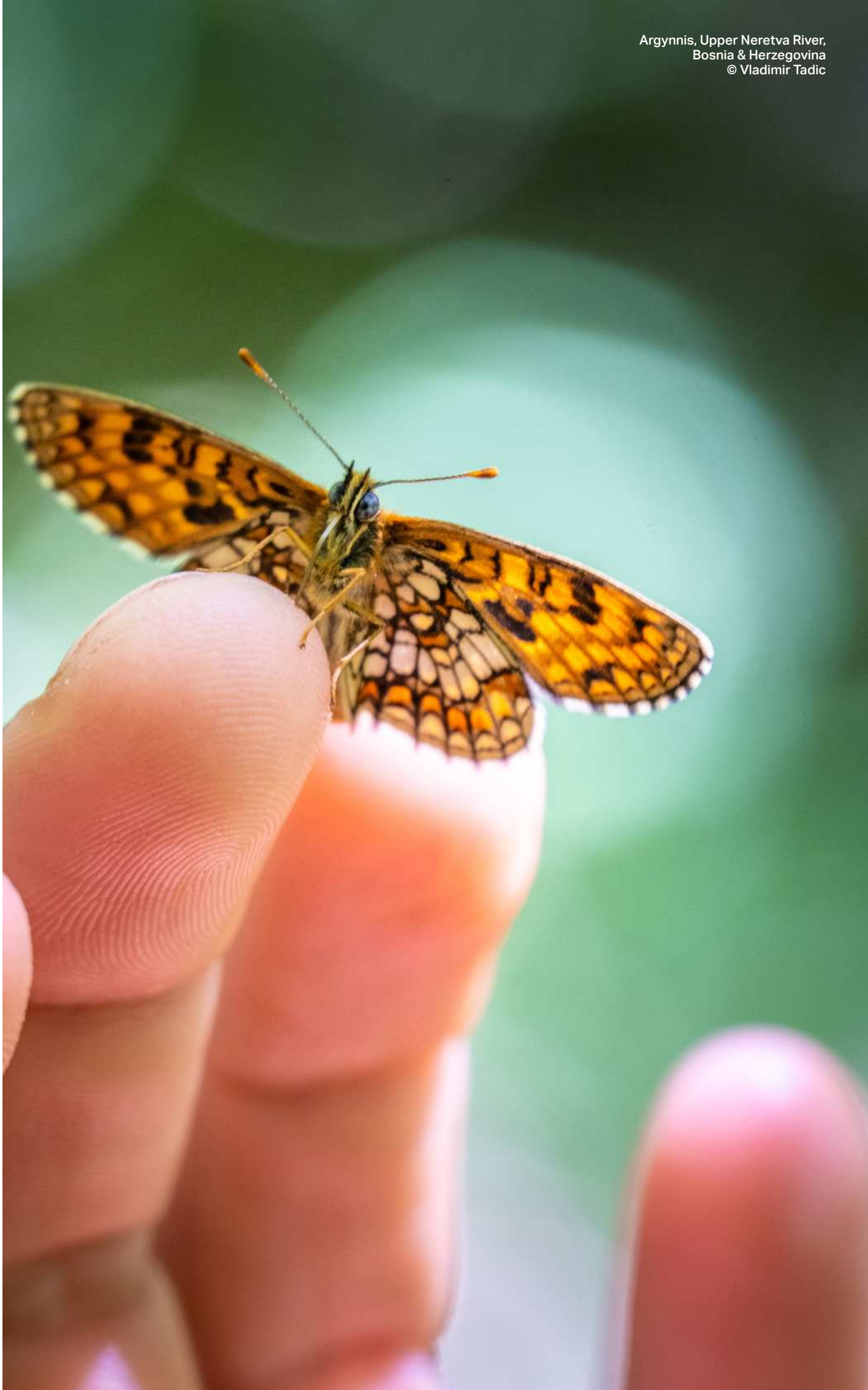
224 Map of protected areas and ecologically important areas can be found here: https://zzps.rs/%d0%b5%d0%ba%d0%be%d0%bb%d0%be%d1%88%d0%ba%d0%b0-%d0%bc%d1%80%d0%b5%d0%b6%d0%b0/ .

Concerning the protected species, the Rulebook on the designation and protection of strictly protected and protected wild species of plants, animals and fungi comprised 2,633 wild species. Annex I of the Rulebook lists strictly protected wild species of plants, animals and fungi, whilst Annex II lists wild plants, animals and fungi with a status of protected species. However, according to the Shadow Report, the status of species in the Rulebook is not harmonised with their status within the Birds Directive and the Habitats Directive[225].

The first Red Book of Serbia was adopted in 1999 – Red Book of Flora of Serbia I. The second Red Book was the Red Book of Butterflies of Serbia from 2003. The third and fourth were the Red Book of Fauna of Serbia I – Amphibians and the Red Book of Fauna of Serbia II – Reptiles from 2015. In 2019, the Red Book of Fauna of Serbia III – Birds was published, while in late 2018 the Red Book of Fauna of Serbia IV – Orthoptera was published[226]. The national action plan for bird conservation and the National Red List for bird species is delayed[227].

225 Shadow Report, (n 186), p. 96.
226 https://www.ekologija.gov.rs/sites/default/files/inline-files/Program%20zastite%20prirode%20RS%202021-2023.%20godine.pdf, p. 7.
227 ECT 2023 Implementation Report, (n 186), p. 11.

FINDINGS AND RECOMMENDATIONS



Argynnis, Upper Neretva River,
Bosnia & Herzegovina
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The analysis reveals the extent to which six EU Directives have been incorporated into the national laws of Western Balkan countries. Despite variations in transposition efforts among countries, a certain amount of progress has been made overall, reflecting substantial efforts to meet the Directives' requirements.

Despite variations in transposition efforts among countries, overall significant progress has been made, reflecting substantial efforts to meet the Directives' requirements.

Certain transposing laws are relatively new, while others are still undergoing the adoption process, making it currently impossible to evaluate their implementation. Nevertheless, numerous countries are yet to conclude the adoption of secondary legislation and bolster their institutional capacity to fully harmonise their national legislation with the EU framework concerning environmental law.

The urgent necessity for efficient enforcement of existing laws is evident across all nations. Consequently, significant enhancements in enforcing environmental regulations emerge as a pivotal area necessitating progress.

A beneficial overview of the most critical issues and proposed standards that can facilitate forthcoming legislative and enforcement procedures is outlined as follows:

The Environmental Impact Assessment Directive

- All hydropower projects should be included in the EIA procedure and assessed against all screening criteria. Hydropower projects should not be excluded in advance from the screening procedure based solely on their power capacity.
- Clear alignment with the appropriate assessment procedure should be provided for in all countries.
- Public participation should be enhanced in order to ensure that representatives of civil society should be properly informed and can participate in decision-making, such as in the EIA Commissions' meetings.
- Authorities should ensure that decisions on EIA (reasoned conclusions) are still up to date when granting the development consent, regardless of the timeframes set.
- The quality of the EIA reports should be improved in order to ensure that the hydropower projects are properly screened against their impact on nature and water resources.

The degree and effectiveness of transposition and implementation of the EIA Directive varies across the Western Balkans countries. For particularly concerning hydropower projects, significant disparities exist, primarily relating to the obligation to conduct screening procedures. While **Albania** and **Kosovo** have faithfully transposed provisions regarding the screening of hydropower projects by ensuring that small hydropower projects are not exempt in advance from the procedure, due to their energy capacity, **Bosnia and Herzegovina** has gone beyond the requirements of the EIA Directive by adopting more rigorous provisions. Specifically, **Republika Srpska** requires an EIA for all hydropower projects with a capacity of 5 MW or more (projects smaller than 5 MW are subject to screening), while **the Federation of Bosnia and Herzegovina** requires an EIA for all hydropower projects, regardless of the power capacity.

Contrary to the above, **Montenegro** and **Serbia** mis-transposed the screening provisions. **Montenegro**, for instance, excludes hydropower projects below 1 MW from the screening procedure, while Serbia does so for those below 2 MW and outside protected areas. Both countries have also mis-transposed Article 2 of the Directive, which means that, in theory, 'salami slicing' is not prevented.

Similarly, **North Macedonia** adopted contradictory bylaws which introduce a process of issuance of a so-called 'elaboration' for hydropower projects below 10 MW, a procedure that seems to run in parallel to the screening procedure, excludes the public consultation procedure, and seems to indicate that the hydropower plants up to 10 MW are actually excluded from the EIA screening procedure.

Moreover, some countries, such as **Albania**, **Bosnia and Herzegovina (Republika Srpska)** and **North Macedonia**, have failed to properly transpose the screening criteria and, as a consequence, proper screening has been disabled which contradicts the requirements of the Directive.

A positive process of aligning the appropriate assessment procedure with the EIA was comprehensively developed in the draft EIA Law of **Serbia** that dedicated a number of provisions to the appropriate assessment procedure. Alignment of the two processes was also found in **Albania** and **Montenegro**.

Moreover, inclusion of the civil society in decision-making procedures was enhanced in **Montenegro** and **Kosovo**, where laws provide for the possibility of selecting experts outside of the authorities in the Commissions for analysis of the EIA reports.

Regarding changes to the projects listed under the Annexes of the Directive, **Albania** failed to transpose paragraph 24, Annex I of the Directive that requires any change to or extension of projects listed in Annex I, where such a change or extension in itself meets the thresholds, to be subjected to a mandatory EIA. The national law only requires screening in these cases. On the other hand, although the provisions regulating this procedure in **Republika Srpska** seem to be more aligned with the Directive, it is questionable whether the changes to the project require a proper screening procedure to be conducted, and whether there is enough emphasis on obliging the authorities to carry out a proper assessment in the case of changes to the project, rather than relying on information provided by the developer. The new EIA Law in the **Federation of Bosnia and Herzegovina** has remedied this issue by clearly stating the obligation for authorities to assess the significance of the change.

The requirement for competent authorities to ensure that a reasoned conclusion is still up-to-date when taking a decision to grant development consent was addressed in all countries by setting a timeframe for the validity of a reasoned conclusion, as encouraged by Article 8a(6) of the Directive. However, none of the countries has ensured that the assessment is still relevant, regardless of the timeframe set. This is important in order to ensure that a long time period between decision-making and construction does not raise questions of validity of the EIA and of the subsequent decision, meaning to ensure that the EIA study did not become obsolete due to e.g. changes in the state of environment, or in relevant regulations at the time of construction.

The clearest issue of this was found in the legislation of **Bosnia and Herzegovina**, where the analysis has shown that the applicable law allows for the life-time validity of the construction permits that does not expire even when the environmental permit does. This means that once the construction permit is issued, it enables the developer to legally perform construction several years after the construction permit was issued, regardless of the validity of environmental permit that is issued for the duration of five years. Moreover, court cases have proven that the construction permits cannot be challenged only due to the environmental permit expiration. On the other hand, the new Draft EIA Law of **Serbia** is endeavouring to ensure the proper procedure for the authorities to assess the relevance of previously approved EIA studies.

Finally, the poor quality of data provided in the EIA reports remains a challenge in all countries, which was one of the main shortcomings raised in cases covered in the implementation part of the report.

The Strategic Environmental Assessment Directive

- Access to justice for SEA-related decisions should be provided.
- Clear alignment with the appropriate assessment procedure should be provided for in all countries.
- Public participation should be enhanced.
- Proper implementation of the SEA procedure should be strengthened.

The transposition of the SEA Directive has seen considerable success, however certain deficiencies remain. Notably, the obligation to carry out Strategic Environmental Assessment (SEA) for plans and programs involving 'the use of small areas at a local level' is entirely omitted from **Albania's** SEA Law. This limitation restricts the scope of plans and programmes subject to screening procedures, only applying when a protected area is potentially implicated. Similarly, the FBiH fails to fully transpose the list of types of plans and programmes that always require the SEA procedure, as well as those that should be subjected to the screening procedure. Consequently, the SEA Law in FBiH does not contain any screening criteria.

Positive improvements are seen in the draft SEA Law in **Serbia** that has included provisions on appropriate assessment in order to align the two processes. In the national laws of **Republika Srpska** and **Montenegro**, it is mandated that any adverse decision regarding the implementation of a Strategic Environmental Assessment (SEA) must be accompanied by explanations and the criteria used to reach such a decision. This requirement serves to bolster legal certainty in environmental decision-making processes.

A significant concern arises due to the restricted access to justice regarding decisions resulting from the strategic environmental assessment procedure. Only **Albania** ensures the possibility to challenge the decisions deriving from the SEA procedure, based on general administrative procedure rules. The draft SEA Law in **Kosovo** requires a decision to be issued; however, it is not clear if that decision can be challenged by the public concerned. North **Macedonia**, on the other hand, only allows challenges against the SEA screening decision, and not for other decisions deriving from the SEA procedure. The remainder of the countries do not provide for access to justice provision at all, and it seems that this is also not possible under the general administrative procedure. This impossibility was demonstrated in **Serbia**, where the Ministry of Environmental Protection consistently refuses to grant public and civil society organisations access to legal recourse in instances where they perceive their rights to have been violated during the strategic impact assessment process. Specifically, the Ministry denies that the decision to approve a strategic environmental impact assessment constitutes a legal action against which a legal remedy can be pursued, without clarifying the legal nature of such approval.

Last but not least, effective implementation of the SEA Directive continues to pose challenges in all of the countries concerned. For example, in **Albania**, it is sometimes difficult to monitor the implementation of the SEA because of the vague indications for information and consultation processes. In **North Macedonia**, due to a lack of synchronised development of the draft plan or programme and the SEA report, adoption or endorsement of the plans before the SEA process is completed was often the case. In **Bosnia and Herzegovina**, the state arrangement makes it difficult to align and implement the Directive for plans and programmes adopted at a national level.

The Environmental Liability Directive

- Regulations governing liability for environmental damage should be implemented across all regions, as currently only Montenegro has such regulations in place.

The ELD has only been transposed and is being implemented in **Montenegro**. Other countries have adopted certain basic provisions related to the definition of environmental damage and the polluter-pays principle; however, implementation of the environmental liability provisions is not being carried out.

In **Albania,** the implementation of ELD provisions has been impeded by the absence of secondary legislation. The absence of specific regulations has hindered the complete enforcement of the environmental liability regime, leaving only the general provisions of the Civil Code applicable. However, it is worth noting that the ELD does not encompass criminal liability or liability for traditional civil law damages, such as property damage or personal injury

Since to date no measures necessary to implement the ELD were adopted, the Secretariat of the Energy Community has opened a case against **Bosnia and Herzegovina** and **Kosovo** and submitted Reasoned Requests to the Ministerial Council of the Energy Community Treaty.

The Water Framework Directive

- Relevant secondary legislation should be adopted and institutional capacity strengthened.
- Environmental objectives and Programmes of measures should be adopted in all of the countries.
- Public participation should be enhanced.
- River basin management plans need to be adopted or updated.
- Proper assessment of the impacts of projects on water bodies in accordance with the WFD needs to be carried out.

In most countries, the core provisions of the Water Framework Directive have been largely transposed and administrative arrangements are in place in order to implement the Directive. However, the absence of secondary legislation translating technical and operational provisions into practice renders it impossible to effectively implement the Directive.

Albania, Bosnia and Herzegovina, Montenegro and **Serbia** have adopted their first river basin management plans. The **Federation of Bosnia and Herzegovina** is already at its second cycle, since updated RBMPs (2022–2027) have been adopted. However, the fragmentation of water policy between the two entities impairs their ability to effectively oversee and manage river basins across the entire territory of **Bosnia and Herzegovina.** In **Kosovo** and **North Macedonia,** no RBMPs have been adopted.

Most of the countries struggled to fully establish provisions on environmental objectives, with only **Albania** having the most successful transposition. In the case of **Montenegro,** lack of proper transposition of the term 'overriding public interest' opened the door for an easier derogation for projects of new hydro morphological modifications or new sustainable human development activities, contrary to the WFD.

Despite the presence of provisions on public participation, engagement remains limited, even when consultations are conducted. The majority of countries face challenges stemming from inadequate institutional capacity and lack of clear and extensive data on water bodies, hindering the proper implementation of Water Framework Directive provisions.

Implementation concerning the impacts of projects and pressures on water bodies, as stipulated in the Directive, seems to be in its early stages across all countries.

The Nature Directives

- Relevant secondary legislation should be adopted and institutional capacity strengthened.
- Natura 2000 sites should be designated.
- Bylaws on appropriate assessment need to be adopted.
- Transposition and implementation of the Birds Directive needs to take place in all of the countries concerned.

Similarly to the Water Framework Directive, the absence of secondary legislation translating technical and operational provisions and insufficient institutional capacity hinder the proper implementation of the Directives.

The processes of designation of Natura 2000 sites are at the early stages at best, and thus conservation measures are not adopted. The lack of proper biodiversity data on species and habitats seems to be a problem in most of the countries. The lists of protected habitats and species are mostly adopted, however they require amendments.

Detailed provisions for appropriate assessment are exclusively present in Montenegro's legislation, whereas secondary legislation for implementing the appropriate assessment procedure has not been adopted by other countries. Additionally, **North Macedonia** failed to transpose any of the provisions regulating the appropriate assessment procedure.

Regarding the Birds Directive, transposition levels differ from country to country. Although Article 4(2) of the Birds Directive is binding on countries under the Energy Community Treaty, most of them have not transposed it. Additionally, the provisions of the Birds Directive are ambiguously defined in most laws. For instance, in Serbia, the Law on Nature Protection does not incorporate distinct provisions transposing the Birds Directive. Instead, it includes bird protection within species protection provisions and consolidates derogation provisions for species and birds, contrary to the Directive's requirements.

Lack of proper assessments of project impacts on protected areas, habitats and species seems to be a major issue in all of the countries. Cases before the Bern Convention, such as in case of Vjosa River in **Albania,** Upper Neretva River in **Bosnia and Herzegovina,** National Park Mavrovo in **North Macedonia,** and the Komarnica River in **Montenegro,** highlight the pressing need for expeditious harmonisation of nature protection legislation and its effective implementation and enforcement.


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