

Commission of the European  
Communities  
(Attn: Secretary-General)  
Rue de la Loi 200  
B-1049 Brussels  
BELGIUM

## COMPLAINT

**TO THE COMMISSION OF THE EUROPEAN COMMUNITIES  
CONCERNING FAILURE TO COMPLY WITH COMMUNITY LAW,  
particularly with the requirements of Directive 2004/17/EC of the European  
Parliament and of the Council of 31 March 2004 coordinating the  
procurement procedures of entities operating in the water, energy, transport  
and postal services sectors**

1. Surname and forename of complainants:

**Focus, društvo za sonaraven razvoj /Focus, association for sustainable  
development (Focus)**

2. Where appropriate, represented by:

Živa Gobbo

3. Nationality:

Focus/ Slovenian

4. Address or Registered Office:

**Focus**

Registered Office:

**Focus, društvo za sonaraven razvoj  
/Focus, association for sustainable development/**

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**Lidija Živčič, [lidija@focus.si](mailto:lidija@focus.si) (Focus)**

6. Field and place(s) of activity:

**Focus, Association for Sustainable Development** is a Slovenian independent, non-governmental, apolitical and non-profit environmental organization. The mission of Focus is to stimulate solutions for environmentally and socially responsible life through education, awareness raising and co-shaping policies in the field of climate change. Focus orients its work on the issues of climate, energy, mobility, global responsibility and consumption. In the framework of these issues, Focus organizes various events, runs campaigns and practically oriented projects, raises awareness, monitors, analyzes, takes part in decision-making processes, co-operates with a variety of stakeholders and works with the media. The work runs at local and national level, as well as at EU and international level.

7. Member State or public body alleged by the complainant not to have complied with Community law:

**Slovenia:**

The Republic of Slovenia,  
Ministry of the Economy of The Republic of Slovenia,  
The Office of the State Prosecutor General of the Republic of Slovenia,  
Competition Protection Office of the Republic of Slovenia,  
National Review Commission for Reviewing Public Procurement Procedures

## 8. Fullest possible account of facts giving rise to complaint:

### **A) Basic facts about the project**

Termoelektrarna Šoštanj, d.o.o. (Šoštanj Thermal Power Plant, hereinafter referred to as “TEŠ”) is a limited company incorporated in Slovenia which is a fully-owned subsidiary of Holding Slovenske Elektrarne d.o.o. (the biggest producer and wholesaler of electricity in Slovenia). Holding Slovenske Elektrarne d.o.o. is in turn wholly owned by the Republic of Slovenia.

TEŠ is located in the municipality of Šoštanj, in the Šaleška Valley, approximately 80 km north-east of Ljubjana. TEŠ plans to build a new 600 MW unit for the Šoštanj lignite power plant (hereinafter referred to as “Unit 6”) which would replace the power plant’s existing units 1-4 and possibly 5.

For the execution of civil works for the main technological plant of the new Unit 6, TEŠ invited tenders.<sup>1</sup> **However, TEŠ did not follow the procedures prescribed for awarding of public procurement by Directive 2004/17/EC** of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (hereinafter referred to as “Directive 2004/17/EC“ or “the Directive”).

**We assert that the procedure prescribed for awarding of public procurement by Directive 2004/17/EC should have been followed.** To prove this, we below give the analysis of the Directive and the conditions under which it is to be applied. Further, we outline the main reasons why the TEŠ project does not meet the set out criteria and why the Republic of Slovenia should be held responsible for not implementing Directive 2004/17/EC.

**Directive 2004/17/EC was violated due to the failure to publish all the information required by the Directive and the failure to inform the relevant bodies of the European Communities about the tender (violation of Articles 42 and 44 of the Directive). As a result, some of the genuinely important information about the tender might not have reached all the potential tenderers.**

### **B) Application of Directive 2004/17/EC**

Below, we summarise the pivotal arguments why the contract for the execution of civil works for the main technological plant of Unit 6 awarded by TEŠ (hereinafter referred to as “the assessed contract”) should be subject to Directive 2004/17/EC.

#### **B.1) Contracting entities**

According to Article 2 Paragraph 2 of Directive 2004/17/EC, the Directive shall apply to contracting entities, **which are contracting authorities or public undertakings** and which pursue one of the activities referred to in Articles 3 to 7.

According to Article 2 Paragraph 1 indent b) of the Directive: „A ‘public undertaking’ is any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:

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<sup>1</sup> See [http://www.te-sostanj.si/filelib/sporoila\\_za\\_medije/invitation\\_for\\_tenders.pdf](http://www.te-sostanj.si/filelib/sporoila_za_medije/invitation_for_tenders.pdf)

- hold the majority of the undertaking's subscribed capital, or
- control the majority of the votes attaching to shares issued by the undertaking, or
- can appoint more than half of the undertaking's administrative, management or supervisory body.”

As mentioned above, TEŠ is the limited liability company, with Holding Slovenske elektrarne d. o. o. as the sole partner. Holding Slovenske elektrarne d. o. o. (hereinafter referred to as “HSE”) is a limited liability company fully owned by the Republic of Slovenia.<sup>2</sup> **The Republic of Slovenia as a state is a contracting authority** (see Article 2 Paragraph 1 indent a) of the Directive). We assume that a dominant influence of the Republic of Slovenia over TEŠ can be presumed in accordance with the options listed in Article 2 Paragraph 1 indent b) of the Directive (see below). As TEŠ is an undertaking, over which the contracting authority may exercise a dominant influence, **TEŠ is the public undertaking.**

The dominant influence in accordance with the first subparagraph of Article 2 Paragraph 1 Indent b) of the Directive when the contracting authority (here the Republic of Slovenia) holds 100 % of the undertaking's subscribed capital. This is not exactly the case of TEŠ and HSE as these are limited liability companies which do not have any subscribed capital. However, the situation is very similar: where a limited liability company is “owned” by the only partner he actually is the only “shareholder” of the company, directly executes the dominant influence over the company and controls the whole company.

As to the second subparagraph of Article 2 Paragraph 1 Indent b) of the Directive, the Republic of Slovenia is the only subject “owning” TEŠ and can therefore control all the votes in the company. The undertaking (TEŠ) is the limited liability company and does not issue any shares. However, there is only one partner of the company, so we could say that this partner holds all the shares of the company (in the sense of the decision-making power). Therefore, the Republic of Slovenia as the only subject owning TEŠ controls all the “votes”, more precisely, it is the only subject who makes all the decisions in the company.

Finally, in respect of the third subparagraph of Article 2 Paragraph 1 Indent b) of the Directive, the Republic of Slovenia can – for the same reasons as mentioned above – appoint all of the undertaking's administrative, management or supervisory body.

**To sum it up, the Republic of Slovenia can exercise dominant influence over TEŠ.** There is no other subject which could exercise dominant influence over TEŠ, as the only partner of TEŠ is HSE and the only partner of HSE is the Republic of Slovenia.

Article 8 of the Directive refers to Annexes I to X of the Directive, which contains the *non-exhaustive* lists of contracting entities. Annex II lists contracting entities in the sectors of production, transport or distribution of electricity and it enumerates 11 Slovene companies - entities producing, transporting or distributing electricity pursuant to the Slovene “Energetski zakon”. TEŠ and HSE are not listed. **However, the list is non-exhaustive and does not enumerate all Slovene contracting entities in the sector.**

## **B.2) Relevant activities**

As stated above, according to Article 2 Paragraph 2 of the Directive, the Directive should apply to those contracting entities, which are contracting authorities or public undertakings and **which pursue one of the activities referred to in Articles 3 to 7.**

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<sup>2</sup> See [http://www.hse.si/en/group\\_tes](http://www.hse.si/en/group_tes)

Relevant activities connected with the electricity are described in Article 3, Paragraphs 3 and 4 of the Directive.

On the web of HSE and related companies, TEŠ states that its principal activity is generation of electricity and district heating energy.<sup>3</sup> The electricity made in power plants owned by TEŠ is distributed to the whole Slovenia – i. e. TEŠ supplies electricity to the network as described in Article 3 Paragraph 3 Indent b) of the Directive.

**TEŠ therefore pursues relevant activities described in the Article 3 of the Directive.**

In this respect, there is the relevant ruling of the European Court of Justice, the Judgment of the Court (Fourth Chamber) of 10 April 2008 (Case C-393/06) in place. According to this judgment, a contracting entity, within the meaning of the Directive, is required to apply the procedure laid down in the Directive only for the award of contracts *which relate to activities* carried out by that entity in one or more of the sectors listed in Articles 3 to 7 of the Directive.

That is also the case of the assessed contract for civil works for Unit 6. The assessed contract should ensure the execution of Civil Works for the main technological plant of the new 600 MW Unit No. 6 in the Šoštanj Thermal Power Plant Complex. The new unit of the power plant complex should obviously be used to produce electricity and provide it to the electricity network, which should then supply the electricity to the network and to the public.<sup>4</sup>

### **B.3) Contract thresholds**

The Directive states that it applies only to contracts of a certain value. Article 16 of the Directive is read as follows: “*Save where they are ruled out by the exclusions in Articles 19 to 26 or pursuant to Article 30, concerning the pursuit of the activity in question, this Directive shall apply to contracts which have a value excluding value-added tax (VAT) estimated to be no less than the following thresholds:*

(a) *EUR 387 000 in the case of supply and service contracts;*

(b) *EUR 4 845 000 in the case of works contracts.”*

In the document called Invitation for tenders<sup>5</sup>, there is not mentioned the estimated cost of the contract. However, the aforementioned document refers to the web of the European Bank for Reconstruction and Development ([www.ebrd.com](http://www.ebrd.com)), where the “General Procurement Notice” for the project was published. On the web pages of the European Bank for Reconstruction and Development, there is the information, that the proposed project has the total estimated costs equivalent of EUR 1 100 000 000.<sup>6</sup>

**The estimated costs are therefore much higher than the minimal value of the contract required by the Directive.**

### **B.4) Exclusions**

The Directive sets forth several exclusions. In case a contract meets the criteria mentioned above (contracting entities are contracting authorities or public undertakings,

<sup>3</sup> See [http://www.hse.si/en/group\\_tes](http://www.hse.si/en/group_tes)

<sup>4</sup> See [http://www.hse.si/en/group\\_tes](http://www.hse.si/en/group_tes): With an installed power of 809 MW, the Šoštanj Thermal Power Plant generates, on average, one third of the energy in the country... According to the adopted strategic development plan of the Šoštanj Thermal Power Plant, the 600 MW Unit 6 will gradually replace the technologically obsolete and economically inefficient Units 1, 2, 3, 4 and 5.

<sup>5</sup> [http://www.te-sostanj.si/filelib/sporoila\\_za\\_medije/invitation\\_for\\_tenders.pdf](http://www.te-sostanj.si/filelib/sporoila_za_medije/invitation_for_tenders.pdf)

<sup>6</sup> See <http://www.ebrd.com/english/pages/workingwithus/procurement/notices/project/101109a.shtml>

they pursue one of the activities referred to in Articles 3 to 7 of the Directive and the contract is of certain minimal value), but it also falls within the scope of the exclusions mentioned by the Directive, the Directive should not apply.

**In the case of the assessed none of the exclusion should apply:**

- *Article 18, Works and service concessions.*

In the case of TEŠ, there will not be awarded any work or service concession. The exclusion does not apply.

- *Article 19, Contracts awarded for purposes of resale or lease to third parties.*

The Directive should not apply to those contracts awarded for purposes of resale or lease to third parties. In the Invitation for tenders or on the HSE or EBRD web pages, no indication that the contract should be re-sold or leased to the third party was found. Presumably, the exclusion does not apply.

- *Article 20, Contracts awarded for purposes other than the pursuit of an activity as described in Articles 3 to 7 or for the pursuit of such activities in a third country.*

As mentioned above, TEŠ (as contracting authority) pursues activity referred to in Article 3 Paragraph 3 of the Directive – it supplies electricity to the fixed network intended to provide a service to the public.

The assessed contract should ensure the execution of Civil Works for the main technological plant of the new 600 MW Unit No. 6 in the Šoštanj Thermal Power Plant Complex. The new unit of the power plant complex is obviously to be used to produce electricity, which should then supply the electricity to the network and to the public. Consequently, the exclusion does not apply.

- *Article 21, Contracts which are secret or require special security measures.*

According to Article 21, the Directive does not apply to contracts when they are declared to be secret by a Member State, when the performance of the contract must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, or when the protection of the basic security interests of that Member State so requires.

As far as it could be assessed on the grounds of the accessible documents, the assessed contract has not been declared to be secret by Slovenia. Further, we presume that the protection of the basic security interests of the Slovenia does not require that the Directive does not apply in this case.

We assume that the civil works to be executed in accordance with the assessed contract do not have to be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Republic of Slovenia. Presumably, the exclusion does not apply.

- *Article 22, Contracts awarded pursuant to international rules.*

In the Invitation for tenders or on the HSE or EBRD web pages, no indication that the contract should be awarded pursuant to international rules was found. Presumably, the exclusion does not apply.

- *Article 22a, Contracts in the fields of defence and security.*

The assessed contract is not the contract to which Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 applies, nor is it the contract to which Directive 2009/81/EC applies pursuant to Articles 8, 12 and 13 thereof. Consequently, the exclusion does not apply.

*- Article 23, Contracts awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture.*

In the Invitation for Tenders or on the HSE or EBRD web pages, no indication that the contract should be awarded to an affiliated undertaking, to a joint venture or to a contracting entity forming part of a joint venture was found. In the Invitation for Tenders, TEŠ invited undisclosed number of sealed tenders from any contractors, not only tenders from those contractors who are TEŠ's affiliated undertaking, joint venture or part of a joint venture. Presumably, the exclusion does not apply.

*- Article 24, Contracts relating to certain services excluded from the scope of this Directive.*

The assessed contract is not the contract for any of the services described in Article 24 of the Directive. The exclusion does not apply.

*- Article 25, Service contracts awarded on the basis of an exclusive right.*

In the Invitation for Tenders or on the HSE or EBRD web pages no indication that the contract should be awarded to an entity which is itself a contracting authority within the meaning of Article 2 Paragraph 1 Indent a) or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty was found. In the Invitation for Tenders, TEŠ invited undisclosed number of sealed tenders from any contractors, not only tenders from contractors who are one of the aforementioned contractors. The exclusion does not apply.

*- Article 26, Contracts awarded by certain contracting entities for the purchase of water and for the supply of energy or of fuels for the production of energy.*

The assessed contract could potentially fall within the scope of Article 26 Indent b) as TEŠ is contracting entity engaged in the activity referred to in Article 3 paragraph 3 of the Directive. However, the assessed contract is not a contract for the supply of energy or fuels for the production of energy. It is the contract for the execution of civil works. The exclusion does not apply.

*- Article 29, Contracts and framework agreements awarded by central purchasing bodies.*

The assessed contract was not purchased from or through a central purchasing body. The exclusion does not apply.

*- Article 30, Contracts intended to enable activity directly exposed to competition on markets to which access is not restricted.*

Contracts intended to enable an activity mentioned in Articles 3 to 7 to be carried out should not be subject to the Directive if, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted.

The assessed contract is **the contract intended to enable an activity mentioned in Articles 3 to 7 to be carried out** (it should enable the activity mentioned in Article 3 Paragraph 3 to be carried out).

There are several cases, in which contracts intended to enable the activity concerned to be carried out should no longer be subject to the Directive according to Article 30:

- i. Member State considers that, in compliance with Article 30 Paragraphs 2 and 3, Article 30 Paragraph 1 is applicable to a given activity. Member State notifies the European Commission. The Commission adopts a Decision (in

accordance with Article 30 Paragraph 6 and within the period it provides for) establishing the applicability of Article 30 Paragraph 1.

- ii. Member State considers that, in compliance with Article 30 Paragraphs 2 and 3, Article 30 Paragraph 1 is applicable to a given activity. Member State notifies the Commission. The Commission does not adopt any Decision concerning applicability of Article 30 Paragraph 1 within the aforementioned period.
- iii. Where *free access to a given market is presumed* on the basis of the first subparagraph of Article 30 Paragraph 3 of the Directive, and where an independent national authority that is competent in the activity concerned has *established the applicability of paragraph 1*, contracts intended to enable the activity concerned to be carried out should no longer be subject to the Directive if *the Commission has not established the inapplicability of paragraph 1* by a Decision (...).
- iv. The legislation of the Member State concerned provides for it and the contracting entity asks the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with Article 30 Paragraph 6. The Commission adopts a Decision (in accordance with Article 30 Paragraph 6 and within the period it provides for) establishing the applicability of Article 30 Paragraph 1 to a given activity.
- v. The legislation of the Member State concerned provides for it and the contracting entity asks the Commission to establish the applicability of paragraph 1 to a given activity by a Decision in conformity with Article 30 Paragraph 6. The Commission does not adopt a Decision concerning applicability of Article 30 Paragraph 1 to a given activity within the aforementioned period.
- vi. The Commission may also begin the procedure for adoption of a Decision establishing the applicability of paragraph 1 to a given activity on its own initiative.

Options i, ii, iv, v and vi mentioned above require that the Commission *adopts a decision* or, at least, that the *Member State notifies* the Commission or *the contracting entity asks* the Commission. **None of that has happened in the case of the assessed contract.**

As mentioned in an e-mail from Ms. Maria Magdalena Toader to Ms. Šabová from ELS (attached), the Commission has not received any application for an exemption from the public procurement rules under Article 30 of the Directive concerning the electricity sector in Slovenia. Also on the official web sites of the Commission there is no mention of any notification, request or decision concerning the Republic of Slovenia.<sup>7</sup> Therefore, the assessed contract cannot be subject to exemption under Article 30 of the Directive on the grounds of the reasons listed in options i, ii, iv, v and vi.

In case of the option iii. mentioned above, there is no need to notify or ask the Commission and no need for a Decision of the Commission to be issued. Article 30 Paragraph 1 would in this case be applicable simply when the three conditions stated in

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<sup>7</sup> See [http://ec.europa.eu/internal\\_market/publicprocurement/rules/exempt\\_markets/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/rules/exempt_markets/index_en.htm)



the Directive (last subparagraph of Article 30 Paragraph 4) are met. The required conditions are:

- *Free access to a given market is presumed on the basis of the first subparagraph of Article 30 Paragraph 3 of the Directive (access to a market should be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex XI). This condition can possibly be met as Annex XI states that in the field of "PRODUCTION, TRANSMISSION OR DISTRIBUTION OF ELECTRICITY," the relevant Community legislation to be implemented and applied by member states is the Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, which should have already been implemented and applied in the Republic of Slovenia.*

- *An independent national authority that is competent in the activity concerned has established the applicability of Article 30 Paragraph 1 of the Directive. We have thoroughly searched the internet and other media to find any relevant document issued by an independent Slovenian authority in respect of the TEŠ 6 project and we have not found any. Therefore we assert that this condition **is not met.***

- *The Commission has not established the inapplicability of paragraph 1 by a Decision.*

As far as we know, there is not such a decision of the Commission, the condition is met.

**As there is no document of an independent national authority** in accordance with Article 30 Paragraph 4, third sentence, **the exception mentioned in option iii. above cannot not apply.**

## **B.5 Conclusion**

**Directive 2004/17/EC fully applies to the process of awarding of the contract for the execution of civil works for new 600 MW Unit No. 6 in the Šoštanj thermal power plant complex and should have been followed in the process of awarding the assessed contract.**

## **C) Failure to comply with the Directive**

Civil works fall in Category No. 12 of Annex XVII A (Services within the meaning of Article 31). According to Article 31 of the Directive: "*Contracts which have as their objects services listed in Annex XVII A shall be awarded in accordance with Articles 34 to 59.*"

**Therefore, the assessed contract should have been awarded in accordance with Articles 34 to 59 of Directive 2004/17/EC. However, in the awarding process of the assessed contract for the execution of civil works for the main technological plant of the new Unit 6, Articles 42 and 44 of the Directive were violated. Consequently, some of the important information about the contract might not have reached all the tenderers who may have been willing to apply for the contract.**

### **C.1 Violation of Article 42 of the Directive**

Article 42 of the Directive:

*"In the case of supply, works or service contracts, the call for competition may be made:*  
(a) *by means of a periodic indicative notice as referred to in Annex XV A; or*  
(b) *by means of a notice on the existence of a qualification system as referred to in Annex XIV; or*

*(c) by means of a contract notice as referred to in Annex XIII A, B or C.”*

In the case of TEŠ, neither the periodic indicative notice, nor the notice on the existence of a qualification system was published as required by Article 42 of the Directive. In the Invitation for tenders, TEŠ claimed it had published a General Procurement Notice on the EBRD websites ([www.ebrd.com](http://www.ebrd.com)). The only notice concerning Šoštanj which was published on the EBRD websites dates back to November 9th 2010<sup>8</sup>. However, the important information which should be part of the Contract Notice for open procedures according to Annex XIII A of the Directive have been omitted in the very notice (and also in the Invitation for tenders). We can demonstrate the violation of the relevant provisions of the Directive on the grounds of following examples of missing information:

- main terms concerning financing and payment and/or references to the provisions in which these are contained (indent 13 of Annex XIII A),
- period during which the tenderer is bound to keep open his tender (indent 16 of Annex XIII A),
- criteria referred to in Article 55 to be used for award of the contract: ‘lowest price’ or ‘most economically advantageous tender’; Criteria representing the most economically advantageous tender as well as their weighting or, where appropriate, the order of importance of these criteria shall be mentioned where they do not appear in the specifications (indent 18 of Annex XIII A),
- name and address of the body responsible for appeal and, where appropriate, mediation procedures; precise information concerning time limits for lodging appeals, or, if need be, the name, address, telephone number, fax number and e-mail address of the department from which this information may be obtained (indent 20 of Annex XIII A).
- date of dispatch of the notice by the contracting entity (indent 21 of Annex XIII A). (Note: the notice was not dispatched to the Office for Official Publications of the European Communities at all – see Article C.2 of this complaint.)

**Due to the omissions listed above, TEŠ violated Article 42 of Directive 2004/17/EC.**

### **C.2 Violation of Article 44 of the Directive**

According to Article 44 Paragraph 2 of Directive 2004/17/EC: *“The notices referred to in Articles 41, 42 and 43 shall be published in accordance with the technical characteristics for publication set out in point 1(a) and (b) of Annex XX.”*

According to Annex XX, point 1(a): *“Notices referred to in Articles 41, 42, 43 and 63 must be sent by the contracting entities to the Office for Official Publications of the European Communities in the format established by implementing measures to be adopted by the Commission in accordance with the procedure referred to in Article 68 Paragraph 2. (...)”*

**TEŠ has not sent its notice referred to in Article 42 of the Directive to the Office for Official Publications of the European Communities. Consequently, TEŠ violated Article 44 of the Directive.**

### **D) Transposition and implementation of the Directive**

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<sup>8</sup> <http://www.ebrd.com/english/pages/workingwithus/procurement/notices/project/101109a.shtml>

### **D.1 Slovene Act on Public Procurement in the water, energy, transport and postal services sector (the Public Procurement Act) and its application to the assessed contract**

The Slovene Act on Public Procurement in the water, energy, transport and postal services sector (Zakon o javnem naročanju na vodnem, energetske, transportnem področju in področju poštnih storitev, Uradni list RS, št. 128/06, 16/08, 34/08, 19/10; hereinafter referred to as “the Public Procurement Act”) lays down mandatory actions required from contracting entities and tenderers when awarding public supply, works and services contracts in the sector of water, transport and postal services. According to its Article 1 Paragraph 2, it transposes Directive 2004/17/EC into the legal order of the Republic of Slovenia.

In its Article 3 paragraph 5, the Public procurement Act defines the conditions under which it applies. Among others, the Act should apply to contracting entities, which are public contracting authorities or public undertakings and which pursue one of the activities referred to in Articles 5 to 9 of the Public Procurement Act. According to Article 2 indent 10 of the Public procurement Act, public undertaking is *„any undertaking over which the contracting authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it. A dominant influence on the part of the contracting authorities shall be presumed when these authorities, directly or indirectly, in relation to an undertaking:*

- *hold the majority of the undertaking's subscribed capital,*
- *control the majority of the votes attaching to shares issued by the undertaking, or*
- *can appoint more than half of the undertaking's administrative, management or supervisory body.“*

This definition of public undertaking introduced by the Public Procurement Act is in compliance with Directive 2004/17/EC. Also the description of the relevant activity in the field of electricity as laid down by the Directive can be found in Article 5 Paragraph 3 of the Public Procurement Act. In this respect, we can conclude that the Directive was correctly transposed.

**The aforementioned implies that according to the Public Procurement Act, the assessed contract for civil works by TEŠ was subject both to the Directive and to the Public Procurement Act** (as to the reasons for which the contract is subject to Directive 2004/17/EC – see Chapter B.1 of this complaint). However, in the Invitation for tenders, TEŠ has stated, that the subject tender is not a public procurement tender in the sense of the Slovenian Public Procurement Law, since under the law of the Republic of Slovenia the Employer is not a contracting entity in the sense of public procurement and is not obliged to follow the valid regulations of the Public Procurement Act and the Auditing of Public Procurement Procedures Act (see note in the end of the Invitation for tenders). On the grounds of all the aforementioned arguments, we claim that this assertion is false. **Both the Directive and the Slovene Public Procurement Act do apply to the assessed contract for civil works for TEŠ. However, none of them has actually been applied.**

### **D.2 Slovene Act on Public Procurement in the water, energy, transport and postal services sector (the Public Procurement Act) and transposition of Articles 42 and 44 of the Directive**

Article 42 of the Directive was transposed by Article 59 of the Slovenian Public Procurement Act which states that contract notices should be in the format of standard

forms and that all contracting entities are bound to use the standard forms set out in Commission Regulation No 1564/2005 of 7<sup>th</sup> September 2005 establishing standard forms for the publication of notices in the framework of public procurement procedures pursuant to Directives 2004/17/EC and 2004/18/EC of the European Parliament and of the Council.

**Therefore, Article 42 of the Directive has been correctly transposed to the Slovene legal order. TEŠ has violated both Article 42 of the Directive and Article 59 of the Slovene Public Procurement Act.**

Article 44 of the Directive was transposed by Article 17 of the Public Procurement Act which states that contracting entities should send for publication to the Office for Official Publications of the European Communities and to the procurement portal contract notices for all public contracts which have estimated value (excluding value added tax) of certain amount (minimally EUR 422 000 for public supply and service contracts).

**We assume, that Article 44 of the Directive has not been fully and correctly transposed into the Slovenian legal order**, as the Directive requires the notices for *all* contracts (which have as their objects services listed in Annex XVII A) to be send to the Office for Official Publications of the European Communities. The Directive does not give Member States any space to lay down thresholds. The member states have to oblige contracting authorities and public undertakings to send *all* the notices to the Office for Official Publications of the European Communities.

Anyhow, the assessed contract has estimated value of EUR 1 100 000 000. Therefore, Article 17 of the Public Procurement Act should apply to it anyway. According to the Slovene Public Procurement Act, TEŠ was required to send the contract notice for the assessed contract to the Office for Official Publications of the European Communities. **That means that TEŠ did not only violate Article 44 of the Directive, but also Article 17 of the Public Procurement Act.**

### **D. 3 Implementation of Directive 2004/17/EC**

The correct implementation of the EC law includes ensuring of the adequate **application** of the relevant measures and effective **enforcement** of the observance of the measure.

**Directive 2004/17/EC was transposed<sup>9</sup> into the Slovenian legislation, but it was not properly implemented. In the case of the contract for civil works for the TEŠ, the Republic of Slovenia did not enforce that the mandatory procedures laid down by the Directive and by the Public Procurement Act are followed.**

Also, the Slovene legal order does not contain any legal tool which would enable individuals to demand the enforcement of the Public Procurement Act.

Article 105 of the Public Procurement Act lays down, that the body competent for the detection of misdemeanours of contracting entities should be the National Review Commission for Reviewing Public Procurement Procedures. However, this body does not examine contracts on its own initiative, but only when it receives an “audit claim”. According to Article 9 Paragraph 1 of the Slovene Auditing of Public Procurement Procedures Act (hereinafter referred to as “APPPA”): *“An audit claim may be submitted by any individual who showed or shows interest in the contract awarding procedure and demonstrates in all probability to have suffered or could suffer damage due to the act of*

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<sup>9</sup> Although we assert that not all the provisions of the Directive were transposed correctly, for example the transposition of the Article 44 of the Directive was imperfect.

*the contracting entity, stated in the claim as being an infringement by the contracting entity in the public contract awarding procedure.”*

As arises from the foregoing, not everybody is entitled to submit the audit claim, but only a person who can demonstrate in all probability to have suffered or could suffer damage due to the act of the contracting entity. At the same time, this person must show or must have showed interest in the contract awarding procedure. These conditions are very restrictive and allows only a very small group of subjects to submit an audit claim, in fact, these are only the subjects to which the contract could be awarded (tenderers). Other people (and most of the public) have no option to enforce that the law is abided.

Article 9 Paragraph 2 of APPPA adds that *“when an act of the contracting entity poses or could pose a threat to the public interest, an audit claim may be issued also by the State Prosecutor’s Office of the Republic of Slovenia, the ministry competent for finance or the office competent for the protection of competition. The authorities referred to in the preceding paragraph may issue an audit claim at any time in the course of procedure, but not later than upon the finality of the decision on a public contract award or the recognition of qualifications.”*

We do not have any information that any of the aforementioned bodies have issued an audit claim. We assert that awarding the contract of such a value when not following the Directive and the Slovene legal order always poses a threat to the public interest. Article 9 Paragraph 2 of APPPA says, that the audit claim *may* be issued. The listed public authorities do not have the obligation to submit it. **Therefore, APPPA does not entirely and properly ensure that the Public Procurement Act (and consequently Directive 2004/17/EC) will be abided.**

The public authorities listed in Article 9 Paragraph 2 of the APPPA had chance to submit an audit claim, but they did not submit it. They did not make use of the possibility given to them in APPPA to help enforce the observance of the law. Therefore, these public authorities (The Office of the State Prosecutor General of the Republic of Slovenia, Ministry of the Economy of The Republic of Slovenia and the Competition Protection Office of the Republic of Slovenia) did not act in compliance with the EC law as they did not make any effort to enforce its observance.

**To conclude it, the Republic of Slovenia has transposed Directive 2004/17/EC and it also laid down some options how to enforce its application. However, existing tools are not sufficient, as in some cases Directive 2004/17/EC is not applied and the public authorities do not enforce its application** (they do not enforce it and they do not have the legal obligation - stipulated in the legal acts - to enforce it).

Directive 2004/17/EC was not correctly implemented in the Republic of Slovenia as the Republic of Slovenia does not enforce the application of the Directive:

- the competent state authorities (The Office of the State Prosecutor General of the Republic of Slovenia, the Ministry of the Economy of The Republic of Slovenia and the Competition Protection Office of the Republic of Slovenia) did not use the mechanism laid down by Slovene law (article 9 Paragraph 2 of APPPA) and did not submit an audit claim to the competent body (Review Commission for Reviewing Public Procurement Procedures),
- Slovene legal system does not contain a procedure which would enable members of the public to enforce observance of the Directive in concrete cases,
- the Slovene legal system does not contain a procedure which would oblige public authorities to enforce the use of the Directive (article 9 Paragraph 2 of APPPA only gives

public authorities the possibility to submit an audit claim, but it does not oblige them to do so).

#### **D.4 Violation of Directive 2004/17/EC by the Republic of Slovenia**

As stated above, we assert that the Republic of Slovenia violated the EC law as it has not properly and fully implemented Directive 2004/17/EC.

The Republic of Slovenia did not enforce the observance of the Directive (or of the legal act which transposed the Directive) and it did not force the contracting authority (public undertaking) to abide the Directive. **Moreover, we would like to emphasize, that the subject which did not follow the Directive and the national law transposing the Directive was the Republic of Slovenia itself as the Republic of Slovenia is the only subject controlling the contracting entity TEŠ (through the mediation of HSE).**

We believe that the breach of the EC law is particularly significant in this case as it is the Republic of Slovenia itself who does not follow its own legislation and the legislation of the European Union.

#### **E) Summary**

##### **1. Directive 2004/17/EC and Slovene Public Procurement Act should have been applied to the contract for the execution of civil works for the main technological plant of the new Unit 6 of the Šoštanj power plant.**

TEŠ – Termoelektrarna Šoštanj d. o. o. – which was to award the contract, is the public undertaking, as the Republic of Slovenia executes dominant influence over it. The assessed contract relates to an activity carried out in the sector listed in Articles 3 Paragraph 3 Indent b) of the Directive (supply of an electricity to a network). The contract has got estimated value of EUR 1,100,000,000 and none of the exclusions laid down in Articles 19 to 26, Article 29 or Article 30 of the Directive should apply to it. **Therefore, the awarding process should have followed the rules laid down by Directive 2004/17/EC.**

2. However, the awarding process of the contract was not in compliance with the Directive. Articles 42 and 44 of the Directive were violated, as TEŠ did not publish proper contract notice containing all the information required by Article 42 of the Directive and also did not send the notice to the Office for Official Publications of the European Communities as required by Article 44 of the Directive.

TEŠ also violated Slovene Public Procurement Act, which transposes the obligations laid down in Articles 42 and 44 of the Directive. (Although Article 44 was not transposed fully and correctly - see Chapter D.2 of this Complaint)

##### **3. The Republic of Slovenia did not enforce the observance of Directive 2004/17/EC and Public Procurement Act.**

4. Furthermore, in the legal order of the Republic of Slovenia, there are not proper and sufficient tools to enforce the observance of the Directive (for example if the public authorities do not act of their own will, members of the public do not have any chance to start a procedure in front of an authorized office unless they are tenderers).

**As the issue is very serious, we entreat the Commission to start the infringement procedure as soon as possible, in the interest of all the citizens of the European Union.**

**9.** As far as possible, specify the provisions of Community law (treaties, regulations, directives, decisions, etc.) which the complainant considers to have been infringed by the Member State concerned:

- Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

**10.** Where appropriate, mention the involvement of a Community funding scheme (with references if possible) from which the Member State concerned benefits or stands to benefit, in relation to the facts giving rise to the complaint:

The investor of the TEŠ project is to benefit the financial support from the European Investment Bank (EIB) in the amount of EUR 550 million and from the European Bank for Reconstruction and Development (EBRD) in the amount of EUR 100 million.

**11.** Details of any approaches already made to the Commission's services (if possible, attach copies of correspondence):

- Ms. Šabová (ELS) has sent an e-mail to the Commission to ask whether there was not an exemption for Slovenia according to Article 30 of Directive 2004/17/EC. She has received an e-mail from Ms. Maria Magdalena Toader, who has claimed that the Commission has not received any application for exemption from the public procurement rules under Article 30 of Directive 2004/17/EC concerning the electricity sector in Slovenia (the e-mail of Ms. Toader is attached to this complaint)

**12.** Details of any approaches already made to other Community bodies or authorities (e.g. European Parliament Committee on Petitions, European Ombudsman). If possible, give the reference assigned to the complainant's approach by the body concerned:

- None

**13.** Approaches already made to national authorities, whether central, regional or local (if possible, attach copies of correspondence):

**13.1** Administrative approaches (e.g. complaint to the relevant national administrative authorities, whether central, regional or local, and/or to a national or regional ombudsman):

- None

**13.2** Recourse to national courts or other procedures (e.g. arbitration or conciliation). (State whether there has already been a decision or award and attach a copy if appropriate):

- None

**14.** Specify any documents or evidence which may be submitted in support of the complaint, including the national measures concerned (attach copies):

- e-mail from Maria Magdalena Toader, Commission européenne, to Ms. Sabova,
- Invitation for tenders, Slovenia, Unit 6 Šoštanj thermal power plant, civil works for main technological plant of unit 6 thermal power plant Šoštanj, 18th January 2011
- Slovene Act on Public Procurement in the water, energy, transport and postal services sector (Zakon o javnem naročanju na vodnem, energetske, transportnem področju in področju poštnih storitev)
- Slovene Auditing of Public Procurement Procedures Act

**15.** Confidentiality (tick one box):

"I authorise the Commission to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

"I request the Commission not to disclose my identity in its contacts with the authorities of the Member State against which the complaint is made."

**16.** Place, date and signature of complainant/representative:

Ljubljana, 2 November 2011



Lidija Živčič