

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 2009/31/EC of the European
Parliament and of the Council of 23 April 2009 on the geological storage of
carbon dioxide and amending Council Directive 85/337/EEC, European
Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC,
2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006**

1. Surname and forename of complainants:

Ekologický právní servis / Environmental Law Service (ELS)

and

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

2. Where appropriate, represented by:

Mgr. Jan Šrytr,
lawyer of the Environmental Law Service

Focus is represented by ELS on the grounds of the power of attorney
(attached)

3. Nationality:

ELS Czech / Focus Slovenian

4. Address or Registered Office:

Environmental Law Service

Address/Registered Office:

**Ekologický právní servis
/Environmental Law Service/**

Dvořákova 13
602 00 Brno
Czech Republic
www.eps.cz

Focus

Registered Office:

Focus, društvo za sonaraven razvoj
/Focus, association for sustainable development/
Maurerjeva 7
1000 Ljubljana
Slovenia
www.focus.si

Address:

Trubarjeva 50,
1000 Ljubljana
Slovenia

5. Telephone/fax/e-mail address:

Environmental Law Service:
Tel: +420 545 575 229 / Fax: +420 542 213 373

Focus:
Tel: +386 1 515 40 80

Contact persons:

Jan Šrytr, jan.srytr@eps.cz (ELS)

Kristína Šabová, kristina.sabova@eps.cz (ELS)

Lidija Živčič, lidija@focus.si (Focus)

6. Field and place(s) of activity:

Environmental Law Service (“ELS”) is a Czech non-governmental, non-profit organisation engaged in environmental protection and defence of other public interests. Its aim is to eliminate cases of unlawful and improper decision-making by state offices in matters of the environment and human rights, to help people gain access to the courts, to build the knowledge and skills of non-profit organization staffs, to expand the ranks of public-interest lawyers, and to help bring about a high-quality legal code. The activities are pursued not only in the Czech Republic, but also in the area of the European Union. The vision of ELS is that of a free society that enables everybody to aspire to personal happiness while being aware of their responsibility to the public, including the state of the Earth. ELS lawyers support those who seek to protect their rights and the interests of the public. We protect human rights and advocate the rule of law, the transparency of state power, and the responsibility of corporations for consequences of their actions. ELS has represented pollution victims of ArcelorMittal steel plants, helped Polish municipalities to fight against relocation to give way to Europe's biggest coal

mine, assisted Bulgarian grassroots organisations to craft legal strategy against the plans of Dundee Precious Metal company to use cyanide technology in local gold mines, and tested the first ever trans-boundary environmental impact assessment based on climate change concerns, in the case between the Czech Republic and Federated States of Micronesia regarding the biggest Czech coal-fired power plant, Prunéřov. Since 2007, ELS has provided complex legal support for the efforts of the European Coalition for Corporate Justice (ECCJ) to promote reforms of EU corporate accountability policies.

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: Environmental Agency of Republic of Slovenia
Ministry of Environment and Spatial Planning

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, thereafter “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), which is in turn 100 percent owned by the Republic of Slovenia. TEŠ is located in the municipality of Soštanj, in the Šaleška Valley, approximately 80 km north-east of Ljubljana.

TEŠ plans to build a new 600 MW unit for the Šoštanj lignite power plant (thereinafter “TEŠ 6” or “Unit 6”) which would replace the power plant’s existing units 1-4 and possibly 5. Its promoters argue with increased efficiency, but in fact, this one lignite power plant alone will swallow up almost the country's entire carbon budget by 2050¹.

On 21 October 2009 the 2968th Environment Council meeting recognized in its *Council Conclusions on the EU position for the Copenhagen Climate Conference* that ‘...developed countries as a group should reduce their GHG emissions below 1990 levels through domestic and complementary international efforts by 25 to 40% by 2020 and by 80 to 95% by 2050...’(p.2). Consequently, the Slovenian parliament adopted in November 2009 the *Declaration of the Parliament on the active role of Slovenia in the*

¹ <http://bankwatch.org/our-work/projects/sostanj-lignite-thermal-power-plant-unit-6-slovenia>

climate policy and called upon the government to oblige to the long-term climate objective of 80 % reduction of GHG by 2050.

The outstanding problem with the TEŠ 6 project is that it is not compatible with the EU's long-term climate targets as laid out in the Council Conclusions above.

The Environmental Impact Assessment of the project did not assess what impact this project would have on Slovenia's emission reduction targets. As stated in the EIA and the EIA Addendum, the absolute emissions of carbon dioxide will not be reduced and will stay at the same level (approximately 4 million tonnes of CO₂). If Slovenia is to reduce its emissions from the current level of roughly 20 million tonnes of CO₂ by 80 % by 2050, which it would need to do in order for the EU as a whole to reach its target, it reaches the level of 4 million tonnes. This means that the whole or almost the whole emission quota of the country will be covered by the functioning of one power plant – TEŠ 6, which is planned to operate until at least 2050. This means that all other sectors in Slovenia will have to reduce their emissions disproportionately more than the energy sector, which can reduce its emissions relatively easily in comparison to other sectors, such as transport.

Consequently, it is practically impossible for Unit 6 to contribute to achieving compliance with Slovenia's long-term climate and energy commitments. Lignite is one of the least efficient and most polluting energy sources which will extend Slovenia's dependency on fossil fuels and make the national renewable energy targets (25% by 2020)² much more difficult to achieve. With TEŠ 6 Slovenia will be locked into high carbon energy technologies for at least four more decades instead of desirable transition to the sustainable low carbon future (modest consumption, energy efficiency and conservation, renewable and decentralised energy).

Moreover, TEŠ 6 (the proposed Unit 6 of the TEŠ power plant) falls within the scope of Article 33 of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 (thereinafter "the CCS Directive"). **However, we assert that the requirements of Article 33 of the CCS Directive were not met in the course of the project development.**

To prove this, we below give the interpretation on how the assessment pursuant to Art. 33 of the CCS Directive should be made based on the interpretation of the very provision, its relation to other legal acts (EIA Directive, Aarhus Convention) and the best practise methodology proposed by the expert study drawn up by the Bellona Foundation (<http://www.bellona.org/>) and the ELS. Further, we outline the main reasons why the TEŠ project does not meet the set out criteria.

B) Interpretation of Art. 33 of the CCS Directive and best practise

1. The character of the assessment pursuant to Art. 33 of the CCS Directive – essential requisites based on the interpretation

The principle of carbon capture and storage (CCS) method is reducing CO₂ emissions from power generation from fossil fuels, principally coal and gas, in a way that, after capture at the site of the combustion plant, the CO₂ should be transported to a suitable

² Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC

geological formation where it is to be injected, with the aim of isolating it from the atmosphere for good. The use of this method should largely contribute to mitigating climate change; on the other hand, potential risks and dangers of the CCS technology should be prevented³.

At the EU level, the CCS method is regarded as one of the future effective instruments in precluding or mitigating global warming. On these grounds, the CCS Directive was adopted⁴.

The majority of provisions of the CCS Directive concern the ‘storage sites’ and relating issues such as storage permits, monitoring and inspections etc. Nevertheless, Article 33 of the CCS Directive (by means of which Directive 2001/80/EC was amended) requires that operators of the given combustion plants assess whether suitable storage sites are available, transport facilities are technically and economically feasible and it is technically and economically feasible to retrofit for CO₂ capture. If these conditions are met, which is up to the competent authority to determine based on the assessment of the operator, the authority should ensure that suitable space on the installation site for the equipment necessary to capture and compress CO₂ is set aside.

Article 33 of the CCS Directive is read as follows:

“In Directive 2001/80/EC, the following Article shall be inserted:

‘Article 9a

1. Member States shall ensure that operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide, have assessed whether the following conditions are met:

- suitable storage sites are available,*
- transport facilities are technically and economically feasible*
- it is technically and economically feasible to retrofit for CO₂ capture.*

2. If the conditions in paragraph 1 are met, the competent authority shall ensure that suitable space on the installation site for the equipment necessary to capture and compress CO₂ is set aside. The competent authority shall determine whether the conditions are met on the basis of the assessment referred to in paragraph 1 and other available information, particularly concerning the protection of the environment and human health.

() OJ L 140, 5.6.2009, p. 114.’”*

No exact requirements are set forth concerning the quality, method, expertness or other requisites of such assessment or stating how the process of the “authoritative determination” should look like. **Nevertheless, we are persuaded that essential**

³ See e.g. http://ec.europa.eu/clima/faq/lowcarbon/ccs_en.htm

⁴ See Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 or Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A Roadmap for moving to a competitive low carbon economy in 2050 (COM/2011/0112 final)

requirements of such an assessment are implicit and necessarily results from the interpretation compliant with the *acquis communautaire* of Article 33 of the CCS Directive.

In order to interpret Article 33 of the CCS Directive, or more precisely the character of the obligation “to assess” the fulfilment of the relevant conditions, we applied the methods that are generally applied by the European Court of Justice (thereinafter the “ECJ”) when interpreting the EC legislation, i.e. the grammatical, systematic, teleological and comparative methods of interpretation

a) Grammatical interpretation

In accordance with the Oxford Dictionaries⁵, a verb ‘to assess’ shall generally mean

- to evaluate or estimate the nature, ability, or quality of
- to calculate or estimate the price or value of
- to set the value of a tax, fine, etc., for (a person or property) at a specified level.

By means of purely grammatical interpretation, we can only conclude that certain process of assessing should take place in the course of which the fulfilment of given conditions should be evaluated or estimated. Further, it can be assumed that the process of evaluation must be real and actually take place. It would not be acceptable if the output was preconceived and the assessment was only simulated.

b) Systematic interpretation

In line with the method of systematic interpretation, it is necessary to consider and respect the broader context of the interpreted provision as well as the objectives and spirit of the relevant legislation and interpret the problematic provision so that the legislation is coherent and concordant. As far as the secondary Community legislation is concerned, it must always be interpreted in a way conformed with the primary Community legislation.

Further, Article 33 of the CCS Directive, or more precisely the CCS Directive as a whole, is a part of the secondary legislation adopted by the European Parliament and the Council on the grounds of Article 175 (1) of the Treaty establishing the European Community (Art. 192 (1) of the Consolidated version of the Treaty on the functioning of the European Union) in the field of the EU policy on the environment.

Subsequently, it is necessary to interpret all its provisions in line with Article 191 of the Treaty (in terms of the consolidated version) and the principles set forth therein, that is in line with the rules and principles of the EU policy on the environment. The main principles that are in place⁶ are: ‘the high level of protection principle’ (the protection of the environment is important and so the standard of protection of the environment should be sufficient); ‘the precautionary principle’ (it is better to act before a fact is scientifically proven as it can be too late to take any action afterwards); ‘the prevention principle’ (prevention is better than liquidation of damage). **The common objective of all principles introduced by the Treaty in the field of the EU policy on the environment is implicit: the effective, sufficient and timely protection of the environment.**

Consequently, the aforementioned legislative context must be thoroughly taken into account when interpreting the term “to assess” regarding the fulfilment of conditions given by Article 33 of the CCS Directive. The very provision was introduced into the

⁵ See <http://oxforddictionaries.com>

⁶ Jans, J. H. *European Environmental law*, Europa Institut University of Amsterdam, Amsterdam, 2000, p. 464

CCS Directive to provide for the further protection of the environment: the ‘assessment’ should be made in order to enable the future capture of carbon dioxide in the premises of the large fossil fuel power plants⁷. Accordingly, the assessment should duly serve to this objective and must be therefore made **objectively, expertly, properly and thoroughly**. **Any other interpretation would go against the objectives of the CCS Directive and the principles of Article 191 of the Treaty (in terms of the consolidated version)**⁸.

c) Teleological interpretation

Teleological interpretation can be understood as a further corrective of narrowly formal and grammatical interpretation. It appeals to the sense, objectives and purpose of the European Community and its legislation.

One of the keystones of the ECJ teleological interpretation of the Community law is the **doctrine of ‘effectiveness’**. We can cite from the article of the former Advocate General of the ECJ Nial Fenelly as follows: “*A principal corollary, developed early on, to the teleological method (See, e.g., Bauhuis v. Netherlands, Case 46/76, [1977] E.C.R. 5.), is the doctrine of “effectiveness”, invariably called by its French name, “effet utile”. The doctrine provides that once the purpose of a provision is clearly identified, its detailed terms will be interpreted so “as to ensure that the provision retains its effectiveness” (See, e.g., Grad v. Finanzamt Traunstein, Case 9/70, [1970] E.C.R. 825, 837, 5, [1971] 1 C.M.L.R. 1, 23).*”⁹ Or, in words of one of the current Advocates General of the ECJ Verica Trstenjak: “**Effectiveness is a central principle of Community law [...]**¹⁰”

According to other authors¹¹, the doctrine of effectiveness is understood by ECJ in a way that such interpretation should prevail which enables the effectiveness of the provision of the Community law to fully and most intensively apply and/or which gives rise to the biggest practical benefit (see also e.g. Judgment of the European Court of Justice of 26 February 1991 in case C-292/89: *Antonissen*; Order of the European Court of Justice of 17 January 1980 in case C-792/79: *Camera Care*).

⁷ Pursuant to indent 47 of the ‘whereas clauses’ of the CCS Directive: “*The transition to low-carbon power generation requires that, in the case of fossil fuel power generation, new investments be made in such a way as to facilitate substantial reductions in emissions.*”

⁸ See also Communication from the Commission to the Council and the European Parliament - Sustainable power generation from fossil fuels: aiming for near-zero emissions from coal after 2020 (COM/2006/0843 final): “*The expectations of higher costs associated with CCS-equipped power plants after 2020 give rise to a tangible risk. This is the risk of a “non-CCS technology lock-in” as the result of ill-considered investment decisions with respect to the coal-fired capacity due for replacement in the coming 10-15 years. It is imperative to avoid a situation where much of the new build before 2020 is undertaken in a way that would either preclude or insufficiently guarantee the addition of CCS components on a sufficiently wide scale after 2020. ... Commission action: The Commission will assess on the basis of recent and planned investments whether new fossil fuels power plants built and to be built in the EU use best available technologies regarding efficiency and whether, if not equipped with CCS, new coal- and gas-fired installations are prepared for later addition of CCS technologies (‘capture ready’).*”

⁹ Fenelly, N., *Legal Interpretation at the European Court of Justice*, Fordham International Law Journal, Volume 20, Issue 3, 1996, Article 4, p. 674

<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1526&context=ilj>

¹⁰ Opinion of Advocate General Verica Trstenjak delivered on 28 March 2007, Commission of the European Communities v Federal Republic of Germany; in case C-503/04

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0503:EN:PDF>

¹¹ Tichý, L., . Arnold, R., Svoboda, P., Zemánek, J., Král, R. *Evropské právo*, C.H.Beck, Prague, 2006, p. 231

The doctrine of “effet utile” has also impact on the general obligation of the Member States to correctly transpose and implement directives as the secondary sources of the Community legislation. As held by ECJ in the Judgment of 8 April 1976 in case 48/75, *Jean Noel Royer*: “*The Member States are consequently obliged to choose, within the bounds of the freedom left to them by Article 189, the most appropriate forms and methods to ensure the effective functioning of the directives, account being taken of their aims.*”

In this regard, it is necessary to apply the teleological interpretation and the doctrine of effectiveness when interpreting the obligation to assess the fulfilment of conditions stated in Article 33 of the CCS Directive.

Consequently, even though no detailed requirements are set forth concerning the quality, method, expertness or other requisites of such assessment, in light of the doctrine of effectiveness, it is clear that this **assessment must be made objectively, expertly, properly, thoroughly and timely. Timely means that if possible it should be definitely made before the most important administrative decisions, finally determining parameters, form or location of the combustion plant, are issued. Any other interpretation would go against the doctrine of effectiveness and the sense and objectives of the CCS Directive.**

At the same time, in line with the aforementioned judgement of the ECJ in case 48/75, **it is up to the Member States to ensure** that the conditions stated in Article 33 of the CCS Directive will be assessed objectively, expertly, properly and thoroughly, that is “effectively”.

d) Comparative interpretation

It is also possible to use the comparative interpretation (*analogia iuris*) with regards to other “assessments” recognized by the EC environmental legislation.

Actually, there is especially the environmental impact assessment pursuant to the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as amended (thereinafter “the EIA Directive”) in place. The EIA Directive contains detailed description of the parameters of the environmental impact assessment. In view of the common aim of both directives (the EIA Directive and the CCS Directive) which is the protection of the environment and, in this respect, limitation of adverse effects of combustion plants, it is possible to compare assessment required by Article 33 of the CCS Directive with the environmental impact assessment described in the EIA Directive.

The interpretation of the term assessment can be done with the help of Article 3 of the EIA Directive. This Article describes environmental impact assessment, but it can be partly considered as a “guideline” of how the assessment pursuant to Article 33 of the CCS Directive should be made. According to the Article 3 of the EIA Directive: “*The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors ...*”

The EIA Directive also requires that the public be properly informed about the whole assessment (Article 6 para. 2 and 3 of the EIA Directive) and the public concerned be given **early and effective opportunities to participate** in the environmental decision-making procedures and, for that purpose, be **entitled to express comments and opinions when all options are open** to the competent authority or authorities before the decision on the request for development consent is taken (Article 6 (4) of the EIA Directive). Further, members of the public concerned should be given access to a review procedure

before a court of law or other impartial and independent body (Article 10a of the EIA Directive).

Moreover, according to the first sentence of the Article 6 Section 1 of the EIA Directive it should be ensured that: *“the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent.”*

Although the EIA Directive sets for the rules concerning one particular type of assessment, based on the comparative interpretation, we can apply the standards, principles and general rules also to the assessment pursuant to Article 33 of the CCS Directives.

Requirements for the assessment which is made in compliance with Directive 2008/01/EC concerning integrated pollution prevention and control (codified version, thereafter the “IPPC Directive”) before getting the permit are similar, as the Directive also requires the Member States to ensure that the public concerned is given effective opportunities to participate in the assessing procedure (Article 15 Section 1 of the IPPC Directive) and also the access to review procedure (Article 16 Section 1 of the IPPC Directive).

2. Timing - relation between the CCS Directive and the EIA Directive (CCS assessment as an integral part of the environmental impact assessment)

Pursuant to Article 4 (1) of the EIA Directive in connection with point 2 of Annex I to the EIA Directive, thermal power stations and other combustion installations with a heat output of 300 megawatts or more, should be made subject to the environmental impact assessment.

Pursuant to Article 3 of the EIA Directive, the environmental impact assessment should identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- material assets and the cultural heritage;
- the interaction between the factors mentioned in the first, second and third indents.

On the grounds of Article 5 of the EIA Directive, the information that should be provided in the course of the environmental impact assessment is defined by Annex IV to the EIA Directive. This information includes i.a. *an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project; an outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects; and a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.*

Undoubtedly, all combustion plants are large producers of carbon dioxide (CO₂) emissions which have demonstrably negative effects on the environment, especially as far as the global warming is concerned. That is why the large combustion plants are always subject to the environmental impact assessment pursuant to the EIA Directive.

The CCS Directive, in order “*to facilitate substantial reductions in emissions*”¹², amended Directive 2001/80/EC by introducing Article 33, requiring that all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or the original operating licence is granted after 25 June 2009 be subject to the assessment whether there are suitable conditions for the future carbon capture and storage, and if so, suitable space on the installation site must be set aside for the equipment necessary to capture and compress CO₂; whether the conditions are met should be determined by the competent authority on the basis of the said assessment and “*other available information, particularly concerning the protection of the environment and human health*”. As this assessment and selection of the suitable space are closely connected with the assessment of the direct and indirect effects of the combustion plant and they actually represent the measure “*envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment*” pursuant to point 5 of Annex IV to the EIA Directive, **they must necessarily be made as an integral part of the environmental impact assessment pursuant to the EIA Directive.**

Moreover, any other interpretation would be unsystematic and in breach of the doctrine of effectiveness (see above) as the purpose of Article 33 of the CCS Directive should be the proper, expert and objective assessment of conditions enabling future reduction of CO₂ emissions which can be the most appropriately made in the very course of the environmental impact assessment.¹³

3. Public participation

a) CCS assessment as an integral part of environmental impact assessment

As said above, assessment and determination of the suitable space for the “CO₂ capture installation” pursuant to Article 33 of the CCS Directive should form an integral part of the environmental impact assessment pursuant to the EIA Directive. Consequently, also the public participation should be ensured by the relevant provisions of the EIA Directive (especially Articles 6, 8 and 10).

Namely, pursuant to Article 6 (4) of the EIA Directive, the public concerned should be given early and effective opportunities to participate in the environmental decision-making procedures and should, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

Further, pursuant to Article 10a of the EIA Directive the public concerned should be given access to a review procedure before a court of law or other impartial and independent body under the condition that members of the public concerned:

- (a) have a sufficient interest, or alternatively,
- (b) maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

¹² See point 47 of the “whereas clauses” of the CCS Directive

¹³ Where the environmental impact assessment had already been made before the CCS Directive came into force there is no way how to include the assessment pursuant to Article 33 of the CCS Directive into it. Very extensively interpreted, the assessment and determination of the suitable space pursuant to Article 33 of the CCS Directive could themselves represent the project in terms of Article 1 of the EIA Directive and consequently be subject to the environmental impact assessment. In case this interpretation is not to be accepted, it would be at least necessary to apply the systematic, comparative and teleological interpretation of the term “assessment” as described above.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. However, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law should be deemed sufficient for the purpose of indent (a). Such organisations should also be deemed to have rights capable of being impaired for the purpose of indent (b).

b) Public participation on the grounds of the Aarhus Convention

Even if the CCS assessment was incorrectly made apart from the EIA procedure, the public participation may not be foreclosed. It is guaranteed at least by the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (thereinafter “the Aarhus Convention”).

The Aarhus Convention was signed by the European Community on 25 June and the Council ratified it on 17 February 2005¹⁴. In this way, the Convention **has become, as a so-called “mixed agreement”, a part of Community law**¹⁵. Since then, it is also necessary to interpret the relevant provisions of Community law in compliance with the Aarhus Convention. Therefore, it is also advisable to refer to the relevant provisions of the Aarhus Convention and findings of the Aarhus Convention Compliance Committee¹⁶ which provides a binding interpretation of the Convention.

Article 33 of the CCS Directive stipulates that operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or the original operating licence is granted after 25 June 2009 have assessed whether suitable storage sites are available, transport facilities are technically and economically feasible and it is technically and economically feasible to retrofit for CO₂ capture. If these conditions are met, which is up to the competent authority to verify, the authority should ensure that suitable space on the installation site for the equipment necessary to capture and compress CO₂ is set aside.

The obligation to determine whether the mentioned conditions are met and, in such a case, to ensure that suitable space on the installation site is set aside is therefore imposed upon the competent authority (*“the competent authority should determine on the basis of the assessment ... and other available information, particularly concerning the protection of the environment and human health”*).

Consequently, some action of public authorities is required. Presumably, some administrative act is to be issued. The very activity or administrative act has to be subject to the public control in line with Article 9 of the Aarhus Convention which guarantees the access to justice in environmental matters.

Within the scope of Article 9 of the Aarhus Convention, *“the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9,*

¹⁴ Council decision 2005/370/EC of 17 February 2005, on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters OJ L 124, 17.5.2005, p.1

¹⁵ Mixed agreements fall within both Community and Member State competence. Thus, conclusion of such an agreement requires joint exercise of Community and Member State competences and close cooperation between Member States and the Community institutions in fulfilling undertaken commitments. If a provision of a mixed agreement does fall within the scope of Community law (which is definitely the case of Article 6 of the Aarhus Convention), then such provision forms an integral part of Community law. Hence, all Member States must interpret the provision in the same way as it is required by Community law.

¹⁶ See <http://www.unece.org/env/pp/compliance.htm#Documents>

paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3)¹⁷”.

In case that the assessment and determination pursuant to Article 33 of the CCS Directive would – incorrectly – not make part to the environmental impact assessment concerning the combustion plant, such assessment and determination in themselves would not apparently represent “a permit for specific activities” in terms of Article 9 (2) and 6 of the Aarhus Convention. As the Aarhus Convention Compliance Committee stated in case relating to Belgium¹⁸: “*When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.*”

However, in such a case, **the access to justice must still be guaranteed in terms of Article 9 (3) of the Aarhus Convention.** Pursuant to Article 9 (3) of the Aarhus Convention, it should be ensured that “*where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*” The assessment and determination pursuant to Article 33 of the CCS Directive would definitely fall within the scope of “acts and omissions by private persons and public authorities which may contravene provisions of national law relating to the environment”. For further interpretation of Article 9 (3) of the Aarhus Convention please see the findings of the Aarhus Convention Compliance Committee of 28 July 2006 in the case Belgium¹⁹, where the Committee gave quite detailed and coherent interpretation of this Article.

Moreover, in accordance with Article 9 (4) of the Aarhus Convention, the procedures referred to both in paragraphs 2 and 3 of Article 9 should provide **adequate and effective remedies**, including injunctive relief as appropriate, and **be fair, equitable, timely and not prohibitively expensive**. Decisions under this article should be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, should be publicly accessible.

Hence, all these conditions should apply also to the assessment and determination of the suitable space pursuant to Article 33 of the CCS Directive.

4. Responsibility of the Member States

As results from Article 33 of the CCS Directive, it is the responsibility of the Member States to ensure that the very provision is correctly followed: “*Member States shall ensure that operators of all combustion plants with a rated electrical output of 300 megawatts or more for ... have assessed whether the following conditions are met If the conditions in paragraph 1 are met, the competent authority shall ensure that suitable space on the installation site for the equipment necessary to capture and compress CO2 is set aside. The competent authority shall determine whether the conditions are met on the basis of the assessment referred to in paragraph 1 and other available information, particularly concerning the protection of the environment and human health.*”.

¹⁷ Case: Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26

¹⁸ Ibid, para. 29

¹⁹ Case: Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 29

Consequently, it is not only the obligation to determine whether the mentioned conditions are met and, in such a case, to ensure that suitable space on the installation site is set aside which is imposed upon the Member States (or their competent authorities). They are also responsible for the quality and sufficiency of the assessments made by the operators of the combustion plants. As a whole, Member States should guarantee that:

- 1) assessments pursuant to Art. 33 of the CCS Directive are drawn up in cases prescribed by the very Directive
- 2) these assessments are drawn up in adequate manner, that is objectively, expertly, properly, thoroughly and timely (i.e. in the course of the EIA procedure, if possible), public should be involved
- 3) based on the assessments, the fulfilment of the set out conditions is thoroughly assessed, with a view to protection of the environment and human health
- 4) if the set out conditions are met, suitable space on the installation site for the equipment necessary to capture and compress CO₂ is set aside.

Where the assessment is made in an insufficient manner or e.g. where it is not made or submitted in the EIA procedure, it is up to the Member State's competent authorities to require the rectification.

5. Best practise

Although some requisites of the assessment pursuant to Art. 33 of the CCS Directive are implicit (results from the interpretation of the very provision), some guidelines presenting good practise and examples would definitely help the Member States to correctly fulfil this obligation.

ELS approached the experts from Bellona Foundation and asked them to draw up an expert study on the CCS readiness for the Šoštanj Thermal Power Plant (Unit 6) on the grounds of the documents presented by the operator as the "CCS assessment" (expert review) and to propose general methodology for evaluation of compliance with Art. 33 of the CCS Directive and progress towards full CCS Readiness (best practise).

The study is attached to the complaint. Here, we outline some of the criteria that should be assessed and dealt with in the course of the assessment pursuant to Art. 33 of the CCS Directive (for more details please see the study):

- 1. Project-specific preliminary economic analysis of capture facilities prepared.*
- 2. Economic and technical pre-feasibility study for capture element made.*
- 3. Conditions for triggering final investment decision for CCS retrofit are described (EUA price, fuel cost...)*
- 4. Indicative schedule for preparing and undertaking CCS retrofit is prepared.*
- 5. Participation of the public in the project preparation has been planned, including assessment of costs of the participation.*
- 6. Location and land footprint of capture plant, compression equipment, chemical storage facilities and exit point are planned.*
- 7. Preferred capture technologies identified.*
- 8. Preliminary design for capture facilities and their integration into the plant prepared.*

9. List of companies which can supply construction and operation services for capture facilities compiled.

10. Rights of way to access the pipeline corridor or shipping route identified and evaluated.

11. Economic and technical pre-feasibility study for transport element made.

12. Investment and operational costs assessed.

13. Preferred transport infrastructure defined (pipelines, booster stations, port facilities etc.). Feasible pipelines and/or shipping routes identified. Health and safety evaluation of transportation system done..

6. Summary

- By means of grammatical, systematic and teleological methods of interpretation which are generally applied by the European Court of Justice when interpreting the EC legislation, it is to be concluded that the assessment pursuant to Article 33 of the CCS Directive must be made objectively, expertly, properly, thoroughly and timely. Timely means that if possible it should be definitely made before the most important administrative decisions, finally determining parameters, form or location of the combustion plant, are issued. By means of comparative interpretation, it would be highly advisable if the requirements similar to those stipulated by the EIA Directive were applied. It is for instance highly advisable that the public participation is ensured.
- The assessment pursuant to Article 33 of the CCS Directive, does fall within the scope of the environmental impact assessment concerning the combustion plant in question and should be hence assessed in the course of it. This includes determining whether the conditions prescribed by Article 33 are fulfilled and ensuring that suitable space on the installation site is set aside.
- As the assessment and determination of the suitable space for the “CO₂ capture installation” pursuant to Article 33 of the CCS Directive should form an integral part of the environmental impact assessment pursuant to the EIA Directive, the public participation is to be ensured by the relevant provisions of the EIA Directive.
- Where the environmental impact assessment had already been made before the CCS Directive became effective there is no way how to include the assessment pursuant to Article 33 of the CCS Directive into it. Very extensively interpreted, the assessment and determination of the suitable space pursuant to Article 33 of the CCS Directive could themselves represent the project in terms of Article 1 of the EIA Directive and consequently be subject to the environmental impact assessment. In case this interpretation is not to be accepted, it would be at least necessary to apply the systematic, comparative and teleological interpretation of the term “assessment” as described above.
- The public participation is also guaranteed by Article 9 (3) of the Aarhus Convention. The Aarhus Convention, after being signed and ratified by the European Community, has become as a so-called “mixed agreement” a part of Community law; since then, it is also necessary to interpret the relevant provisions of the EC law in compliance with the Aarhus Convention. Subsequently, in line with Article 9 (3) of the Aarhus Convention, it should be ensured that members of the public (if they meet the criteria laid down in national law) have access to administrative or judicial procedures to

challenge the assessment and authoritative determination pursuant to Article 33 of the CCS Directive.

- It is the responsibility of the Member States to ensure that the conditions of Art. 33 of the CCS Directive are properly met. They should control if the assessments are made and if so, in what quality and extent, and as the case may be they are to require the rectification.
- Although some requisites of the assessment pursuant to Art. 33 of the CCS Directive are implicit, guidelines presenting good practise and examples would definitely help the Member States to correctly fulfil this obligation. The best practise guidelines were proposed in the Bellona Foundation study on the CCS readiness. Further, it would be highly advisable, if the Commission itself issued some guidelines concerning the best practise which would help the Member States and the operators to fulfil the conditions of Art. 33 of the CCS Directive.

C) Violation of Art. 33 of the CCS Directive in the course of the development of Šoštanj Thermal Power Plant project

1. TEŠ 6 subjected to the CCS assessment

CCS Directive came into force on 25 June 2009. Pursuant to Art. 33 of the CCS Directive, those "*combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide*" fall within its scope.

This is also the case of the proposed Unit 6 of Šoštanj Thermal Power Plant:

- a) TEŠ 6 should be of rated electrical output of 600 megawatts and
- b) the original construction licence (Construction permit) for TEŠ 6 was issued on 16/3/2011.

Consequently, the Šoštanj Thermal Power Plant (TEŠ 6) is obligatorily subject to the CCS assessment.

2. Transposition deadline in respect of Art. 33 of the CCS Directive

As it has been confirmed by the DG Climate Action, the general transposition deadline of the Directive, i.e., 25 June 2011, does not apply to Article 33. The provisions introduced by Article 33 are applicable to "*operators of all combustion plants with a rated electrical output of 300 megawatts or more for which the original construction licence or, in the absence of such a procedure, the original operating licence is granted after the entry into force of Directive 2009/31/EC*". Directive 2009/31/EC entered into force on 25 June 2009. Consequently, according to the DG Climate Action, Article 33 hence applied after, and should have been transposed by, this date (see the e-mail from DG Climate Action of 29/7/2011 10:40 am).

In this respect, the provision of Art. 33 of the CCS Directive should have been followed since 25 June 2009 in relation to the Šoštanj Thermal Power Plant project.

Moreover, not only should Art. 33 of the CCS Directive have been followed when approving TEŠ 6, it should have been transposed into the Slovenian legislation by this date.

None of these happened in the TEŠ 6 project's authorization process.

3. Violations of Art. 33 of the CCS Directive in the course of the development of the TEŠ 6 project

Article 33 of the CCS Directive was not transposed by 25 June 2009 into the Slovenian legislation. It is important to outline that the CCS Directive as a whole has not been transposed until today into the Slovenian law, though the transposition period expired.

In respect of TEŠ 6, the Slovenian competent authorities did not follow the explicit requirements of the provision of Art. 33 of the CCS Directive on the grounds of the argument that Article 33 of the CCS Directive should have been first transposed into the national legislation. We cite from the Environmental permit of 16/2/2011 issued by the Environmental Agency of the Republic of Slovenia (translated from Slovenian): *“In relation to the comment of the affected participant and public about the failure to adhere to the Directive 2009/31/EC, the addressed body (Agency for environment) explains that the directives are addressed to the member states and are not directly applicable to the state organs, courts or citizens without prior transposition to the national legislation. The addressed body did not use the cited directive in this procedure because it was not transposed to the Slovene legislation. Addressed body comments that the cited directive, including its Article 33, which relates to the change of Directive 2001/80/EV, demands additional detailing at the member state level, which consequently means that it cannot have a direct effect. In spite of this, the manager (comment of ELS: meaning TEŠ) informed the addressed body with a letter of 12 November 2010, where the manager explained its views on the comments of the public, and the affected participant at the hearing on 26 January 2011, that the manager elaborated a ‘full analysis in line with Article 33 of Directive 2009/31/EC’, which refers to carbon capture and storage, and delivered it to the Ministry of Environment on 9 October 2010, but the analysis is not a part of the application or documentation for the environmental permit and decision about fulfilling the conditions is not a subject of this administrative procedure.”*

As results from the cited text above, the investor (TEŠ) actually made a document called “CO2 Capture and storage potential of unit 6 of the Šoštanj Thermal Power Plant” that should allegedly have represented the CCS assessment.²⁰ Nevertheless, a) the content of the document does not meet the requirements of Art. 33 of the CCS Directive, b) it was submitted in the wrong stage of the permitting process and c) the competent authorities have never assessed its quality, correctness and adequacy. Consequently, the conditions of Art. 33 of the CCS Directive have not been met.

a)

The expert study on the CCS feasibility and readiness for the Šoštanj Thermal Power Plant (Unit 6) made by Bellona Foundation proves that the submitted documents **fail to comply with article 33 (1) of the CCS Directive also because of:**

- the absence of project-specific assumptions concerning economic feasibility, including lack of evaluation of economic feasibility of the capture, transport (in particular by sea) and storage;

²⁰ THERMAL POWER PLANT ŠOŠTANJ has ordered the study „CO2 capture readiness of Unit 6 in Thermal power plant ŠOŠTANJ“, that was prepared by Elektroinštitut Milan Vidmar, Ljubljana, in September 2010 as a Paper: 2034. This study is called „Addition“ and refers to previous study „CO2 capture readiness of unit 6 in Thermal power plant Šoštanj“ prepared in May 2010, that allegedly confirms that Unit 6 of Power plant Šoštanj fulfils requirements of capture readiness defined in European legislation. The document prepared in May 2010 was available only in Slovene language and both documents are attached to this complaint.

- the lack of consideration of local geographical conditions' impact on technical feasibility, in particular for building pipelines;
- the absence of any information beyond already available data from GeoCapacity on suitability of storage sites;
- the lack of consideration of the impact of protected areas and NATURA 2000 areas on transport and storage locations.

In sum, the information contained within the documents does not exhaust what can reasonably be expected under article 33.1 of the Directive. It does not allow for the assessment of the feasibility of the project – neither technical nor economic feasibility, nor the availability of suitability of storage sites.

For more details please see the attached study.

b)

The document presented by the operator was not submitted in the course of the EIA procedure – the EIA decision was issued on 11/11/2009 and the document was drawn up in May 2010²¹. As a result, direct and indirect effects of the combustion plant in question (TEŠ 6) have not been adequately and correctly assessed as requires the EIA Directive. Moreover, the public participation principles have been violated as the public could not comment on the CCS assessment document presented by the operator and could not take part in the process of its preparation.

c)

As is clear from the above cited text of the environmental permit, the Agency did not consider the submitted assessment to be a part of the application or documentation for the environmental permit (which was issued on 16/2/2011) and did not take it into account even at this advanced stage of the “permitting process”. **This is in severe breach of the requirement that the assessment is to be made timely**, i.e. before the most important administrative decisions, finally determining parameters, form or location of the combustion plant, are issued. As said above, we are persuaded that the assessment should have been made in the course of the environmental impact assessment procedure. Nevertheless, the Agency should have at least assessed the quality, correctness and adequacy of the submitted CCS assessment document in the course of the “environmental permit proceedings”. The competent authorities failed as they refused to deal with the submitted CCS assessment and, in general, to actually review the fulfilment of the conditions of Art. 33 of the CCS Directive.

To sum it up:

- The Republic of Slovenian has not transposed Art. 33 of the CCS Directive by 25 June 2009 into the national legislation. The Republic of Slovenian has neither transposed the CCS Directive as a whole by 25 June 2011.
- The assessment for the Šoštanj Thermal Power Plant (TEŠ 6) was made in breach of the requirements of Article 33 of the CCS Directive as

²¹ For more details about the „assessment studies“ prepared by the operator, please see the footnote number 21.

- the content of the document does not meet the requirements of Art. 33 of the CCS Directive and
- the document was submitted in the wrong stage of the permitting process, which i.a. averted the public participation.
- The state control obligatorily resulting from the responsibility of Member States given by Art. 33 of the CCS Directive completely failed. The Slovenian competent authorities did not require the effective rectification - right the opposite, they did not even include the incorrectly made assessment into the running proceedings on the environmental permit and persisted on the fact that TEŠ 6 did not fall into the scope of Art. 33 of the CCS Directive.

D) Request for the best practise guidelines

Due to the severe impact of the Šoštanj Thermal Power Plant (TEŠ 6) on the accomplishment of EU climate policy goals, there is urgent need of the Commission to take action. The Šoštanj Thermal Power Plant is fully owned by the Republic of Slovenia. Consequently, the Slovenia is allegedly interested in the putting in the operation of TEŠ 6.

Furthermore, the Slovenian case may recur in relation to other combustion plants in other Member States, thus it is necessary to set forth clear limits and requisites concerning the CCS assessment best practise. CCS is the strategic technology that is planned to be largely used in future in order to prevent further air pollution and related climate change. That is why the CCS assessment is important to be done correctly and sufficiently these days as regards large combustion plants in progress. For these reasons, we would like to ask the Commission, in line with the prevention principle, to give some instructions or issue guidelines concerning the CCS assessment pursuant to Art. 33 of the CCS Directive best practise. This is strongly desirable as it would avert other malpractice in connection with CCS assessments and it would largely contribute to the attainment of the aims of the CCS Directive and EU climate policy in general.

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 2009/31/EC** of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 (“the CCS Directive”)

Article 33
 - **Directive 2003/35/EC** of the European Parliament and of the Council of 26 May 2003, providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17
 - **Aarhus Convention** on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25

June 1998, done at Aarhus, Denmark *in connection with Council decision 2005/370/EC* of 17 February 2005, on the conclusion, on behalf of the European Community, of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters OJ L 124, 17.5.2005, p.1

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:

It is necessary to outline that 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 with a further EUR 100 million syndicated to commercial banks. Both the EIB and EBRD claim that the TEŠ 6 project fulfils the requirements of Art. 33 of the CCS Directive and is “CCS ready”. Nevertheless, the only document on which basis they provide these statements is the study “CO2 capture readiness of Unit 6 in Thermal power plant ŠOŠTANJ“, from September 2010 called „Addition“. ELS has repeatedly ask them for more documents or supporting evidence.

Please see the report on the web pages of the CEE Bankwatch Network: <http://bankwatch.org/sites/default/files/briefing-EBRDSostanj-May2011.pdf>.

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

- None

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:

- The European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD) were approached by ELS in the matter of the CCS readiness of TEŠ 6 and the financial support provided in relation with its construction by EIB and EBRD.
- The European Investment Bank (EIB) was also approached by Focus and the CEE Bankwatch Network (co-operating NGO) in the matter of climate targets and the priorities of the current EU climate policy with regard to the financial support provided by the EIB for the construction of the TEŠ 6.
- TEŠ 6 and the EIB financing were also subject to the parliamentary question of 13/1/2011 (E-011102/2010)

- 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):
- Comments on the process of issuing environmental permit for TEŠ 6 were submitted to the Environmental Agency of Republic of Slovenia by Focus (attached)
- 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)²²:
- Bellona Foundation's study on the CCS feasibility and readiness for the Šoštanj Thermal Power Plant (Unit 6)
 - E-mail from DG Climate Action of 29/7/2011 10:40 am
 - Možnost zajema in shranjevanja CO2 iz bloka 6 termoelektrarne Šoštanj by Elektroinštitut Milan Vidmar of May 2010
 - CO2 Capture and storage potential of unit 6 of the Šoštanj Thermal Power Plant by Elektroinštitut Milan Vidmar of September 2010
 - EIA addendum of October 2009
 - Construction permit of 16/3/2011
 - Environmental permit of 16/2/2011
 - Environmental consent of 11/11/2009
 - Comments on the process of issuing environmental permit for TEŠ 6 of 29/10/2010 by Focus
 - Parliamentary question/answer from 13/1/2010 (E-011102/2010)

²² Copies of the documents are from the operational reasons on the attached compact disc.

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:

Brno, Czech Republic, 3 October 2011

Mgr. Kristína Šabová,
lawyer of the Environmental Law Service / Responsible Energy

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