

Intermediate findings and position of the Commission for the Prevention of Corruption (hereafter: Commission)

The Commission is carrying out procedure number 242-1022/2009 with the aim of investigating suspicions of corruption, conflict of interest and other breaches of the Prevention of the Corruption Act and the Integrity and Corruption Prevention Act in relation to the TEŠ 6 project (Power Island of Block 6 of the Sostanj Power Station/Termoelektrarna Šoštanj, d.o.o.). The Commission started the procedure at the end of 2009 in line with the Prevention of the Corruption Act, valid at the time. Therefore the procedure must be finished according to this Act, which significantly limits the jurisdiction and possibilities for action of the Commission in the field of obtaining data and finding irregularities. Apart from that, a line of legal questions and interpretations is open to be settled by the other competent institutions, but those have not been responsive for years. This contributes to the length of the process. Parallel to the investigation by the Commission, a pre-trial procedure is open and the Commission must subordinate its activities to this process.

The Commission has decided to inform the Government and other institutions of the previously established facts and perceptions related to TEŠ 6 for the following reasons:

- it is urgent that the Government ensures that the relevant ministries and authorities within its jurisdiction adopt decisions, which have been delayed for several years, but are, according to the Commission, crucial for the legitimate and transparent implementation of the project and availability of public funds for TEŠ 6;
- it is essential that the Government, ministries and the Capital Assets Management Agency of the Republic of Slovenia define their position towards the reviews of the project and take appropriate measures for the correction of the anomalies and to reduce the risk for recurrence;
- the Commission (without identifying individual responsibility) clearly notes that the project, considering the huge injections of public money and the associated corruption risks and the risk for the efficient use of public funds, has been designed and implemented non-transparently, lacks supervision and is burdened with political and lobbying influences, because of which there was (and still is) high risk of corruption and conflict of interest.

The Commission emphasizes that the main purpose of this report is to warn and to appeal that any potential decision to continue the project TEŠ 6 must include both, measures to eliminate the past major and minor irregularities, as well as establishing additional mechanisms that will ensure proper monitoring, control, strict transparency and avoid conflicts of interest in the further implementation of the project.

The Commission has submitted this intermediate report to the Government and other competent authorities.

The Commission appeals to the competent authorities they should not merely follow up by adopting decisions, which would transfer the responsibility to the institutions in charge of the investigation and say 'these institutions have to find out if there were irregularities in the project'. The reason for this appeal is a fact that such procedures can last for a very long time and their outcomes cannot be predicted. The same is valid for the Commission's procedure: so far it has not been able to fully confirm or invalidate the suspicion of corruption. The fact remains, and the Commission stands firmly behind it –it is necessary to eliminate existing risks regarding the project.

The Commission explicitly highlights that it is not forming a position in regard to the economic, energy, environmental or strategic aspects of the project as it has no jurisdiction over those aspects, that, and therefore it focuses solely on the issues of corruption, conflicts of interest, unauthorized lobbying and other risks for corrupt and unethical conduct in relation to the TEŠ 6 project.

From the findings so far, the following elements arise from the procedure in connection with the TEŠ 6 project:

- suspicion of several illegal actions, which have been passed to the relevant competent body for prosecution,
- conflict of interest,
- infringement of regulations in the field of lobbying,
- neglect of official duties by individual holders of public offices, which resulted in uncoordinated action and non-responsiveness of certain public institutions.

Suspicions of illegal actions

In the process of preparing the project documentation for TEŠ 6,

- the management of TEŠ did not present all relevant and available information related to some issues to the supervisory board, so that the supervisory board could not adopt expert and legally correct decisions;
- in doing business with three different suppliers and with 10 different contracts of a total value of 2.8 million EUR, the management of TEŠ showed a lower value of the contracts in order to avoid the obtainment of otherwise requisite consent from the supervisory board;
- in the process of collecting offers for the main technological equipment, the management enabled business secrets of the SIEMENS AG consortium to be available to the competitive and finally selected company, t. i. ALSTOM;
- at the same time the supervisory board of TEŠ and the management of Holding Slovenske elektrarne (HSE d.o.o. – Holding of the Slovenian power plant companies) neglected their due diligence of supervising the management of TEŠ and issuing of guarantees.

This leads to suspicion about several illegal actions of individuals:

- Disclosure of and Unauthorised Access to Trade Secret (according to the Article 241 of the Criminal Code valid at the time)
- abuse of position or rights (according to the Article 244 "Abuse of Economic Powers" of the Criminal Code valid at the time)

For both actions a legal entity can be responsible according to point 7 of the Article 25 of the Law of Responsibility of Legal Entities for Offenses.

Because pre-trial procedures are open for the above listed offences, the Commission cannot reveal additional details at this time. The Commission has already submitted the relevant documentation to the National Bureau of Investigations and the Police Directorate Celje, while the Commission intends to propose to the Specialized State Attorney to establish a special multi-institutional group for investigation.

Conflict of interests and corruption risks

The management of TEŠ formed the main and technical commission for the implementation of the public procurement for TEŠ 6. Among its members there was also a person from CEE Inženiring, which prepared the tender. This company has an ownership link with SOL INTERCONTINENTAL, which has a business link with ALSTOM (SOL is exclusive representative of ALSTOM HRVATSKA and its business record shows that in 2008 its major suppliers were ALSTOM Switzerland and ALSTOM Hrvatska).

The management of TEŠ later on adopted a decision to establish a negotiation group to negotiate the contract on supply and installation of the main technical equipment with ALSTOM, which had a business link to CEE, which employed three members of the negotiation group (out of the 15 members).

In this way one (later selected) supplier, t. i. ALSTOM, was put into a privileged position and a real risk arose that one of the suppliers was familiar with the offer of the competitive supplier.

It remains a fact that in the period from September 2006 to October 2008 a total of 22 people and in the period from November to December 2009 a total of 18 people, among them also those three employed in CEE (which had a business link with ALSTOM), signed a statement about impartiality and confidentiality, which is supposed to suffice for impartiality and confidentiality in the process of procurement. However, the fact that the members of the commission only signed this statement is not and cannot be a sufficient guarantee that impartiality and confidentiality of the procedure could be achieved without excluding such a person. The responsible persons in TEŠ should have ensured (not only formally) that the technical commission was impartial and objective, especially, because they were familiar with the listed facts and connections among the actors in such a market (it is a relatively small market). Listed facts and connections among the actors should have been known to those that know the market (in this case - the management and supervisory board of TEŠ).

By conveying information designated as a trade secret of the non-selected supplier to the employees of a private company an opportunity arose, t. i. the involved private and legal entities had an interest that this information would reach the selected supplier. This information would have played a key role in the time of negotiation between the selected supplier and TEŠ, if the selected supplier had had complete information about the offer of the competitive supplier. This indicates a breach of Article 5 of the Law on Obligations, as the company, which is in the ownership of the state, did not respect the principle of thoroughness and

fairness when entering into contractual relationships and fulfilling the obligations arising from these relationships. This principle binds the parties of contractual relationships to respect the interests of the other party. The interest of the non-selected supplier was surely not to create any kind of circumstances, which would lead to the disclosure of its trade secrets, certainly not in the time between the start of the procedure and selecting the final supplier.

From the above described issues, elements of corrupt conducts appear, such as breaching the general principle about avoiding conflicts of interests, including a possibility of Article 40 of the Law on Economic Entities having been breached. These demands protections of data that constitute the trade secrets of a company even by people who are not part of the company, if they knew or should (according to the characteristics of the data) know that the data are a trade secret.

The Commission believes that the actions of the responsible persons, who by breaching their obligations create a possibility that data that represent a trade secret are handed to a company, which is related to a company that is a direct competitor of the company whose trade secret was revealed, matches the definition of a corrupt conduct according to the Article 2 (3) of the Prevention of the Corruption Act,. Whether this was the case in the case of TEŠ, the Commission could not fully establish because of the limitations of its jurisdiction according to the old Prevention of the Corruption Act. It is undisputed, however, that the circumstances that enabled such action and the matching consequences were created.

It has to be stressed that in this part of the procedure, the Commission is bound to adhere to the Prevention of the Corruption Act. If at that time the currently valid Integrity and Corruption Prevention Act had been valid, the Commission would have investigated the conflict of interest in the case of TEŠ 6. The members of the selection commission are not official persons according to the Integrity and Corruption Prevention Act and are not bound to adhere to the Integrity and Corruption Prevention Act, but they have to avoid conflict of interest according to general ethical standards. However, the members of TEŠ management do belong to the category of the official persons as they are the management of the entity, which structure of ownership is: 100 % Republic of Slovenia. The Commission has already expressed its position in the past, that limiting risks related to creating a conflict of interest, is not only a task for official persons in the public sector and management of public companies, but they also have to ensure that different expert opinions or the work of commissions that represent the basis for decisions on spending public funds are transparent, useful, fair and the risks of possible conflict of interest are properly managed. These criteria were not fulfilled in the case of TEŠ.

Breaching regulations in the field of lobbying and influencing legislative processes related to the project in a non-public manner

In the framework of issues related to TEŠ 6 the Commission has also examined the procedures in connection with lobbying. The Commission established that regulations on lobbying were breached in the case of the Law on the State Guarantee for TEŠ 6. In relation to this finding, the Commission has started the appropriate minor-offence procedures.

These minor-offence procedures are of lesser relevance as the Commission's systemic finding, with which the Commission ascertained that the Law on the State Guarantee for TEŠ 6 was submitted into legislative procedure in a way, which is completely in contrary with the objectives and principles of the Integrity and Corruption Prevention Act, especially related to the articles that regulate lobbying. As an example the Commission pointed out that during the supervisory procedure (and after lengthy checks and investigations among parliamentarians and the managements of relevant companies) the Commission had found out that the authors of the proposed Law on the State Guarantee for TEŠ 6 are members of the Holding of the Slovenian power plant companies - HSE.. The Commission could not determine for sure to whom in the Parliament was the proposal handed(parliamentary groups and individual MPs with whom the Commission talked, did not officially know who that person was). The so-called "legislative footprint annex" does not exist in this case or was not secured in an appropriate and transparent manner (such an annex would list all the lobbyists whom lead MPs met while a legislation was being drafted).

The Commission highlights that it does not dispute the Law on the State Guarantee for TEŠ 6 itself, nor its appropriateness or need. It is the duty of the Commission, however, to warn about the fact that the procedure of drafting the Law and its entry into the legislative procedure was not transparent and was hence in contradiction with the aims and objectives of the Integrity and Corruption Prevention Act.

Unresponsiveness of certain state institutions in implementing their duties

The documentation which the Commission gathered during the procedure shows there is an unresolved question about the status of TEŠ according to the Law on Public Procurement and that is whether TEŠ is a subject to the special regulations on public procurement or not. This status is relevant for the procedural foundation of the project as well as for the procedures of the Commission and pre-trial procedures. Finally, this status is relevant also from the perspective of respecting EU regulations. It is still unknown whether or not TEŠ is a subject to public procurement rules. This remains unknown in spite of the duty of the Ministry of Finance to decide on the status of the entity in case of doubt whether the entity fulfils the criteria for such an entity (in line with Article 3 of the Law on Public Procurement). The Commission estimates that Ministry of Finance is taking unreasonably long time to decide on this status, as the incoherence between the definition of TEŠ' status from the side of Ministry of Economy and Ministry of Finance exists since 5 February 2007 at least. Hence it is urgent that the Government engages more actively in the resolving of this question.

The Commission describes the dynamics of relationship between the Ministry of Finance and the Ministry of Economy regarding the status of TEŠ to illustrate its case:

The unclear position on TEŠ' status arises from the letter from the Minister of Economy, which was sent to the General Secretariat of the Government on 5 February 2007. In this letter the Ministry of Economy opposes to the suggestions of the Ministry of Finance on the Regulation on the List of Public Procurers, the EU regulations in this field, the List of Works and Services, obligatory information in public tender notices, technical specification descriptions and to the requirements that equipment for electronic ordering must fulfil. The Ministry of Economy opposed to the listing of 12 additional public procurers – among them also TEŠ – on the list of entities that fall under the jurisdiction of the Law on Public Procurement, with the argument that the list contains economic entities, which do not match the definition of 'public legal entity' as defined in the second paragraph of Article 3 of Law on Public Procurement. According to the interpretation of the Ministry of Economy all the entities with a status of public legal entity has to fulfil all 3 criteria, listed in the mentioned paragraph, while the mentioned 12 companies do not fulfil all 3 criteria.

The Ministry of Finance responded on 12 February 2007. In its response it establishes that by striking the producers of electricity off the list a question opens whether real competition can exist. The Ministry of Finance believes that one of the conditions to exclude an activity from the jurisdiction of the Law on Public Procurement must be that formal and real competitions exist. The Ministry of Finance says that the Law on Public Procurement prescribes a special procedure of excluding areas where formal and real competition exists. Before entering the EU, Slovenia communicated a list of generic subjects that it categorized as public procurers according to Directive 93/38/EEC of the EC and according to WTO definitions. Slovenia communicated that the Directive applies to companies, which, according to the Energy Law:

- produce electricity or
- transport electricity or
- supply electricity.

The EC has, as the letter from the Ministry of Finance explains, already summoned Slovenia to make a detailed listing of economic subjects, which implement the listed activities. The Ministry of Economy was (as the ministry that knows the economic subjects of Slovenia) asked to contribute the names of those entities.

The documentation shows that on 10 April 2007 the Ministry of Finance sent to the Ministry of Economy an appeal to obtain an opinion on whether the electricity producers fall under the Law on Public Procurement. The appeal states that the Government of Slovenia at its regular session on 15 February 2007 debated the suggested Regulation on the Lists of Public Procurers and placed a duty on the Ministry of Finance to, together with the Ministry of Economy, obtain the opinion of the EC on the status of electricity producers as public procurers according to the Law on Public Procurement. The Ministry of Finance asked the Ministry of Economy to send a suggestion for determining the status of electricity producers and suppliers to the Competition Protection Office.

The Commission is still gathering information on the sending of this suggestion to the Competition Protection Office. However, even before it has gathered this data, it has established that after the amendment of the Law on Public Procurement on 18 June 2011 it is also under the jurisdiction of the Ministry of Finance to submit a request to the Competition Protection Office to find out if an activity is directly subjected to competitive procedures. Such a request must contain the listing of activities that are believed to be directly subject to competition, and facts and evidence that support the claim and a list of legislation on the conditions for proving obligations to carry out competitive procedures.

The Commission's documentation reveals that on 26 February 2010 TEŠ received notification from the Ministry of Finance regarding the beginning of a procedure to establish the status of TEŠ. Although the Commission and other institutions urged the Ministry of Finance, it has not reached a conclusion on the status of TEŠ yet. The Commission has also not been informed whether the Competition Protection Office would issue its opinion regarding TEŠ' status, which is equally important for establishing whether or not TEŠ is subject to the public procurement regulation.

Inappropriate and insufficient response to the findings of different audits of the project

The Government produced a Report on the Construction of TEŠ 6 and on 15 March 2011 the Committee of Economy in the Parliament debated this report. The report also deals with the content of an audit of the project, which was done by PricewaterhouseCoopers (PWC). This audit highlighted a variety of irregularities in the TEŠ 6 project.

Among other things, the findings of the revision relate to the management of risks and management of the company. Another group of findings is related to the involvement of CEE. In regard to the latter group the Commission points out that it came to the same conclusions as the PWC audit, but in a separate and independent manner. Among the general findings of PWC, the report lists also 23 special findings, grouped into the following categories: investment in TEŠ 6, investment into two gas turbines, procedures for selecting certain suppliers, direct sales of electricity, investment in the telecommunication centre and management building, rewarding employees in regard with TEŠ 6 project and the system for keeping track of documents.

The Commission establishes that the listed audit findings – although they are specific, comprehensive and show serious irregularities – were not followed by appropriate measures. Furthermore, none of the responsible persons has appropriately reacted to the findings (apart from the fact that the findings became a subject of political disputes). The Government placed a duty on HSE on 14 April 2011 to act in relation to the findings. HSE studied the conclusion of the Government and established that it is not under its jurisdiction to implement the duties that the Government placed on it. HSE established that it is only obliged to follow the conclusions of the Capital Assets Management Agency and on 26 May 2011 requested the Office for Legislation to provide clarifications. This Office confirmed HSE's findings on 2 June 2011. The Commission pointed out that the response of HSE was markedly formalistic and that HSE is obliged in any case to respond to the established risks in its role as a conscientious and diligent manager in the public sector.

The Commission sent a demand to the Government on 20 December 2011 to hand over the documentation and respond to the following questions: Has the conclusion of the Government of 14 April 2011 been implemented yet? If not, has the Government implemented any measure to ensure that the conclusion is implemented?

The Government informed the Commission about its findings on 24 December 2011. It explained that there was no deadline set for the implementation of the conclusion on 14 April 2011. HSE reports regularly (quarterly), but only about the progress of the investment in TEŠ 6 and not regarding the other tasks that Government placed on it. Therefore the Government established that the conclusion was not implemented. And also the Government has not taken any measures to ensure that the conclusion are implemented. This shows an extreme lack of interest and responsibility in the findings of the audit, which is clearly in collision with the principle of diligent management of public funds.

Anti-corruption clause – Article 14 of the Integrity and Corruption Prevention Act

Since the entry into force of the Integrity and Corruption Prevention Act on 5 June 2010, all public sector bodies and organisations entering into contracts that exceed EUR 10000 (excluding VAT) with bidders, the suppliers of goods and services, or contractors shall, by taking each case into consideration, include in these contracts the content referred to in first paragraph of Article 14 of the Integrity and Corruption Prevention Act as a compulsory element of any contract. This provision is valid also for concluding contracts with bidders, suppliers or contractors outside the territory of the Republic of Slovenia.

Considering that TEŠ is a state-owned company, the Commission believes that it is liable to include the anti-corruption clause in its contacts. Even if they are not included in the individual contract, the clause is valid under the law itself and its breach can lead to invalidation of the deal.

It is a fact that the majority of the contracts in the case were concluded before the entry into force of the Integrity and Corruption Prevention Act. The breaches of the anti-corruption clause are thus not valid in this case. However, certain annexes were signed after this date, for which the anti-corruption clause was already valid, and considering the complexity of the deal, more contracts and/or annexes can be expected.

The Commission stresses this element also due to the fact that the possible established corrupt conduct (according to the Article 14 of the Integrity and Corruption Prevention Act) under the civil and criminal investigation can lead to the invalidity of the contract or annex (and not because of the breaches of the anti-corruption clause in past and future contracts, which would result in minor-offences procedures).. Considering the complexity of the project, it is not possible to fully foresee what this means, but the results will without doubt be serious. This fact additionally binds all decision-makers to a high level of care in managing and controlling the project and strategic decisions related to it. The Commission believes that this has not been demonstrated, at least not in the part related to controlling corruption risks and risks of conflict of interests.

Alleged irregularities, connected to construction and environmental permits

Media reports related to the TEŠ 6 project claim that the construction of TEŠ 6 has begun and progressed without the appropriate construction and environmental permits. According to the current findings and verifications, the Commission cannot confirm such offences.

Follow-up activities

The Commission does not have any more manoeuvring space for further independent prosecution of the matter within its jurisdiction; the reasons for this have been explained earlier in this report. However, we emphasize once again that the content procedures are concluded not because the suspicions have not been confirmed, but because of the limited jurisdiction under the old Prevention of the Corruption Act and the complexity of the case, the Commission cannot continue despite the indisputably known risks.

In the part related to the suspicions of criminal offences the Commission will offer support to the investigation and prosecution institutions and will make sure that the matter is dealt with in a holistic way and as a priority, including by establishing a specialized investigation group. The final decision will be left to the office of the public prosecutor.

Above all, the Commission will – besides further assessment of the possible breaches of the provisions under the Prevention of the Corruption Act and Integrity and Corruption Prevention Act – monitor the actions of the subjects of investigation that have according to its findings so far neglected the care to which they were obliged and have acted in contrast to the regulations, as well as to the goals and values to which all subjects from the public sector are and must be obliged.

Conclusions

The Commission has concluded that the issues related to the project are to a large extent a result of inappropriate monitoring, non-responsiveness and lack of systematic coordination and consistency among the governmental institutions. No government (since 2007) has at any stage (the design, the implementation, or even after the first complaints of irregularities became known) ensured that the positions of the Ministries of Finance and Economy have been coordinated or that legal and organizational obstacles have been eliminated. Moreover, no government – considering the fact that the project has been financed through public money and run by a state-owned company – ensured an appropriate response to the (published) results of different audits. In particular, the government has not ensured the implementation of the legal powers of the Ministry of Finance in determining the status of TEŠ, liable for special rules on public procurement, nor has the Government taken appropriate action to eliminate the irregularities and risks identified in the audits of the TEŠ 6 project. The Commission also notes that the mentioned unresponsiveness of the different governmental institutions has primarily not been a result of maltreatment by the qualified services of the Public Offices and Ministries, as it is more a result of political influence and decisions.

The Commission stresses that these findings do not prejudge possible disciplinary, criminal or other liability of individual legal or natural persons for individual actions, services or omissions. The Commission is an authority for the systematic monitoring and points out systemic risks that involve corruption, conflict of interests and the integrity of the public sector administration. Its objective findings confirm without a doubt the presence and extent of risks involved and the fact that the project has not been designed, led

and controlled by (economic categorization and invested assets) sufficient mechanisms in order to remove corruption risks and the risk of conflict of interests. When suspicions of irregularities occurred, the governmental institutions and politics acted in an uncoordinated and non-transparent manner, delaying key decisions.

Finally, the Commission stresses that the main goal of this report is to warn and appeal to decision-makers that a possible decision on the future of the project should include measures for eliminating past larger and smaller irregularities, as well as stipulate additional measures that will ensure appropriate monitoring, control, and strict transparency and avoid conflict of interests in the further implementation of the project.