

**LEGAL ANALYSIS ON POTENTIAL HUMAN RIGHTS VIOLATIONS FROM  
MINING ACTIVITIES IN PERNIK, BULGARIA**

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## Abbreviations

**APC** means the Administrative Procedure Code, Promulgated in State Gazette No. 30 of 1 April 2006, as subsequently amended.

**CJEU** means the Court of Justice of the European Court.

**ECHR** means the European Convention of Human Rights.

**EPA** means the Environmental Protection Act, Promulgated in State Gazette No.91 dated 25 Sept. 2002, as subsequently amended.

**EU** means the European Union.

**DPA** means the Disaster Protection Act, promulgated in State Gazette No. 102 dated 19 Dec. 2006, as subsequently amended.

**Ordinance on the Disasters` Commission** means the Ordinance on the Organization and Activity of the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers, Promulgated in State Gazette No. 28 of 13 April 2010, as subsequently amended.

**Interdepartmental Commission** means the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers.

**LP** means land plot.

**Otkrit Vagledobiv Mines EAD** means Otkrit Vagledobiv Mines EAD, having Company No (EIK) 113551816, concessionaire at Coal Basin of Pernik with some exceptions.

**Recoal AD** means Recoal AD, having Company No (EIK) 113550568, concessionaire at Gladno Pole concession site.

**Report** means this Legal Analysis on Potential Human Rights Violations from Mining Activities in Pernik, Bulgaria.

**RIEW** means Regional Inspection of Environment and Waters – a regional department of the Ministry of Environment and Waters.

**SRA** means the Subsurface Resources Act, Promulgated in State Gazette No. 23 dated 12 March 1999, as amended subsequently.

**Za Zemyata** means Environmental Organisation Za Zemyata, address Sofia 1000, 11B Yanko Sakazov Blvd., app. 2.

## **Executive summary**

The coal mining in the Town of Pernik has been having very negative consequences on the local population.

### **1. The concession near Stara Teva**

The opencast mining site of Gladno Pole, operated by the concessionaire Recoal AD in the period 2005-2015, is located in close proximity to two residential areas – Stara Teva (around 300 m from the mine) and Rudnicar (10-15 m from the mine). This substantially increased the environmental impact on the local residents, who were constantly exposed to dusting and noise. Based on the information obtained for the purposes of this Report, the concessionaire failed to comply with the applicable legislation and good mining practices. The information from onsite checks of the institutions and the increased levels of dust and noise in the region are indicative of breach of the health protection conditions, based on which the concession was granted, namely obligation for irrigation of the concession site and roads, for construction of noise shaft, and carrying out of extraction works only during day time. There are indications that the concessionaire was involved in the deforestation of the park between Stara Teva and the concession site, which contributed to the environmental impact on the local residents and facilitated the illegal mining in the area. Illegal landfills were found inside the concession boundaries and outside. Furthermore, public information shows outstanding mining royalties and deposits for reclamation activities for the last years of the concession. The quality of the reclamation works following the termination of the concession is also controversial. The ongoing dusting in the area and the lack of adequate restorative measures to favour the area lead to the conclusion that the reclamation works were not sufficient to ensure quality environment for the local area and residents.

As seen from the summary of the information obtained from public sources and through queries to institutions, the control over the concession were exercised by numerous authorities – Ministry of Energy, Ministry of Health, Ministry of Agriculture, Executive Forests Agency, Pernik Municipality, and the District Governor. This weakened the control, lead to failure of the institutions to cooperate and take effective measures to protect the rights of the local residents. Largely, the institutions reacted only after signals from the affected parties and failed to perform follow-up control. No information on any sanctions on the concessionaire is obtained.

#### *Potential legal violations*

The case of Stara Teva may represent potential violations of the following legal obligations of the institutions:

- Failure of the institutions to award the concession in compliance the legal requirements and the provide safe environment for the local residents (the environmental impact procedure, the requirements for statutory distance from settlements)

- Failure of the institutions to exercise efficient control over the operation activities of the concessionaire (environmental and sanitary control, control for violations in operation of mining activities)
- Failure of the institutions to exercise control over illegal mining
- Violations of the right to life, right to family life and right to property under the ECHR.

## **2. Illegal mining in Rudnicar**

Rudnicar Residential Area has been subjected to underground illegal mining for years. Illegal mining galleries were dug underneath the houses of the local residents exposing them to noise, stress and fear for their life, health and property. As the mining was done without any consideration of safety and technical requirements, soon deformations of the terrain started to appear. Since 2013 there has been ongoing collapse of earth spoils, the most significant of which (on 1 July 2015) rendered two houses inhabitable and caused damage to another two houses. The failure of the institutions to take effective measures to terminate the illegal mining is obvious. Only after the accident of 1 July 2015, the Municipality ceased the entrance to the illegal galleries and appointed a 24-hour police station. Besides that, no measures to prevent further collapse of the terrain are taken. Despite the alerting conclusions of experts on the imminent risk for the life and property of the local, the municipality has not taken restorative measures to consolidate the terrain (fill in the underground galleries). The issue is not discussed in the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers- the body responsible for provision of financial assistance in the case of disasters. No financial assistance has been provided to the owners of the damaged real estate.

The history of mining in Pernik shows a tendency of neglecting the rights of local citizens, of tolerating the violations done by concessionaires and illegal miners, of ineffective control and overall failure of the institutions to deal with the situation and provide healthy and safe environment for the population. These factors have negative consequences for the local residents, who are exposed to unsafe environment with imminent risk for their life, health and property and to arbitrary institutions who fail to protect their rights.

### *Potential legal violations*

The case of Rudnichar may represent potential violations of the following legal obligations of the institutions:

- Failure of the institutions to exercise control over illegal mining;
- Failure of the institutions to provide financial assistance for reconstruction of property due to disaster;
- Failure of the institutions to consolidate the terrain and to stop the processes of collapsing earth spoils;
- Failure of the institutions to provide information to local residents on the condition of the terrain and the potential risks for the life, health and property of the residents.

- Violations of the right to life, right to family life and right to property under the ECHR.

## **Purposes**

This Report is prepared on the instruction of the Ecological Association EKO-UNIA, Poland.

This Report aims to give general overview of the negative impacts that mining activities in the Town of Pernik, Bulgaria, have on local population. Some of these impacts may constitute violations of human rights according to the ECHR.

The Report is structured as follows:

- Part I Concessions in Pernik gives general overview of the mining activities in Pernik and summary of the two key concessions that have impact on the local population – the concession of the former state-owned company Otkrit Vagledobiv Mines EAD and Recoal AD
- Part II Stara Teva Case provides summary of the impact of the mine in Gladno Pole, operated by Recoal AD and potential measures for legal protection
- Part II Rudnichar Case provides summary of the impact of illegal mining in Rudnichar Residential Area and potential measures for legal protection
- Appendix No. 1: Map of concession awarded to Recoal AD
- Appendix No. 2: Land Plots excluded from the Forest Fund, for which procedure for exclusion has started
- Appendix No. 3: Legal framework provides a summary of the applicable national and European legislation

The Report is prepared based on publicly available information from official sources such as the National Register of Concessions, the Commercial Register, the Land Register and the site of the Geodesy, Cartography and Cadaster Agency. Part of the information is obtained through requests for access to information submitted for the purposes of this Report or submitted by local residents. Where information from the media is used, this has been specifically noted.



## **Potential human rights violations due to mining activities**

We have discerned two stark cases of potential human rights violations due to mining activities in Pernik: in Rudnichar District and in Stara Teva. The differentiation of the cases is based on the source of the impact rather than the type of violation..

### **Case 1: Stara Teva**

Stara Teva Resident lives in Stara Teva Residential Area, which is in close proximity to the opencast mine operated by Recoal AD. Stara Teva Resident owns 19 acre of land in close proximity to the mine, whose value has decreased dramatically due to the deterioration of the region. The potential violations of the legal requirements combined with the failure of the institutions to impose effective control, lead to potential violation of the right to life and family life, on the one hand, and the right to property, on the other.

### **Case 2: Rudnichar**

Rudnichar Resident lives in the Residential Area of Rudnichar, which has been impacted by illegal mining activities for years. The illegal mining activities in Rudnicar has been taking place since 2010. Ever since the house of Rudnichar Resident is subject to the gradual impacts of the geodynamic processes. Cracks on the walls appear, the terrain in the garden visibly collapses and holes emerge. So far, despite the alarming expert opinions recommending immediate action to prevent further damage, no measures are taken by the authorities to fill in the illegal mining galleries and consolidate the terrain. The authorities fail to provide comprehensive information on the situation to the impacted citizens. No monetary compensation for the damages suffered is paid, as well.

Rudnichar Resident has been experiencing stress and disturbances of the noise due to the extraction of coal underneath his house. He lives in constant stress and fear for his wellbeing and property. The failure of institutions to take adequate measures to recover the damages suffered and to prevent future ones lead to potential violation of the right to life and the right to property.

## **Part I: Concessions in Pernik**

Pernik (in Bulgarian: Перник) is a city in western Bulgaria. The city is located about 20 kilometres south-west of the capital of the country, Sofia. The city is in close proximity to the western border of Bulgaria, neighbouring Serbia.<sup>1</sup>

Pernik is the seat of Pernik municipality (part of Pernik Province), which includes 24 towns and villages.

With population of 80,191 as of 2011, Pernik is the most populated city in western Bulgaria after Sofia. Due to its close proximity to the capital of Bulgaria, Pernik has relatively well developed economy, including one of the largest enterprise for the production and marketing of steel and steel profiles.

### **1. History of mining in Pernik**

Bulgaria's brown coal deposits are mostly located in the western part of the country. Bobov Dol represents 60 % of the national brown coal deposit and Pernik – 17 %.<sup>2</sup> The coal in Pernik is located in four coal layers with a thickness of 1 to 3 m. They are highly calorific, and, according to public data, close to depletion.

The mining activity in Pernik dates back to 1891. In July 1891, following research of the coal deposits in the area, the Ministry of Finance issued an order for their exploitation. On 17 August 1891, 114 employees start extraction activities in area Kulata and Beli Breg. Later on, in 1899, the first power plant in Bulgaria is built in Pernik.

#### **1.1. People's Republic of Bulgaria (1946-1989)**

After the establishment People's Republic of Bulgaria in 1946., the mining activities in Pernik were conducted by the State Mining and Energy Complex Giorgi Dimitrov (in Bulgarian СМЕК „Георги Димитров“). After the shift to multi-party political system in 1989, the assets and liabilities of State Mining and Energy Complex Giorgi Dimitrov were divided between newly established state owned companies. Mini Pernik EAD assumed the mining activities and Toplofikatsia Pernik EAD assumed the activities related to central heating.

#### **1.2. Democratic changes (after 1989)**

##### *Mini Pernik EAD*

- Mini Pernik EAD is a sole owner joint stock company, owned by the state.
- The company is incorporated in 1991 with resolution of the District Court of Pernik.<sup>3</sup>
- The Company is established by means of Disposition No 47/7.XI. 1991 of the Council of Ministers.

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<sup>1</sup> <https://en.wikipedia.org/wiki/Pernik>

<sup>2</sup> <http://geografia.kabinata.com/03.htm>, last accessed 5 May 2017

<sup>3</sup> The information on the corporate history of the mentioned companies is obtained from the company files at the public Commercial Register, available at [brra.bg](http://brra.bg)

- The capital of the company upon incorporation is BGN 72,052,000. The capital is determined according to Decree No. 179/13.09.1991 of the Council of Ministers for evaluation of the property of the state and municipal enterprises upon the incorporation of companies with state property and assessment of their tangible and non-tangible long-term assets and materials.
- In 1993, the capital is decreased to BGN 670,746,000.
- In 1999, the capital is increased to BGN 2,662,157,000
- Pursuant to a court decision of 31 May 2000, the Company undergoes corporate reorganization by separation of newly established company - Otkrit Vagledobiv Mines EAD (translated Opencast Mines Joint Stock Company), which assumes the assets and liabilities related to opencast mining. The capital is denominated to BGN 2,662,157.<sup>4</sup>
- As of July 2000, the company is in liquidation. The liquidation procedure is still ongoing as of today.

#### *Otkrit Vagledobiv Mines EAD (1)*

- Otkrit Vagledobiv Mines EAD is a sole owner joint stock company, owned by the state.
- The company is established by means of the court decision for corporate reorganisation of Mini Pernik AD of 31 May 2000.
- The capital of the company upon incorporation is BGN 2,407,000. It could be easily seen that the majority of the assets of Mini Pernik EAD are transferred Otkrit Vagledobiv Mines EAD, the capital of which before the corporate division was BGN 2,662,157.
- Pursuant to a court decision of 29 July 2000, Otkrit Vagledobiv Mines EAD merges into Toplofikatsia Pernik EAD, state-owned term central. As a result of the merger, Toplofikatsia Pernik EAD assumes all assets and liabilities of Otkrit Vagledobiv Mines EAD, which is terminated without liquidation.
- In September 2002, Toplofikatsia Pernik EAD undergoes corporate reorganization and a newly established company, Mini Otkrit Vagledobiv EAD (2) is established.<sup>5</sup> The new company assumes the assets and liabilities related to opencast mining according to a division protocol.

#### *Otkrit Vagledobiv Mines EAD (2)*

- Otkrit Vagledobiv Mines EAD is a sole owner joint stock company, owned by the state.
- The company is established by means of the court decision for corporate reorganisation of Toplofikatsia Pernik EAD of 19 September 2002.

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<sup>4</sup> According to the Law on Denomination of the Lev, as of 5 July 1999, and 1,000 old leva is replaced for 1 new leva.

<sup>5</sup> This is a new company, different from the company Otkrit Vagledobiv Mines EAD established in 2000 and referred to as Otkrit Vagledobiv Mines EAD (2) for the purposes of this Report. Any references to Otkrit Vagledobiv Mines EAD mean Otkrit Vagledobiv Mines EAD (2), established after division from Toplofikatsia Petnik EAD in 2002.

- Registered scope of activity: extraction and enrichment of brown coal
- Capital as of incorporation: BGN 3,774,000
- Pursuant to Resolution No. 2858 of 30 July 2004 of the State Agency of Privatisation, Otkrit Vagledobiv Mines EAD is privatised by means of tender, which was won by Kornikom EOOD.
- In 2011, all shares of the company are assumed by Amrafel Ltd, established in the Seychelles Islands.
- In 2014, all shares of the company are assumed by Laumer Ltd, established in the United Kingdom.
- As of today, Otkrit Vagledobiv Mines EAD is an operating company.
- In 2003, Otkrit Vagledobiv Mines EAD is awarded a concession for extraction of coal (Please refer to Part 2.1. of this Report).
- In 2016, the concession is transferred to Min Industry EOOD, a company with registered capital of BGN 2.

**Conclusion:** The corporate history of the state owed company operating the mining in Pernik shows that some of the corporate reorganizations lack clear business reasoning. In May 2000, the opencast mining activities are organized in a separate company (Otkrit Vagledobiv Mines EAD) and only three months later (July 2000) this company merges into Toplofikatsia AD, the company responsible for the central heating in Pernik. Two years later the opencast mining activities are separated again and the new company Otkrit Vagledobiv Mines EAD is established.<sup>6</sup>

Once privatised, the mining company is quickly acquired by a company registered in offshore jurisdiction, thus obscuring its actual owners. The acquisition by a UK company in 2014 was quite probably urged by a law that prohibited companies registered in offshore jurisdictions to obtain license and operate concession for extraction of subsurface resources, and to hold shares in company that does so.<sup>7</sup>

## 2. Coal concessions in the area of Pernik

After the privatisation of the mining industry, private parties had to obtain concession from the state in order to perform mining activities. According to the National Concessions Register, three concessions for extraction of coal have been awarded in the region of Pernik.

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<sup>6</sup> In Bulgaria, corporate mergers, acquisitions, divisions and separations follow the principle of universal succession, i.e. the transferee acquires all rights and obligations of the transferor. The exact volume of the rights and obligations of the company Otkrit Vagledobiv Mines EAD that merged into Toplofikatsia AD in 2000 and the volume of the rights and obligations of the company Otkrit Vagledobiv Mines EAD that was established in 2002 can be identified only after review of the transformation protocols, which are not publicly available.

<sup>7</sup> Law on Economic and Financial Relations with the Companies Registered in Jurisdictions with Preferential Tax Regime, the Controlled by their Persons and their Actual Owners, Promulgated in State Gazette No. 1 of 3 January 2014

1. Concession awarded to the privatised company Otkrit Vagledobiv Mines EAD for the whole Coal Basin of Pernik with certain exceptions.
2. Concession awarded to Recoal AD for Section Gladno Pole of the Coal Basin of Pernik.
3. Concession awarded to Vaglishta Pernik OOD for section Bela Voda of the Coal Basin of Pernik.

This Report analyses the first two concessions: the concession to Otkrit Vagledobiv Mines EAD due to its size and historical importance for the mining in Pernik; and the concession granted to Recoal AD because of its close location to residential areas and claimed numerous violations of the applicable legislation and impact on the local residents.

### **2.1. Concession to Otkrit Vagledobiv Mines EAD<sup>8</sup>**

Concessionaire	Otkrit Vagledobiv Mines EAD, No (EIK) 113551816
Legal act awarding the concession	Resolution No. 780 of 12.11.2003 of the Council of Ministers
Subject of concession	Extraction of brown coal in the designated Concession site.
Concession site	The concession site comprises the whole Coal Basin of Pernik without the following areas: Sveta Ana, Sveti Nikola, Prouchvane District, Tehnikum, Stara Teva, Gladno Pole, Stari Kapii, Leskov Dol, Shoroko Pole, 7 <sup>mi</sup> Setpemvri and Maksim Taban.
Period of the concession	10 years as of entry into force of the concession
Starting date	13 August 2004
Termination date	13 August 2014
Prolongation	Until 13 august 2029  By means of Resolution No. 855 of 03.11.2015 of the Council of Ministers, the concession is prolonged for another 15 years starting from 13 August 2014.
Transfer of concession	The concession is transferred to from Otkrit Vagledobiv MinesEAD to Min Industry EOOD  Resolution No. 1006 of 24.11.2016 of the Council of Minister

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<sup>8</sup> The information about the concessions is obtained from the publicly available National Register on Concessions.

## Min Industry EOOD

- Min Industry EOOD is a limited liability company, owned and managed by one individual, Petar Metodiev Nikolov. The company is registered with the Commercial Register under Company No. (EIK) 202255425.
- The company has the lowest registered capital possible under Bulgarian law – BGN 2, approximately EUR 1. The media the transfer of the concession from Otkrit Vagledobiv Mines EAD to Min Industry EOOD is reported as transfer to Mr. Kovachki, a notorious figure in the Bulgarian public life, considered the owner of key energy infrastructures, including coalmines and heating centrals.<sup>9</sup>

### 2.2. Concession to Recoal AD

Concessionaire	Recoal AD, Company No (EIK) 113550568
Legal act awarding the concession	Resolution No. 242 dated 5 April 2005 of the Council of Ministers
Legal grounds	The concession is awarded without tender or competition, on the grounds of Art. 29 and Art. 54, paragraphs 5 and 6 of the Subsurface Resources Act, which apply to holders of permission for prospecting and exploration who registered a commercial discovery.
Subject of concession	Extraction of coal deposits in the designated Concession Site
Concession Site	Gladno Pole-A ("Гладно поле - А") Section of the Pernik Coal Basin deposit  The Concession Site is individualized by the coordinates of points No. 1 to 10 from the coordination system of 1970.
Period of the concession	10 year as of entry into force of the concession
Starting date	12 May 2005.
Termination date	12 May 2015
Prolongation	No
Financial guarantees for performance of obligations under the	Bank or monetary guarantees to ensure payment of royalty: <ul style="list-style-type: none"><li>– For the first year – 50% of the concession payment due until the end of the first year of coal extraction</li></ul>

<sup>9</sup> [http://www.dnevnik.bg/biznes/2016/11/16/2865667\\_kovachki\\_okonchatelno\\_poluchi\\_prava\\_po\\_vuglishtna/](http://www.dnevnik.bg/biznes/2016/11/16/2865667_kovachki_okonchatelno_poluchi_prava_po_vuglishtna/)

concession agreement	<p>– For every following year – 50% of the concession payment for the preceding year.</p>
<p>Guarantee to ensure performance of the obligation upon termination of the concession</p> <p>(Departure Fund)</p>	<p>Initially: annual amount of 10% of the concession payment for the previous year<sup>10</sup></p> <p>According to amendment of 2008, the guarantee payment is agreed as follows:</p> <p>For year 2008 – BGN 42 000</p> <p>For year 2009 – BGN 40 000</p> <p>For year 2010 – BGN 40 000</p> <p>For year 2011 – BGN 40 000</p> <p>For year 2012 – BGN 40 000</p> <p>For year 2013 – BGN 40 000</p> <p>For year 2014 – BGN 40 000</p>
Mining royalty	<p>Determined as percent of the total income from the extracted and sold coal calculated by application of R-factor to determine the percent of the concession payment.</p> <p>The R-Factor is calculated as follows:</p> <p>R-factor = TCR / TCC, where:</p> <p>TCR - Total Cumulative Revenue from the concession activity for all reported periods minus concession royalties paid;</p> <p>TCC - Total Cumulative Cost of the concession activity including development, exploitation, exit, reclamation and bio-recruitment costs for all reported periods.</p> <p>The calculated R-factor is used to determine the Royalties, as follows:</p> <p>R-Factor Concession Remuneration (Royalties)</p> <p>&lt;1.00 2.0%</p> <p>1.00 - 1.50 3.0%</p> <p>1.50 - 2.00 4.0%</p> <p>2.00 - 2.50 6.0%</p> <p>2.50 - 3.00 8.0%</p> <p>&gt; 3.00 10.0%</p>

<sup>10</sup> There is mistake in the information published with regards to the amount of the guarantee payment, it is said thirty % in words, but 10 % in numbers. The amount of the concession payment is not public and we cannot estimate which one is correct.

	The R-factor is calculated at the six-month periods and the relevant mining royalty apply to the income from the activity during the previous six-month period based on a Report on the actual revenues and expenses during the respective six- month period prepared by the Concessionaire.
Payment of mining royalty	In two annual instalments, until July 31st and 31st January.

## Recoal AD

- Recoal AD is a joint stock company, incorporated by registration with the District Court Pernik in 2002.
- As of incorporation, the company had registered capital of BGN 50,000, divided in 1,000 shares of BGN 50 each.
- The shares were distributed as follows:

Shareholder	Number of shares	Percentage in the shareholding
Michel Briku	290	29%
Eric Briku	290	29%
Filip Wotle	30	3%
Luck Soe	50	5%
Ivan Valchanov Markov	170	17%
Alexi Prodanov Aleksiev	170	17%
<b>Total</b>	<b>1,000</b>	<b>100%</b>

- **Members of the Board of Directors:** Michel Briku, Eric Briku, Filip Wotle, Luck Soe, Ivan Valchanov Markov, Alexi Prodanov Aleksiev
- Ivan Valchanov Markov and Alexi Prodanov Aleksiev are former directors of Mini Pernik EAD and Mini Maritsa Iztok.
- **Executive Directors:** Eric Briku. Filip Wotle and Ivan Makrov
- **Current corporate structure**
- **Distribution of the shares<sup>11</sup>**

Shareholder	Number of shares	Percentage in the shareholding
Michel Briku	290	29%

<sup>11</sup> The last published information on the distribution of the shares is as of 29 January 2016



Eric Briku	290	29%
Filip Wotle	30	3%
Luck Soe	50	5%
Ivan Valchanov Markov	85	8,5%
Alexi Prodanov Aleksiev	85	8,5%
Nord Investement AD	170	17%
<b>Total</b>	<b>1,000</b>	<b>100%</b>

- **Members of the Board of Directors:** Michel Briku, Eric Briku, Filip Wotle, Jan Clod Bernard Rombo, Richard Jules Andres
- **Executive Directors:** Eric Briku. Filip Wotle
- **Insolvency Procedure:** On 20 September 2016, Recoal AD submitted a claim to Sofia District Court for voluntary insolvency. The company claims that according to a court decision of the Greek court, it owes EUR 443 167,60 plus accrued interest to a Greek company (Intercom EPE) for transaction for lignite coal and that it is not able to pay this due liability.
- On 7 June 2017, Sofia district Court declared Recoal AD insolvent. Within one month from the date of this decision, creditors may claim their receivables (until 7 July 2017). In Bulgarian law, the cost for reclamation of a mine site is at the expense of the concessionaire. During this period, the Ministry of Energy may claim payment of reclamation activities, if it considers that these are not done as required by law.

## **Part 2: Stara Teva case**

### **1. Concession to Recoal AD**

#### **1.1. Awarding the concession**

##### *Environmental screening*

The obligation to carry out environmental impact assessment procedure was in force as of the awarding of the concession for extraction of coal to Recoal AD in 2005. The data reviewed for the purposes of this Report notes that this obligation was complied with and Resolution No. 3-2/2004 on environmental impact assessment was issued by the RIEW Pernik. The environmental impact assessment and the documentation on the resolution of the RIEW is not obtained and reviewed at this stage.

The practice shows low quality of the environmental impact assessment procedure conducted in Bulgaria at that time. In case C-141/14 of the CJEU, it was found that in the region of Kaliakra, the Bulgarian authorities did not require impact assessment for several wind farms. For other wind farms, the impact assessment carried out did not take into account the cumulative effect.

The failure of the environmental impact assessment procedure to meet the regulatory standards has practical importance for operating projects, as their permit may be revoked. In the case of Recoal AD, however, as the concession is already expired, flaws in the procedure may have very limited practical outcome.

##### *Concession*

By means of Resolution No. 242/15.04.2004, the Council of Ministers awarded concession for extraction of coal to Recoal AD.

##### *Health requirements*

As of the moment of awarding the concession, specific health requirements on the minimum distance between the sources of environmental impact such as sites, facilities and installations, and the residential areas has to be provided. According to Ordinance No. 7 of 25 May 1992 on Hygiene Requirements for Health Protection of the Urban Environment, distance of at least 500 m had to be provided between the sites of extraction of coal deposits and residential areas.<sup>12</sup>

According to the cited ordinance, this minimum distance may be decreased by a resolution of the Ministry of Health. Based on this exception to the rule, the Ministry of Health issued position No 47-22-IICK-00773 of 1 September 2004 on the case of Recoal AD. The position is issued based on land-use situation plan, technological project for development of the mining activities and report on the environmental assessment. The Ministry of Health allowed

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<sup>12</sup> Ordinance No. 7 of 25 May 1992 on Hygiene Requirements for Health Protection of the Urban Environment, promulgated in State Gazette No. 46 dated 4 June 1992, repealed as of 17 May 2011

the concession site to be situated in distance closer than the minimum of 500 m, subject to compliance with the following conditions:

- Temporary noise protection shaft to be built.
- Extraction activities shall take place only during daytime.
- In the dry seasons, the layers shall be irrigated when processed; the site and the transport roads shall be irrigated periodically in order to prevent the dusting of the residential area.
- The waste management activities shall be carried out in compliance with the applicable legislation.

The Ministry of Health allowed mining works to be performed in distance as close as 15-20 m from Rudnicar Residential Area and 300 m from Stara Teva Residential Area (Please refer to the map on Appendix No. 1 to this Report).

**Opinion:** The Ministry of Health allowed the concession site for extraction of coal to be in close proximity to two residential areas. The additional measures, which the concessionaire was obliged to follow, were defined in general terms, which might allow deviations. The specific size of the noise shaft was not provided for. No specific time interval for irrigation was provided for.

In the documentation for the preparation of this Report, the decision of the Ministry of Health itself was not included. We are aware of its content from a reply of the Ministry of Health to request for access to public information. Thus, at this stage it cannot be assessed whether the Ministry grounded the exclusion from the general requirements for minimum distance on analysis of the potential impact of the mining activities on the local residents.

#### *History of concession works*

- The concession is awarded on 15 April 2004.
- Concession agreement is signed on 12 May 2005.
- The concession site is in exploitation since June 2007.
- On 6 November 2014, the concessionaire submitted application for prolongation of the concession for 15 years.
- The concession expired in 2015.
- We are not aware of the reasons why the concession has not been prolonged.

#### **1.2. The concession site**

According to information provided by RIEW Pernik from 2015, the concession site amounts to 335,000 sq.m.<sup>13</sup> The works on the site consisted of processing coal through a mobile sewer

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<sup>13</sup> Letter from RIEW Pernik No. 94-00-324/09.06.2015

installation and two wheel loaders. A mobile crushing plant was installed. Fractions in the size of 0-30 mm, 30 – 70 mm and over 70 mm were produced.

### **1.3.Compliance with concession-related obligations**

#### **1.4.Environmental and health requirements**

The extraction works were carried out in open pit manner.

According to information provided by RIEW Pernik, noise protection shaft was built to guarantee compliance with the permitted noise levels and decrease the noise impact to the residential area.<sup>14</sup> The last measurement of the noise from the mining activities was performed in 2013 and found no violation of the permitted noise levels. Automatic irritating system was installed.

Washing installation was installed in the beginning of 2015.

According to the findings of inspection of RIEW of August 2014, as of January 2014, the mining activities were terminated. The inspection found 10 wagon wans for administrative and communal purposes on the site. Upon the inspection, the irrigation system was off.

Illegal landfill was found in the concession site in the size 18-20sq. m. and outside the borders of the concession site.

**Opinion:** From the information provided, it may be concluded that there are several violations of the terms of the concession:

- Violation of the waste management obligations;
- Potential violation of the obligation to prevent dusting of the residential area . It is concluded that the irrigation system was off, because no extraction and transport activities are performed. Still, dusting may occur from the opencast mine even when no extraction and transportation is performed. In addition, based on the information provided, the requirement imposed by the Ministry of Health is not conditional on operations taking place, but rather on the proximity of the concession site. The local residents complain of dusting when the mine was active and when activities were terminated.

Za Zemyata has submitted a request for access to public information to the Ministry of Energy requesting data about the control and inspections performed on spot and the quality of reclamation works. As of the date of this Report, answer is not yet provided.

#### **1.4.1. Mining royalty and deposits to Fund for Departure**

According to the data available in the National Concession Registry, Recoal AD made the following payments for mining royalty:

<b>Due date</b>	<b>Mining royalty amount (BGN)</b>
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<sup>14</sup> Letter from RIEW Pernik No. 94-00-324/09.06.2015

31.07.2007	3,615.67
31.01.2008	75,386.97
31.07.2008	27,022.31
31.01.2009	28,085.26;
31.07.2009	2,057.85
31.01.2010	6,557.25
31.07.2010	9,872.71
31.01.2011	86,275.91
31.07.2011	42,692.54
31.01.2012	36,496.01
31.07.2012	19,472.26
31.01.2013	37,709.54
31.07.2013	5,822.12
<b>Total</b>	<b>381,066.40</b>

As of the date of this Report, the following obligations for payment of mining royalty of Recoal AD are outstanding:

<b>Due date</b>	<b>Mining royalty amount (BGN)</b>
31.01.2014	62,772.35
31.07.2014	11,109.28
31.01.2015	869.80
31.07.2015	1,462.45
<b>Total</b>	<b>76 213,88</b>

The amounts does not provide information on the accrued interest due.

According to the data available in the National Concession Registry, the obligation to pay deposit in the Liquidation Fund for year 2014 (amounting to BGN 40,000) is outstanding. According to reply of the Minister of Energy to a query of the Mayor of Pernik as of 5 June 2015, the obligation to pay the deposit for the Liquidation Fund for 2013 is outstanding as well. According the data in the National Concession Registry, as of today, this obligation is paid.

As explained in Section No. 1 to Appendix No. 3 to this Report, the amount of the royalty is calculated based on the information about income and expenses related to the concession provided by the concessionaire. According to information provided by the Ministry of Energy to a request to access to public information, marksheider measurement to check the accuracy of the data declared by the concessionaire has not be performed in the case of Recoal AD.<sup>15</sup>

Za Zemyata submitted a request for public information about the payments due by Recoal AD with regards to the concession. As of the date of this Report, answer is not yet provided.

#### **1.4.2. Deforestation of the forest dividing the concession site and Stara Teva Residential Area**

As could be seen from extraction of Google Maps in Appendix No. 1, Stara Teva Residential Area is neighbouring small forest, on the other side of which the concession site of Recoal AD is situated. Based on representations of local residents, the forest dividing the concession site and Stara Teva Residential Area has been gradually cut down, allowing the pollution and noise from the mining activities to increase its impact on the local residents and facilitating the illegal mining in the area. The following information from the competent institutions and publicly available information have been collected.

##### *Mining activity outside the designated boundaries of the concession site*

According to an university article, as of November 2007, the mine in Gladno Pole in the Coal Basin of Pernik has reached the technological boundary of the south side of the concession site.<sup>16</sup>To extract the deposits located in the boundary area, underground mining had to be carried out. No information on technological development of the mine has been reviewed for the purposes of this Report and it cannot be concluded based on official information where the extraction works have been focused. However, according to the representations of local residents, extraction works have been performed in the very boundary with Stara Teva.

##### *Change of the designation of forestland*

According to Order No. 49-25 pf 24 January 2007 of the Minister of Agriculture and Forests, forestland of 99,777 acre in Gladno Pole Area and Beli Breg Area has been excluded from the forest fund, as a result of which the designation of the LP-s have been changed allowing their commercial exploitation.

According to Order No. 49-12 of 30 December 2009 of the Minister of Agriculture and Foods, forestland of 12,211 acre in Beli Breg area has been excluded from the forest fund. The exact location of this land cannot be ascertained based on the information provided.

Ad of May 2015, procedures for change of the designation of agricultural land located between the concession site of Recoal AD and Stara Teva Residential Area were initiated. The procedures started in 2008 concern LP-s of total size of 28.996 acre and the procedure started in 2010 concerns LP-s of total size of 47,857 acre. The location of one of the LP-s

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<sup>15</sup> Order of the Minister of Energy No. ПД-16-884/27.06.2014

<sup>16</sup> Development by underground techniques of deposits located on the boundaries of the concession site, published in Annual of the University of Mining and Geology St. Ivan Rilski, Vol. 52, Part 2, 2009

concerned in shown in Appendix No. 2 If these procedures are completed, these LP-s could be used for commercial purposes.

#### *Acquiring ownership over forestland*

According to the public Land Register, Recoal AD acquired ownership over LP-s representing deciduous forest in the area of Beli Breg.

#### *Deforestation*

According to information provided by the RIEW on 15 June 2007, deforestation on the east side of the concession site has started. The RIEW informed local residents that removal of forest on the southeast side of the concession site, where Parizhka Komuna Street is located (at the boundary with Stara Teva Residential Area), is not envisaged.

Inspection of the Regional Department of the Executive Forests Agency of 17 June 2014, performed on the signal of local residents, found deforestation of areas in the size of 7 acres, 3 acre, and 9 acre.<sup>17</sup> The deforestation was done by mechanical excavation of the soil. The wood was not found upon the inspection. The inspection also found partial deforestation of additional forest area of around 5-15 acre. The Regional Department of the Executive Forests Agency prescribed check of the reasons for deforestation and notification to the police with regards to the signs of illegal mining done by Roma population.

#### **1.4.3. Dumping of mine waters**

With letter No. 5888 of 7 November 2008, the Deputy Mayor of Pernik ordered Recoal AD to terminate dumping of mine waters into a ditch next to railway on the line Pernik-Voluyak. The dumping of mine waters has been ascertained though inspection on the spot. Due to the lack of draining ditch, the waters flooded a LP in Rudnicar Residential Area. Article in a local media in 2009 shows that a nearby house suffered serious damage. Because of the accident, most of the rooms were in practice not suitable for living. This extremely worsened the living conditions of the owners. We have no data if compensation is paid by either the state or the concessionaire.

According to the information provided by the National Railway Company, the railway infrastructure near the ditch, where mine waters were dumped suffered damage. It was estimated that the reconstruction would cost approximate BGN 199, 000 net of tax.<sup>18</sup>

No information on any sanctions against Recoal AD and other actions to ascertain liability for the damages suffered by the local residents and the National Railway Company has been obtained.

#### **1.4.4. Mine reclamation**

According to the applicable legislation on mining, summarized in Section No. 1 to Appendix No. 3 of this Report, the concessionaire shall prepare a plan for actions upon termination of concession and pay the required deposit to ensure that reclamation will be carried out. From

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<sup>17</sup> Protocol No. 002626/27.06.2014 of the Regional Department of the Executive Forests Agency, Kyustendil

<sup>18</sup> Letter No. 1386 of 2 February 2012 of National Railway Company

the information obtained, it appears that Recoal AD failed to pay the deposit for Reclamation Fund for 2014 (BGN 40,000). The local residents claim that no effective reclamation measures are carried out. Abnormal dusting continue to be a problem. New trees are not planted.

A query to the Ministry of Energy has been submitted to request information on the reclamation of Recoal AD. No response has been provided as of the date of this Report.

#### **1.4.5. Control**

The general control for compliance with the obligations of the concessionaire is entrusted with the Ministry of Energy. Based on the information provided, the Ministry generally controlled the concession activities by document inspection and through the reports submitted by the concessionaire.

**Opinion:** It could be easily seen from the described above that different authorities performed inspections in line with their competence – the RIEW for compliance with environmental norms, the regional departments of the Executive Forests Agency and of the Ministry of Agriculture with regards to the deforestation of the park between Stara Teva Residential Area, the Municipality with regards to dumping of mine waters, etc. Still, it appears that no effective control has been performed. Furthermore, it appears that the concessionaire even failed on the basic obligation to pay mining royalty and ensure reclamation of the terrain. At this stage, no information for sanctions of Recoal AD has been obtained. Recoal AD is in insolvency proceedings. According to the publicly available information, as of the date of this Report, the Ministry of Energy has not claimed payment of outstanding obligations from Recoal AD.

## **2. Illegal mining**

Based on the representations of the local residents, illegal mining is carried out on regular basis in the forest dividing the Stara Teva Residential Area and the concession site and in the Park Ursa, which lies on the east side of Stara Teva Residential Area. The illegal mining is done manually and holes several meters deep are dug in the ground. Local residents claim that often teenagers and children go down the holes to extract coal. This is done without compliance with any safety measures, which exposes the perpetrators to risk for their health and life. Local residents claim that there are around 90 holes for illegal extraction of coal in the forest area between Stara Teva Residential Area and the concession site.

The illegal mining is organised activity done primarily by Roma population. A bag of coal is sold for BGN (approximately EUR 5). The illegal coal is sold in the black market and used for heating. This coal is not purified and emits higher level of pollution than regular coal.

According to information provided in May 2015 by the Ministry of Agriculture and Foods, upon inspection of the Regional Direction Agriculture, mining activities were performed outside the boundaries of the concession site, in LP 55871.633.5. As of the date of the inspection, the LP is owned by Pernik Municipality. The inspection has not identified the



perpetrator, who is responsible for the illegal mining. As of 4 December 2014, LP 55871.633.5 was acquired from Recoal AD.<sup>19</sup>

### *Control*

The local municipality and the Ministry of Energy are competent to exercise control over illegal mining activities. They are competent to ascertain the act of illegal extraction of coal and impose administrative penalty:

- From BGN 50 000 to 100 000 for first violation
- From BGN 200 000 to BGN 300 000 for second violation
- From BGN 400 000 to 500 000 for every following violation.<sup>20</sup>

Under Bulgarian law, administrative violations may be sanctioned following a very formal administrative procedure, which requires the involvement of the perpetrator in several stages and provides for very strict time frames for the specific stages of the procedure. Failure to comply with the procedure leads to annulment of the penalty and in practice is very often used in the favour of the perpetrator.

There is no specific provision in the Criminal Code prohibiting illegal mining and providing criminal sanction. In practice, this means that the police authorities does not have authority to control and prevent illegal mining.

The difficulties to impose effective control over illegal mining through administrative sanction can be seen from the case-law. In the beginning of 2016, the Ministry of Energy imposed sanction of BGN 50,000 for illegal mining to an individual. The inspectors found the perpetrator taking a bag of coal out of a hole dug in the ground and another 20 bags coal in the area. The sanction was repealed by the District Court of Pernik on the grounds that the sanctioning act was issued after expiry of the three-months period from the moment the perpetrator was known to the authority.<sup>21</sup>

**Opinion:** The Administrative Violations and Sanctions Act provides very stringent and tight deadlines in which the authorities have to perform specific actions. Furthermore, the current legal frameworks entrusts the inspection and ascertaining of violations to inspectors, who are administrative officers and does not have the qualification and competence to deal with individuals on the site of violation. It could be concluded that in the case at hand, the administrative sanctioning mechanism proves ineffective to sanction and prevent violations from individuals. Sanctions on the grounds the criminal proceedings shall be sought as a resolution.

The local initiative the Neighbours of Recoal (local residents of Stara Teva) submitted a proposal for criminalization of the illegal mining to the Environmental Commission at the National Parliament. No actions from the competent institutions to this end are taken so far.

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<sup>19</sup> According to information from the Land Regsiter

<sup>20</sup> Art. 93 of the Subsurface Resources Act

<sup>21</sup> Resolution No. 725 of 18 November 2016 of Pernik District Court

### **3. Local initiative against Recoal AD**

The local residents were very active in pursuing effective control over Recoal AD. The local residents claim they suffer extreme air and noise pollution. They also claim that Recoal AD provided protection to the illegal miners.

In pursuit of their rights, the residents of Stara Teva formed a local citizens' initiative named the Neighbours of Recoal on whose behalf they addressed various institutions. Separate residents also address institutions.

The following institutions were addressed with signals for action and requests for information:

- The RIEW
- The Ministry of Health
- The Ministry of Energy
- The Ministry of Environment and Waters
- Pernik Municipality
- The Parliament of the Republic of Bulgaria
- The Executive Forests Agency
- The Ministry of Agriculture and Foods
- Prosecution
- The National Railway Company
- The District Governor

On 31 July 2015, a meeting to discuss the impact of mining on local residents took place. Attendees were:

- Representatives of the main concessionaires in Pernik: Mini Pernik EAD and Recoal AD
- Competent authorities: District Governance, Pernik Municipality, Ministry of Interior, districts department of Fire Safety, State Agency of National Security, RIEW, Energy Distribution company CEZ
- The University of Mining and Geology
- Local residents

Currently, there is an initiative to remedy the situation through the procedure for adoption of a new general planning act (this is the act that determines the designation of the LP-s). The local residents address local institutions with a claim the former mine site to be designated as recreation area. On 14 June 2017, a meeting with the District Governor was held to this end.

### **4. Potential legal measures**

The following legal measures may be undertaken to remedy the damages suffered by local residents, to enforce proper reclamation of the terminated concession and terminate illegal mining (Please refer to the respective sections of Appendix No. 3).

### *Remedy of damages suffered*

The local residents may file claims for compensation of damages against the competent institutions and request financial remedy for the damages suffered from the violations of the concessionaire's obligations (devaluation of real estate and non-material damages). In such a court case, it will have to be proven that (i) the defendant has failed to perform its legal obligations (that the institutions failed to exercise control) , (ii) the damage suffered by the claimant; (iii) the casual link between the inaction and the damage. Violation of the rights protected under the ECHR, namely the right to family life and the right to property may be claimed.

### *Enforcing proper reclamation*

According to Bulgarian law, the concessionaire is responsible for the reclamation of the concession site. No specific obligation for the competent institutions to perform the reclamation instead of the concessionaire is provided for. Liability for environmental damage according to the Law on the Responsibility for Prevention and Remediation of Environmental Damage is also entrusted with the operator. As Recoal AD is in insolvency procedure, it may be impossible for the institutions to collect the receivables for the reclamation from the former concessionaire.

Claims from local residents for restorative injunctions against the institutions, based on their failure to exercise efficient control, will probably be dismissed. The practice of the courts is to award such claims only based on specific obligation prescribed in law and not on general obligation to exercise control. Probably the most successful route for court protection would be through claims based on the infringement of rights under the ECHR before national courts and later on before the European Court of Human Rights.

The current initiative to claim reclamation through the procedure for adoption of a new general planning act may prove the most efficient option. Still, the outcome depends only on the will of the politicians, which cannot be determined at this early stage of cooperation.

### *Illegal mining*

In the case of Stara Teva illegal mining has not caused direct damage to the residents. Still, it causes stress and negative environmental consequences. In such case, soft measures such as signals and requests for inspection on the compliance with reclamation obligations may be initiated.

Following the procedure under Art. 256 and 257 of the APC (please refer to Section No. 5 of Appendix No. 3), local residents may request the competent authorities (Ministry of Energy and Municipality) to exercise control over the illegal mining. Considering the restrictive approach of Bulgarian courts on legal standing and the application of the mentioned procedure under the APC, the outcome cannot be predicted.

Another option is to claim criminalizing the act of illegal mining, thus providing efficient tool for police to control the situation.

## **Part III. Rudnichar Case**

### **1. Rudnichar Residential Area**

Rudnichar Residential Area is located on a hill in the western part of the city of Pernik, only two km from the city centre. The residential area composes of one and two-story family houses with gardens, most of which built in the 60-s and 70-s. The area is located in the south part of the old mine Beli Breg that is out of operation area since 1962.

Rudnichar has been subject to underground mining activities for years, which activated geodynamic processes, caused damage to building and created imminent risk for the life, health and property of local residents. The locals explain that illegal mining started around 2010. In their words, it all started when Otkrit Vagledobiv Mines EAD extracted coal from a LP in Rudnichar right next to deserted bunker building. This LP is owned by Mini Otkrit Vagledobiv EAD according to official data. This revealed the coal deposits and facilitated access to them. The local residents claim that they could hear the talks and bangs of illegal miners under their houses.

According to the opinion of Dr. Stefcho Stoinev, Head of the Department of Hydrogeology and Engineering Geology of the University of Mining and Geology St. Ivan Rilski, Sofia, the area impacted by the collapse of earth soils is located in the south part of Rudnicar Residential Area and is outside the zone of the old mine galleries.<sup>22</sup> There are two illegal galleries under Rudnichar Residential Area, each 120-150 m long. The galleries are around 1,5 – 1,8 m in width and 1,4 – 1,6 m in height. According to the experts, the collapse processes will continue and will intensify in the rain periods, which poses immediate danger for the buildings in the area.

There have been several incidents where the illegal miners suffered damage from poisonous gases (gas grizu) coming from the old mining galleries. One of them took place in 2013.<sup>23</sup>

#### **1.1.Collapse of earth spoils due to illegal mining**

The first deformations in the terrain were registered in 2013.

On 15 July 2015, there were collapse of earth spoils that caused damage to several residential buildings, located at 6,8 and 9 of 5<sup>th</sup> Street at Rudnichar Residential area. The buildings are in close proximity to the entrance of the illegal mines. The Mayor of Pernik announced emergency and immediate measures to cease the illegal mining were taken: the entrance to the illegal mining galleries was closed by piles of earth and a police watch house was placed near the entrance. According to the local residents, the illegal mining has ceased since then.

On 25 November 2015, another collapse of earth spoils followed. A hole of 1,5 m in diameter and 2m deep emerged on 2 5<sup>th</sup> Street. The hole emerged just a meter from a residential

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<sup>22</sup> Opinion of Dr. Stefcho Stoinev, Head of the Department of Hydrogeology and Engineering Geology of the University of Mining and Geology St. Ivan Rilski, Sofia, prepared on the instruction of Pernik Municipality, Income No. 15/10341 of 9 December 2015 of the register of Pernik Municipality

<sup>23</sup> Last accessed 30 April 2017, [http://arhiv.zapernik.com/krimi/kopach-na-vuglishta-se-obgazi-v-nelegalna-mina-v-kv\\_22039/](http://arhiv.zapernik.com/krimi/kopach-na-vuglishta-se-obgazi-v-nelegalna-mina-v-kv_22039/)

building. On the instruction of the Mayor of Pernik, an expert opinion on the geodynamic condition of the impacted terrain was given.<sup>24</sup> The opinion concludes and this collapse of earth spoils and the previous ones (of July 2015 and of 2013), are the result of illegal mining activities that took place under the residential area and are not caused by landslide processes. The experts conclude that there is immediate danger for the residential buildings in the area.

New collapse of earth spoils is registered on 9 January 2016. A hole of 2 m diameter and 2 m tall emerged at 1 6<sup>th</sup> Street, Rudnicar.

## **1.2.Cases of local residents**

Below, there is a short summary of the four cases of residents of Rudnicar who suffered material and nonmaterial damages due to the collapse of earth spoils.

### **House 1<sup>25</sup>**

House 1 is located most closely to the entrance of the illegal mine. During the period of the illegal mining, the mother of the current owner inhabited the house. The owner explains that her mother, now deceased, was very much disturbed by the mining and the stress contributed to her ill health. Due to the accident of 1 July 2015, the house is now uninhabitable. There are serious cracks on the house and visible subsidence in the garden. The owner lives in another place, but explains that it would be much more convenient for her if she lived in the house as she would commute less and her way to work would be safer.

### **House 2**

The owner of House 2 used to live with her family in the house before the accident of 1 July 2015. Because of the accident, the house is no longer liveable. Serious damage is done to the house – cracks on the building, subsidence in the garden, etc., and loss of furniture. The owner and her family is currently residing in municipal housing. The owner is decided to claim damages of around BGN 75,000 representing both the value of the house, the damaged furniture, and non-material damages (stress and illnesses).

### **House 3**

This property is located around 50 m. from the entrance of the illegal mining gallery. The house is recently built. The building permission dates 2000. The damage to this house is comparatively small. There are cracks on the walls and the windowpanes had to be changed by the owners due to holes that emerged between the panes and the wall (three windows and a door).

### **House 4**

This house is located most remotely from the entrance of the legal mining gallery out of the four properties. The house is also the largest and the most expensive of the four houses. The owner lives in the house alone. Because of the accident, his house got cracks.

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<sup>24</sup> Opinion of Geozashtita Pernik EOOD to the Mayor of Pernik, dated 4 December 2015

<sup>25</sup> The numbering is done for the purses of clarity only.

### **1.3.Actions of the local residents**

The owner of House 1 (located on 6 5<sup>th</sup> Street), was a 78 year-old lady, who lived on her own. She complained to the competent institutions numerous times about the illegal mining that was taking place literally at her doorstep. She wrote lengthy letters to the Municipality, to the concessionaire Otkrit Vagledobiv Mines EAD, to the Ministry of Interior and to the Ombudsman. She explained in detail that she could hear the bangs and talks of the miners under her house and that she sees how the coal is extracted and sold in bags. The letters reveal that the local residents live in fear from the miners and are in constant stress that their houses might collapse.

The entrance of the illegal mine is located in a land plot that is owned by Mini Otkrit Vagledobiv EAD. For this reasons, the local residents wrote numerous letters to the concessionaire, as well.

The owner of House 1 also signalled the media.

From the letters, it becomes obvious that no effective measures to stop the illegal mining are taken by the institutions. The police made inspection following the signals, but once they left, the illegal activities resumed.

The owner of House 1 claimed that the stress she suffered as a result of the illegal mining was the reason for worsening her health condition. She died before the accident of 1 July 2015. Her heir, who lives in another place, now owns the house.

### **1.4.The response from the institutions**

Official enquiry to the competent institutions was made to ascertain the measures taken to consolidate the terrain and prevent further collapse of earth spoils.

In response, Municipality Pernik provided the following information.

After the accident of 1 July 2015, the Municipality took immediate actions to cease the illegal mining activities. As explained, the entrance to the illegal mining galleries were blocked and a police watch house has been installed to prevent access to the galleries.

An expert opinion on the condition of the landslide processes were provided by Geozashtita EOOD – Pernik in compliance with the letter of the Ministry of Regional Development and Public Works with Outgoing No. 08-00-592/22.07.2015. The experts concluded that there are no signs of landslide processes, but the collapse of earth spoils is the result of the illegal mining. The experts prescribe evacuation of the people living in the two most impacted buildings (House 1 and House 2) and execution of a thorough engineer-geological analysis and investment project for the measures necessary to consolidate the terrain.

After the accident of November 2015, the Municipality assigned assessment of the situation to experts. The reports of Geozashtita and the university professor were issued, both concluding that urgent actions need to be taken to prevent further collapse of the terrain.

The holes that emerged as a result of the collapse of earth spoils were filled in.

In April 2016, the Municipality assigned works for technical liquidation and prevention of negative consequences of the old and new mining works of the endangered houses in Rudnichar. The remuneration under the contracts was approximately BGN 250,000 (approximately EUR 125,000). The works, however, never started.

In August 2016, the Mayor of Pernik sent a letter to the Minister of Interior requesting financing for the works under the assigned contract.<sup>26</sup> The Mayor explains that due to its poor financial condition, the Municipality cannot bear the costs of the consolidation of the terrain.

According to letters from the Ministry of Interior and the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers, the financial support has not been provided so far and no works on the consolidation of the terrain have been performed. The Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers confirms the case of Rudnichar has not been discussed.<sup>27</sup> This is confirmed by the Ministry of Interior.<sup>28</sup>

The local residents have no information on these facts as well. No financial aid has been provided. We have not been informed whether the Municipality has appointed an expert commission to determine the condition of the impacted real estate.

### **1.5.Responsibility for damages from collapse of earth spoils caused by illegal mining**

The collapse of earth spoils in Rudnichar is disaster in the sense of the act and the according protection shall be provided. In compliance with the DPA, the Mayor of Pernik announced emergency for the collapse of earth spoils on 1 July 2015, 25 November 2015 and 9 January 2016. Generally, victims of disasters and the owners of impacted property shall be provided with financial assistance for reconstruction of the affected property. As of the accident of 1 July 2015, the legislative amendment restricting the financial aid only to people who meet social criteria for low income, was not in effect (Please refer to Appendix No. 3 for further details on the law on disasters).

## **2. Potential legal measures**

In the case of Rudnichar, there are several key issues that need to be dealt with: (i) the risk of further collapse of earth spoils; (ii) termination of illegal mining; and (iii) financial assistance for the victims of collapse of earth spoils and owners of impacted real estate.

### *Risk of further collapse of earth spoils*

Expert opinions have established that measures to consolidate the terrain need to be taken: filling of galleries. The documentation provided by Pernik Municipality refers to two expert reports concluding that the total cost of construction works to consolidate the whole area amounts to BGN 600,000 and the measures to consolidate only the impacted buildings

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<sup>26</sup> Letter with Outgoing No 15/9879-8 of 8 July 2016

<sup>27</sup> Letter with Outgoing No. 953900-985 of 25 April 2017

<sup>28</sup> Letter with Outgoing No. 812104-87 of 24 April 2017

amount to BGN 250,000 (this is the amount that the Municipality requested from the state budget).

From the information provided, it appears that there has not been coordination between the competent institutions – Pernik Municipality and the Interdepartmental Commission. In the beginning of May 2017, Za Zemyata has submitted a signal to the Municipality and the Interdepartmental Commission to inform them of the state of emergency of the situation of Rudnichar and to claim immediate actions. We are still awaiting the response from the institutions.

Claims from local residents for restorative injunctions against the institutions, based on their failure to exercise efficient control, will probably be dismissed. The practice of the courts is to award such claims only based on specific obligation prescribed in law and not on general obligation to exercise control. Probably the most successful route for court protection would be through claims based on the infringement of rights under the ECHR before national courts and later on before the European Court of Human Rights.

The current initiative to claim reclamation through the procedure for adoption of a new general planning act may prove the most efficient option. Still, the outcome depends only on the will of the politicians, which cannot be determined at this early stage of cooperation.

#### *Financial assistance*

From the information provided, it appears that Pernik Municipality have not requested financial assistance for reconstruction of the impacted real estates from the state budget, e.g. appointment of expert commission to determine the condition of the buildings and request to the Interdepartmental Commission. Two buildings are no longer inhabitable, but no official assessment of experts is carried out. Still, this has to be ascertained following the specific legal procedure.

Similarly, these issues may be raised in the communication with the instructions. If the institutions refuse to cooperate, court claims on behalf of the owners of the impacted real estate may be submitted to claim compensation for failure of the municipality to perform its obligations under the DPA.

The situation appear to be in violation of the right to family life, the right to life and right to property under the ECHR. Arguments to this end shall be made before local courts and if no remedy is awarded, claim before the Court of Human Right may be filed.

The impact on the restrictive rules on state financial assistance for restoration works that entered into legal effect as of March 2016, will have to be further analysed, given the fact that the Municipality failed to start the procedure in due terms.

#### *Termination of illegal mining*

The measures taken by the Municipality after the accident of 1 July 2015 have resulted in temporary termination of illegal mining in Rudnichar. Still, the competent institutions (Pernik



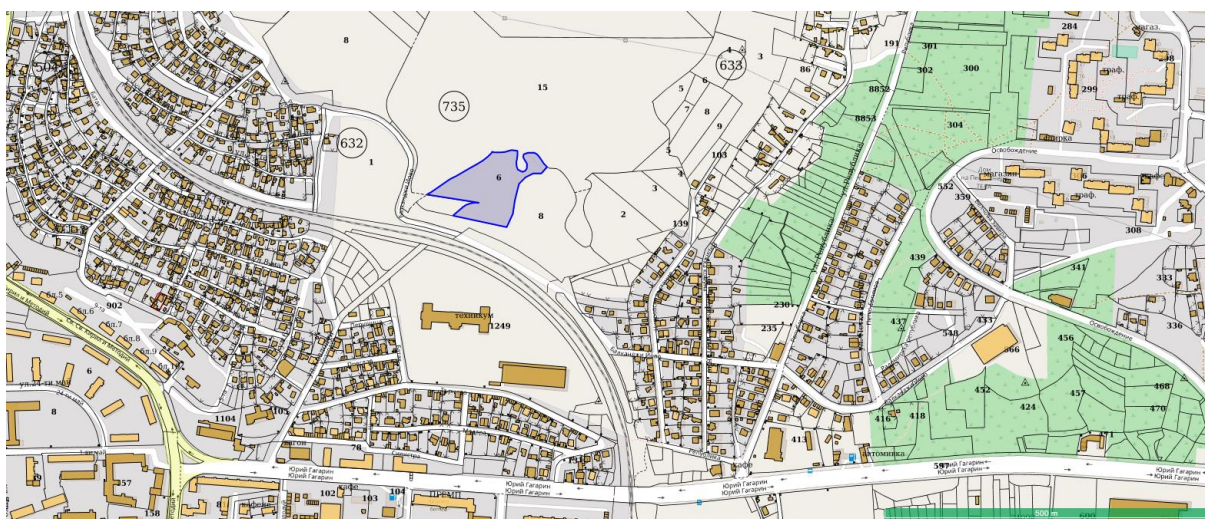
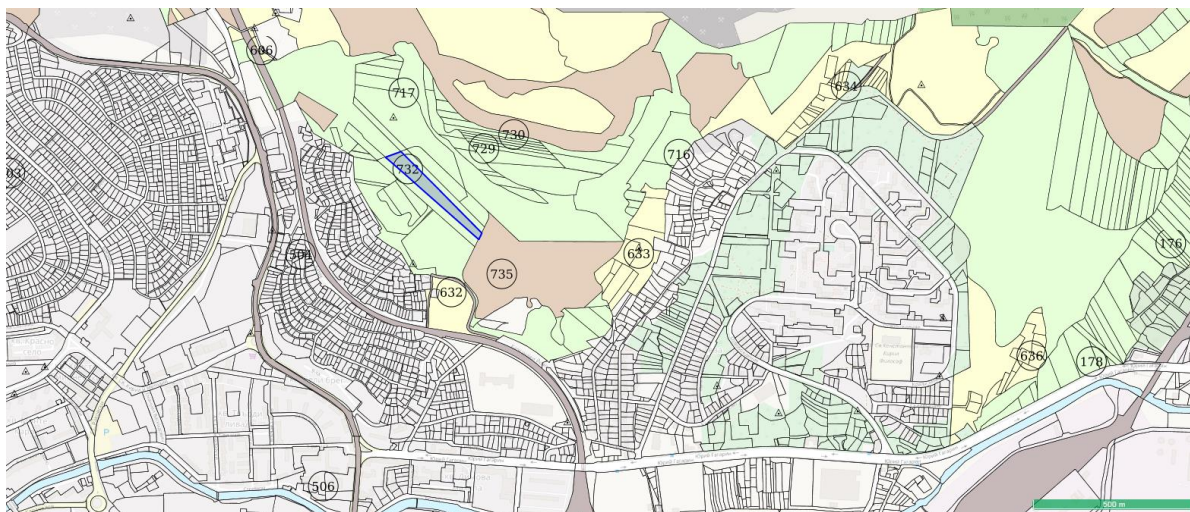
Municipality and the Ministry of Energy) have failed to exercise proper control and effectively terminate the illegal mining despite the numerous signal of local residents.

Theoretically, a claim for damages suffered by the illegal failure of the institutions may be filed. In such a court case, it will have to be proven that (i) the defendant has failed to perform its legal obligations (that the institutions failed to exercise control) , (ii) the damage suffered by the claimant; (iii) the casual link between the inaction and the damage (i.e. that the illegal mining has caused the collapse of earth spoils). Again, claims based on the ECHR shall be made.

## Appendix No. 1: Map of concession awarded to Recoal AD



## Appendix No. 2: Land Plots excluded from the Forest Fund, for which procedure for exclusion has started



## **Appendix No. 3: Legal framework**

### **1. Legal framework on concessions**

According to the Constitution of the Republic of Bulgaria, subsurface resources such as solid fuels (coal), metallic minerals, industrial minerals, oil and natural gas and building materials are exclusive state property.<sup>29</sup> Such legal treatment is also accorded to coastal beaches, republican roads and water basins, forests and parks of national importance, natural and archaeological reserves. It is considered that these objects are of such importance to the society that they can be owned only by the state. Exclusive state property shall be utilized and managed in the interests of citizens and society and cannot be subject to other property regimes, such as private state property that may allow transfer of real estate rights to private parties. The terms and conditions for awarding concessions and permits for research, development, utilization, protection and management are set out in the SRA and the Concessions Act.<sup>30</sup>

#### **1.1.Awarding of concession**

Concessions for extraction of subsurface resources and permits for prospecting and/or exploration of subsurface resources are granted under the SRA. Rights over other subjects of exclusive state property are granted under the regime of the Concessions Act.

Prospecting and exploration of subsurface resources is carried out on the grounds of a licence. Extraction of subsurface resources is carried out on the basis of concession.

Concessions for extraction is granted by the Council of Ministers based on a proposal from the Minister of Energy. The Council of Ministers authorizes the Minister of Energy to conclude a concession contract. Concessions for extraction may be granted to commercial companies who can prove that they have the required management and financial capacity to pursue the relevant activities.

Concessions for extraction of subsurface resources may be granted for a period of up to 35 years. The boundaries of concession areas shall be specified in the specialized maps.

Concessions for extraction of subsurface resources may be granted by means of a competition or tender procedure or on the grounds of a privatization deal. Additionally, the holder of licence for prospecting and/or exploration may be awarded a concession for extraction subject to obtaining a certificate for commercial finding.<sup>31</sup> Tender or competition procedure shall be conducted when the holder of a licence for prospecting and/or exploration has not requested to obtain concession for extraction within six months from registration of commercial site.

Competition is a procedure in which the proposals of all admitted candidates are assessed on the grounds of initially set criteria. Auction is a procedure in which the proposals of the

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<sup>29</sup> Art. 18 of the Constitution

<sup>30</sup> Promulgated State Gazette No. 36/02.05.2006

<sup>31</sup> Art. 29 of the SRA

admitted candidates are ranked based on price criteria - the highest concession payment offered. Concession is awarded to the candidate that gave the highest price offer.

The competition or auctioning procedure is opened by means an order issued by the Council of Ministers. The order is promulgated in the State Gazette and the Internet site of the granting authority.

An appointed commission evaluates whether the candidates meet the set criteria for the competition/tender. The awarded concessions are promulgated in the State Gazette and published in the Internet site of the Ministry of Energy.

The concession comes into legal effect as from the signing the concession agreement.

### **1.2.Terms and conditions of the concession**

The specific terms and conditions of the concession are set out in the concession agreement.

According to the SRA, the concessionaire is entitled to:

1. ownership on the extracted resources and on the technological waste from extraction;
2. pursue all the required activities pertaining to extraction, including further exploration within the deposit boundaries, storage, processing, transportation and sale of subsurface resources for which the concession has been granted;
3. to further explore and extract mineral resources from the mining waste resulting from the concession activities on the grounds of a supplementary agreement to the concession contract.

#### *Mining royalty*

The concessionaire owes mining royalty. The amount of the mining royalty is determined by the granting authority taking into account the type and value of subsurface resources, the specific terms of extraction, primary processing implementation and following the principles and methods to set out in an Ordinance of the Council of Ministers.<sup>32</sup> The specific amount and the terms of payment are set forth in the concession contract. Fifty percent of the concession payment are transferred to the budgets of the municipalities where the concession site is located. The mining royalty is due regardless of final financial results of the concessionaire.

The concessionaires is responsible for the technical liquidation, conservation reclamation of mining sites. The concessionaire shall provide financial guarantees in the form of bank guarantee in favour of the Minister of Energy; opening a trust account with a bank, an insurance policy or other type of guarantee coordinated with the Minister of Energy. The financial guarantees and the envisaged amount of the funds shall be agreed in the concession agreement.

#### *Financial guarantee*

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<sup>32</sup> Ordinance on the Principles and Methodology for determining the concession payment for extraction of superficial resources according to the Superficial Resources Act, adopted by the Council of Ministers, Promulgated in the State Gazette No. 59/29.06.1999



The concessionaire shall provide financial guarantee for each year of the concession. The specific amount of the guarantee is depends on the activities related to technical liquidation, conservation and re-cultivation of the mining site as defined in the working project for the concession works and the schedule endorsed for their implementation.

If upon termination of the concession contract the amount of the financial guarantee does not cover wholly the factual value of activities related to technical liquidation, conservation and reclamation, the outstanding amount shall be at the expense of the concessionaire. Where upon termination of the contract, the amount of the financial guarantee exceeds the factual value of activities related to technical liquidation, conservation and reclamation, the excess shall be released in favour of the concessionaire after completion of the activities.

### **1.3.Termination of the concession**

The concession contract may be terminated in the following events:

- upon expiry of the term of concession and after acceptance by the competent authorities of the activities for liquidation of the mining extraction site and/or rehabilitation of the affected land and forests;
- objective impossibility to pursue the concession activities;
- bankruptcy of the concessionaire;
- by mutual agreement;
- by virtue of ruling of a court of justice or a court of arbitration;

The granting authority may terminate the concession in the following events:

- after suspension of the concession activities due to breach of the concessionaire obligations, the concessionaire has not taken the required measures to remedy the breach.
- risks for the national security, the environment, the health and safety of the population, as well as for destruction or damaging of cultural values.
- Failure of the concessionaire to comply with the requirements for conservation of the earth bowels and the rational use of resources, the protection of environment and re-cultivation of the excavated sites or management of mining waste.

The Minister of Energy may suspend the concession, if the concessionaire pursues activities that infringe the law or the concession agreement.

### **1.4.Ownership of the land**

The land over the subsurface resources remains property of its initial owners, irrespective of concessions or permits for prospering and exploration that may be awarded. The concessionaire may reach an agreement with the holders of real rights over the land in the area, which hinder or create difficulties to the concessions works.

Usually, the concessionaire and the owner reach an agreement and the owners of the land establish real rights in favour of the concessionaire. In such cases the agreement also defines the terms and conditions of use of the land, the respective procedures and compensation.

If no agreement is reached, the concessionaire may refer the matter to the Minister of Energy. Depending on the nature of the works, their duration and environmental impact, the Minister of Energy may initiate a procedure of expropriation for state needs according to the State Property Act.

The owners of the land lose their property rights upon payment of compensation. According to the State Property Act,<sup>33</sup> land owned by private parties may be expropriated only for state needs, which cannot be satisfied by any other means and only subject to payment in advance of just compensation.

The monetary compensation is calculated considering the designation of the land on the basis of the market value of properties with similar characteristics which are situated near the expropriated land.

### **1.5. Monitoring and control**

The Minister of Energy exercises control over the mining activities and in particular over the preservation of the earth bowels, the performance of the overall and annual working projects, the plans for management of mining residues and the projects for conservation, liquidation and rehabilitation of mining sites.

The Minister of Environment and Waters oversees the compliance with environmental standards of concession works and working or liquidated mining residue infrastructure in accordance with the Environmental Protection Act, Protected Territories Act, Biological Diversity Act, the Law on the Waters and the Waste Management Act.

The Minister of Energy and the Mayor of the municipality exercise control over illegal mining activities.

## **2. Environmental law**

Concessions are awarded subject to environmental impact procedure and shall be operated in compliance with the applicable regulations on water, air, biodiversity, nature preservation. For the purposes of this Report, a brief review of the obligation for EIA and the law on environmental liability is provided.

### **2.1. Environmental impact assessment**

The Environmental Protection Act (EPA) implements Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. According to EPA, investment proposals for quarries, opencast mining, peat extraction and underground mining shall be subject to environmental screening.<sup>34</sup>

The Regional Inspection of Environment and Waters at the location of the site shall perform the environmental screening by taking into consideration the parameters of the project and its potential impact of the specific characteristics of the environment. The screening involves

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<sup>33</sup> Publication - State Gazette No. 44/21.05.1996

<sup>34</sup> Art. 93, paragraph 1 in conjunction with Appendix 2, Art. 2, item a) and b) of the Environmental Protection Act

informing the public of the investment project. The RIEW decides whether environmental impact assessment has to be performed for the specific case.

In the current environmental legislation, the environmental impact assessment is the key tool to prevent negative impact on the environment and local residents. That is why, when required by law, completion of the procedure is a prerequisite for granting permit to proceed with the project.

The requirement to run environmental screening for mining activities dates from the entry into force of the EPA, in 2003. Accordingly, both concessions reviewed in this Report shall have been subjected to environmental assessment procedure.

## **2.2. Law on the Responsibility for Prevention and Remediation of Environmental Damage**

The Law on the Responsibility for Prevention and Remediation of Environmental Damage transposes Directive 2004/35/EC. The law implements the “polluter pays” principle whereby the party responsible for pollution is liable to pay damages to remedy the environmental damage caused. The objective is to ensure that operators pay for ecological damage caused by their activities either by remedying it themselves or paying public authorities for doing so. The law covers large number of activities connected with mining, which are specifically listed. Coal mining, however is not on the list.

Coal mine operator may be subjected to this law in case of damage caused to protected species and natural habitats, if the operator has been at fault or negligent.

## **3. Law on Disaster Protection**

Regulation on the protection from disasters and assistance to victims of disasters is provided in the Disaster Protection Act (DPA)<sup>35</sup> and the Ordinance on the Organization and Activity of the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers (Ordinance on the Disasters Commission)<sup>36</sup>. According to Article 2 of the Act, disaster is “*any significant disruption of the normal functioning of society, caused by natural phenomena and/or human activity, leading to negative consequences for the life or health of the population, property, economy and the environment and which the capacity of the system servicing the routine activities related to protection of society would be insufficient to prevent, bring under control and overcome.*” The act provides a general definition that covers both phenomena caused by natural processes and by human activity. Accordingly, it may be concluded that the collapse of earth spoils in Rudnichar shall be considered disaster in the sense of the act and the according protection shall be provided. In compliance with the DPA, the Mayor of Pernik announced emergency for the collapse of earth spoils on 1 July 2015, 25 November 2015 and 9 January 2016.

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<sup>35</sup> Disaster Protection Act, Prom. SG. 102/19 Dec 2006, as amended subsequently

<sup>36</sup> Ordinance on the Organization and Activity of the Interdepartmental Commission for Reconstruction and Assistance to the Council of Ministers, Promulgated in State Gazette No. 28 of 13 April 2010



### **3.1.State financial assistance for victims of disasters**

According to the DPA, the victims of disasters and the owners of impacted property shall be provided with the following assistance: urgent support and reconstruction assistance. The urgent support includes feeding and temporary accommodation for the affected individuals and animals and other necessary measures.

The reconstruction assistance includes construction and repair works to impacted buildings and removal of dangerous building. The right to reconstruction assistance is provided to owners and holders of real rights over buildings that comply with the legal requirements, when these buildings are their only housing.

The financial assistance granted shall be in such an amount to ensure the minimum necessary living conditions of the owners of impacted property and may not exceed the value of the tax assessment of the impacted real estate. Minimum necessary living conditions in the sense of the Ordinance on the Disasters Commission means housing with one living room, kitchen or kitchenette, bathroom/WC and one storage room, which poses no risk for the health and life of the citizens. It shall be noted that in Bulgaria, the tax assessment of real estate is usually much lower than market price. This significantly lowers the amount of the financial assistance that may be provided to the victims of natural disasters, leaving them to bear the costs of the damage.

New legislative amendment to the Ordinance on the Disasters Commission, in legal effect as of 22 March 2016, restricts the reconstruction assistance only to people who meet the certain social criteria, as follows:

1. Average monthly income of the members of the family of the applicant for the previous 12 month shall be below the poverty line for the respective year (BGN 314 for 2017)<sup>37</sup>
2. The applicant shall not be sole a trader or a shareholder in a company.
3. The applicant shall not hold receivables, deposits, shareholdings or securities, with total value exceeding BGN 500 (approximately EUR 250) per member of the family.
4. In the previous and the current year, the applicant shall not have disposed of movable and immovable property, the total value of which exceeds the 12- times the poverty line for the respective year.
5. There shall be no outstanding public liabilities for the impacted real estate for which financial assistance is requested.

The victims of disasters shall comply with all listed criteria in order to obtain reconstruction assistance. This restricts the state financial assistance in case of disasters only people of low

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<sup>37</sup> According to Ordinance No. 23 of 26 January 2017, promulgated in SG No. 11 of 31 January 2017, the poverty line for 2017 is BGN 314 (approximately EUR 167).

income. People who does not meet these criteria have to bear the cost of damages suffered at their own expense.

Interestingly, as of the accident of 1 July 2015, the mentioned restrictive criteria was not in legal effect. Based on the information provided by the institutions, no

### **3.2.Procedure**

Within six months from the disaster, the Mayor of the impacted area is obliged to:

- (i) send the information about the impacted real estate and a copy of the order for entering into effect of the plan for protection upon disasters to the Interdepartmental Commission and the District Governor; and
- (ii) appoint an expert commission to determine the condition of the impacted real estate and the reconstruction works are needed, as well as whether some buildings are dangerous and have to be removed.

Within six months from entry into effect of the order determining the condition of the impacted real estate (issued by the expert commission), the Mayor may submit to the Interdepartmental Commission a request for financial assistance to cover the cost of reconstruction works necessary to repair and consolidate the impacted building, as well as the cost of removal of dangerous buildings. The financing is provided by the state budget.

The mayor is responsible to:

- announce publicly the resolutions of the Interdepartmental Commission;
- inform the victims of disasters for the resolutions of the Interdepartmental Commission;
- organize the execution of the resolutions of the Interdepartmental Commission by administrating the payment of Reconstruction assistance.

### **3.3.Preventative measures**

The DPA provides an explicit list of measures to prevent disasters that are financed by the state budget. These include:

- analysis and mapping of disaster risks, classification of settlements;
- measures reducing the vulnerability of critical infrastructures;
- planning of disasters protection;
- education and practical training
- adoption of Disaster Protection Programmes.

The preventative measures listed does not include technical measures to prevent directly disasters that might impact private property. Strict interpretation of the DPA excludes the measures required to consolidate the terrain under Rundichar area.

It appears that the resources necessary to consolidate the terrain in Rudnicar cannot be provided under the regime for exceptional expenditure according to Article 56 of the DPA either.

#### **4. The European Convention of Human Rights**

The Republic of Bulgaria ratifies the ECHR in 1992. According to the Bulgarian Constitution, once ratified, international acts become part of the national legislation. Such acts have priority over the national law, which contradict them.<sup>38</sup> Protocol No. 1 on the right to property is also ratified in 1992.

The cases reviewed this Report may represent violations of some of the right protected under the ECHR, namely the right to life (Art. 2 of the ECHR), the right to family life (Art. 8 of the ECHR), the right to property (Protocol No. 1 to the ECHR) and the right to healthy environment.

##### **4.1.Right to life**

The right to life is proclaimed in Art. 2 of the ECHR: *“Everyone’s right to life shall be protected by law”*.

The following decision of the European Court of Human Rights finds that in a situation similar to the ones reviewed in this Report, the Court finds violations of the ECHR.

##### **Kolyadenko and Others v. Russia 28 February 2012 <sup>39</sup>**

###### *Facts*

The applicants lived in Vladivostok near the Pionerskaya River and water reservoir. They were all affected by a heavy flash flood in Vladivostok in August 2001. The applicants submitted in particular that the authorities had put their lives at risk by releasing the water without any prior warning and by having failed to maintain the river channel, and that there had been no adequate judicial response in that respect. They also complained that their homes and property had been severely damaged, and that they had had no effective remedies in respect of their complaints.

###### *Decision of the Court*

The Court held that there had been a violation of Article 2 (right to life) of the Convention, finding that the Russian Government had failed in its positive obligation to protect the relevant applicants’ lives. It further held that there had been a violation of Article 2, as it was not convinced that the judicial response to the events of August 2001 had secured the full accountability of the officials or authorities in charge. The Court also held that there had been a violation of Articles 8 (right to respect of private and family life and home) of the Convention and 1 (protection of property) of Protocol No. 1 to the Convention, finding that

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<sup>38</sup> Art. 5, paragraph 4 of the Constitution of the Republic of Bulgaria

<sup>39</sup> Factsheet – Environment and the ECHR, [http://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf), last accessed 18 June 2017

the responsible officials and authorities had failed to do everything in their power to protect the applicants' rights under these provisions.

#### **4.2.Right to family life**

The following decisions of the European Court of Human Rights find that in situation similar to the ones reviewed in this Report, the Court finds violations of the ECHR.

##### **Brânduse v. Romania (7 April 2009)<sup>40</sup>**

###### *Facts*

The applicant complained about the offensive smells created by a former refuse tip situated about 20 metres away from the prison where he was detained and affecting his quality of life and well-being.

###### *Decision of the Court*

The Court held that there had been a violation of Article 8 of the Convention on account of the Romanian authorities' failure to take the necessary measures to deal with the problem of offensive smells coming from the tip in question. The file showed that throughout that period the tip 1998 until 2003, had no proper authorisation either for its operation or its closure. Furthermore, although it was incumbent on the authorities to carry out preliminary studies to measure the effects of pollution, it was only after a fierce fire on the site in 2006, that they did so. The studies concluded that the activity was incompatible with environmental requirements, that there was a high level of pollution exceeding the standards established and that persons living nearby had to put up with significant levels of nuisance caused by offensive smells.

##### **Di Sarno and Others v. Italy (10 January 2012)**

###### *Facts*

This case concerned the state of emergency (from 11 February 1994 to 31 December 2009) in relation to waste collection, treatment and disposal in the Campania region of Italy where the applicants lived and/or worked, including a period of five months in which rubbish piled up in the streets. The applicants complained in particular that, by omitting to take the necessary measures to ensure the proper functioning of the public waste collection service and by implementing inappropriate legislative and administrative policies, the State had caused serious damage to the environment in their region and placed their lives and health in jeopardy. They also criticised the authorities for not informing those concerned of the risks entailed in living in a polluted area.

###### *Decision of the Court*

The Court observed that the collection, treatment and disposal of waste were hazardous activities; as such, the State had been under a duty to adopt reasonable and appropriate

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<sup>40</sup> Factsheet – Environment and the ECHR, [http://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf), last accessed 18 June 2017

measures capable of safeguarding the right of those concerned to a healthy and protected environment. In this case, the Court held that there had been a violation of Article 8 of the Convention. The Italian authorities had for a lengthy period been unable to ensure the proper functioning of the waste collection, treatment and disposal service, resulting in an infringement of the applicants' right to respect for their private lives and their homes. The Court held that there had been a violation of Article 13 (right to an effective remedy) of the Convention in so far as the complaint related to the absence of effective remedies in the Italian legal system by which to obtain redress for the damage sustained was concerned.

#### **4.3.Right to property**

The right to property is enshrined in Article 1 of Protocol No. 1 to the ECHR: *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”*

This provision is aimed at protecting a person against unjustified interference by the state with the peaceful enjoyment of his or her possessions. Negative obligations have been held to include, for example, expropriation or destruction of property as well as planning restrictions, rent controls and temporary seizure of property. However, from the Court's more recent practice, it is clear that positive obligations may arise in a number of circumstances. In *Öneryıldız v. Turkey* and in *Kolyadenko and Others v. Russia* (cited in Part. 3.4.1 above), the state was found to be under the obligation to undertake practical steps to avoid destruction of property.

#### **Öneryıldız v. Turkey 30 November 2004<sup>41</sup>**

##### *Facts*

The applicant's dwelling was built without authorisation on land surrounding a rubbish tip used jointly by four district councils. A methane explosion occurred at the tip in April 1993 and the refuse erupting from the pile of waste engulfed more than ten houses situated below it, including the one belonging to the applicant who lost nine close relatives. The applicant complained in particular that no measures had been taken to prevent an explosion despite an expert report having drawn the authorities' attention to the need to act preventively as such an explosion was not unlikely.

##### *Court decision*

The European Court of Human Rights held that there had been a violation of Article 2 of the Convention on account of the lack of appropriate steps to prevent the accidental death of nine of the applicant's close relatives. The Court observed in particular that the Turkish Government had not provided the slum inhabitants with information about the risks they ran by living there. Even if it had, it remained responsible as it had not taken the necessary practical measures to avoid the risks to people's lives. The regulatory framework had proved

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<sup>41</sup> Factsheet – Environment and the ECHR, [http://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf), last accessed 18 June 2017

defective as the tip had been allowed to open and operate without a coherent supervisory system. The town-planning policy had likewise been inadequate and had undoubtedly played a part in the sequence of events leading to the accident.

In this case the Court also held that there had been a violation of Article 1 (protection of property) of Protocol No. 1 to the Convention and a violation of Article 13 (right to an effective remedy) of the Convention.

#### **4.4.Right to healthy environment**

The ECHR does not enshrine the right to a healthy environment as such. The European Court of Human Rights has developed its case-law to cover environmental matters such as the existence of harm to the environment and exposure to environmental risks by other right protected by the ECHR, namely the right to life, life to family life and right to property.

#### **4.5.Enforcement**

The rights protected under the ECHR may be enforced either by claim at a national level or by means of a claim to the European Court of Human Rights.

##### **4.5.1. Bringing a case before the ECHR**

The Convention allows legal standing to individuals, group of individuals, company or NGO claiming violation of their rights. The ECHR, however, sets an admissibility criteria aimed to bring application to the national level requiring that the Court will deal with a petition only after all domestic remedies have been exhausted: Article 35 § 1 – Admissibility criteria “*1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...*” Accordingly, before submitting a claim to the Court the claimant shall have taken their case through the courts of the country concerned, up to the highest possible level of jurisdiction. Only after receiving a final resolution, an individual may resort to the Court.

Exception from this rule is allowed in case the court establishes breach of Art. 13 of the ECHR. In *Neshkov and others against Bulgaria*, the Court dismisses the Government’s objection of non-exhaustion of domestic remedies and finds that the claimants did not have an effective domestic remedy in this respect, in breach of Article 13 of the Convention.

##### **4.5.2. National level**

The Convention is applicable at national level and domestic courts have to apply it. The national practice shows that Bulgarian courts are still unfamiliar with the ECHR and not eager to apply it. Still, if claim is well prepared, national courts will have to consider it.

Article 13 of the European Convention on Human Rights establishes the right to an effective remedy, stating, “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

Generally, two types of remedies of the Bulgarian law have been discussed by the ECHR and are suitable in view of the cases reviewed in this Report: remedies to bring the ongoing

violation to an end and allow improvement of the situation and compensation for any damage suffered.

## **5. Legal procedures at national level**

### **5.1.Compensation for damages caused by state or municipal bodies**

In Bulgaria, claims for damages caused by state or municipal bodies may be lodged pursuant to the Law on State and Municipal Liability for Damages<sup>42</sup> The following has to be proved in order to substantiate liability of a state or municipal body under this Act:

1. administrative act, action or failure to act;
2. issued / carried out by an administrative body or its officials;
3. in case of or in connection with the administrative activity of the defendant body;
4. revoked as unlawful by the order provided by the law;
5. damage cause to the claimant;
6. direct causal link between the revoked administrative act, the act / omission and the damage.

The claim has to be brought before the administrative court. The claim may be lodged following a final court resolution holding that the challenged administrative act, action or failure to act is unlawful. However, it is possible to claim both (unlawfulness of the act and compensation) in one court procedure. Resolutions of the administrative court are subject to cassation review by the Supreme Administrative Court.

Bulgarian courts have adopted very restrictive practice when examining the legality of the challenged act of the administrative bodies. They consider that an act is unlawful only if it breaches a concrete obligation entrusted to the defendant by law or other normative act. It is considered that general obligations and competences entrusted by law may not substantiate illegality of the action. Furthermore, on a general level courts fail to consider violations of the ECHR for example when examining the legality of the acts of the administrative bodies.

The European Court of Human Rights makes the following observation on the effectiveness of the legal regime under the Law on State and Municipal Liability for Damages with regards to claimed violations of human rights:

*“...when examining claims of this type, (Bulgarian) courts very often did not take into account, as such, the general rule proscribing inhuman and degrading treatment, but only the concrete statutory or regulatory provisions governing conditions of detention. As a result, in the absence of a concrete domestic-law rule governing a particular aspect of these conditions – such as a rule laying down the minimum space per prisoner, or a rule requiring that toilets be properly installed in each cell – the courts often found no illegality, and did not go on to*

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<sup>42</sup> Law on State and Municipal Liability for Damages, promulgated in State Gazette No. 60/05.08.1988, in force as of 01.01.1989, as subsequently amended

*examine whether these matters could, when taken alone or together with other aspects of the conditions in which the inmate was held, constituted inhuman and degrading treatment (see paragraph 132 above).“<sup>43</sup>*

## **5.2.Enforcement against the state authorities illegal actions or failure to act**

Article 250 and the following of the Code of Administrative Procedure provides prohibitory injunctions, against unlawful acts of the authorities that any person who has the requisite legal interest may request the cessation of acts carried out by an administrative authority or a public official that have no basis in the law or in an administrative decision. The request is to be made to the competent administrative court.

Articles 256 and 257 of the Code of Administrative Procedure provide mandatory injunctions, against the authorities’ failure to fulfil their statutory duties. An individual or organisation may bring proceedings to enjoin an administrative authority to carry out an act that it has the duty to carry out under a legal provision. If the court allows the claim, it must order the authority to carry out the act within a fixed time limit.

These procedures may be allowed only when challenging factual act or failure to act. Administrative acts<sup>44</sup> issued by authorities have be reviewed under the general regime of the Code of Administrative Procedure. Although seemingly simple, this rule is the grounds for dismissal of numerous claims and is specifically problematic in cases where there is not clarity whether the challenged act constitutes factual act or a legal one.

The European court of Human rights makes the following observation on the effectiveness of the legal regime under the Art. 250 and the following and Articles 256 and 257 of the Code of Administrative Procedure with regards to claimed violations of human rights

*“...with two exceptions, which concerned very concrete statutory duties of the prison authorities – two cases concerning failures to provide prisoners with clothes and shoes – it does not appear that the administrative courts have thus far interpreted these provisions in a way enabling an inmate or a group of inmates to obtain a more general improvement of the conditions of their confinement.”*

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<sup>43</sup> Neshkov and Others v. Bulgaria

<sup>44</sup> Under Bulgarian law (Art. 21 of the Code of Administrative Procedure): An administrative act is an explicit declaration of intent or the expression of an action or inaction by an administrative body or by another body or organization empowered by law to create rights or obligations, or directly affect the rights, freedoms or legitimate interests of individual citizens or organizations, and the refusal to issue such an act. Example of administrative acts are licenses, permission, resolutions, ect.



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