



ENVIRONMENTAL LAW SERVICE



Secretary General

European Investment Bank

98-100, boulevard Konrad Adenauer

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Brno, 9 January 2012

Facts of the complaint

This complaint relates to a decision taken by the European Investment Bank to provide a loan for €550 million entitled “TEŠ – Thermal Power Plant Šostanj”¹ (hereinafter “TEŠ”) which was signed by the European Investment Bank on 27/09/2007 (for €110 million) and 22/04/2010 (for €440 million).

We would like to bring to Bank’s attention the following controversies in relation to the project of TEŠ:

1. Insubstantial allegation that the project in question is „carbon capture ready“ and that the assessment submitted by the operator fulfils the criteria set up by Directive 2009/31/EC² (hereinafter “CCS Directive”), Article 33.1.
2. Failure to comply with the relevant public procurement EU Directive³ - Public procurement for the Civil works for main technological plant of Unit 6 of the TEŠ, Invitation for tenders from 18/1/2011.
3. Questionable economic viability of the project.

1. Carbon Capture Readiness of the Unit 6 of the Šostanj Power Plant

The principle of carbon capture and storage method is to reduce CO₂ emissions from power generation from fossil fuels. At the EU level, the CCS method is regarded as one of the future effective technique for mitigation of climate change. On these grounds, the CCS Directive was adopted⁴.

Article 33.1 of CCS Directive obliges EU Member States to ensure that applicants for new thermal power stations above 300 megawatt electric capacity carry out an assessment of whether suitable CO₂ storage sites are available as well as of the technical and economic feasibility of CO₂ transport and retrofitting CO₂ capture technology, prior to the issuing of a construction permit for the power plant. There is no commonly

¹ For more information see: <http://www.eib.org/projects/pipeline/2006/20060319.htm>.

² 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.

³ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

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), further EU Climate and Energy Package http://ec.europa.eu/clima/policies/package/index_en.htm.

agreed standard for these assessments, nor exact requirements are set forth concerning the quality, method, expertness or other requisites of such an assessment.

Nevertheless, we are persuaded that essential 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 fulfil the aim and objective of Directive the assessment of the feasibility of CCS retrofit should be interpreted in a meaningful way conform with the objectives and purpose of the EU legislation. In line with the doctrine of "effectiveness", which 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", we cannot be satisfied with only the "pro forma" assessment of the CCS feasibility in the large projects such as TEŠ.

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 Art. 33. The provisions introduced by Art. 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, Art. 33 hence applied after, and should have been transposed by this date. In this respect, the provision of Art. 33 of the CCS Directive should have been followed since 25 June 2009.

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 Šostanj Thermal Power Plant:

- a) TEŠ 6 shall 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, TEŠ 6 is subject to the CCS assessment.

Obligation of the Bank to comply with the CCS Directive

As it is declared by the EIB "The Bank is an EU body, bound by EU law and committed to promoting EU policy objectives."⁵ This obligation is also established in the *Bank's Environmental and Social Practices Handbook*⁶ in which it is set out that the Bank requires all its projects to comply with EU environmental principles, standards and practices⁷ and comply with the EU environmental *Acquis* among which CCS Directive is also counted.

Furthermore, the opinion that the Bank shall follow the EU objectives and contribute to them was confirmed by the European Court of Justice in its judgement of 10.7.2003⁸, para. 102: "It is clear,...that the EIB is intended to contribute towards the attainment of the European Community's objectives.

⁵ The EIB Statement of Environmental and Social Principles and Standards, 2009, para.10, p.6.
http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf.

⁶ Version 2 of 24/02/2010, http://www.eib.org/attachments/thematic/environmental_and_social_practices_handbook.pdf.

⁷ In the case of projects outside of the EU, these obligations are applied only if it is practical and feasible.

⁸ CASE C-15/00 European Commission v European Investment Bank.

Moreover, in 2006 the Bank together with other financial institutions signed the *European Principles for the Environment* – declaration presenting a common approach to environmental management associated with the financing of their projects. On basis of this declaration the Bank shall engage with project sponsors in addressing environmental issues, thus contributing to good environmental management of the projects and sustainable development. The European Principles for the Environment are defined as the guiding environmental principles in the EC Treaty and the practices and standards incorporated in EU secondary environmental legislation. In the EU Member States, the Signatories thereby agreed to provide financing to public or private sponsors of projects only where the projects comply with the principles and the relevant secondary EU legislation.

In addition, the Bank in its *“Clean Energy for Europe: A reinforced EIB Contribution”* requires “new commercial coal/lignite power stations should use best available technology and be “carbon capture ready”. They should also be cost effective taking into account CO₂ externalities, i.e. be able to exploit CCS once that technology becomes commercially available”⁹.

Policy document *“EIB Complaints Mechanism Principles Terms of Reference and Rules of Procedure”*, February 2010, presents that when performing its activities, the Bank is bound by European Treaties and its Statute as well as by the relevant legislative and regulatory framework of the European Union. The Bank should therefore operate in order to ensure that its various activities support and implement EU policies¹⁰.

The Bank’s position on alleged CCS readiness of TEŠ

In the *Proposal from the Management Committee to the Board of Directors –TEŠ–Thermal Power Plant Šostanj: Construction of a new 600 MW power generation unit largely replacing existing outdated capacity*, point 1: “Value-added identification Consistency with the priority objectives of the EU (Pillar 1)” is stated that: “In the long run, the plant can accommodate carbon capture and sequestration, which would lead to a significant reduction of CO₂ emissions.” Further, within “Quality and soundness of the investment (Pillar 2)”: “The project is in line with the Bank’s conditions for financing of new coal/lignite power stations, as recently endorsed by the Board of Governors, because it will apply Best Available Technology (BAT), replaces existing generating capacity and can be equipped for carbon capture in the future. Furthermore, there is ample space in the vicinity of the plant for the installation of carbon capture equipment in the future, and the promoter has considered the possibility of long-term CO₂ storage locations, citing a salt formation in Austria as likely candidate site.”

Similarly, in the *Bank’s appraisal report of TES - THERMAL POWER PLANT SOSTANJ*, point 9. “Environmental impact - Key Issues” it is stated: “Furthermore, there is ample space in the vicinity of the plant for the installation of carbon capture equipment in the future, and the promoter has considered the possibility of long-term CO₂ storage locations, citing a salt formation in Austria as likely candidate site.”

In addition, there is a document on the Bank’s website available *TEŠ Power Plant and Premogovnik Coal Mine Environmental Impact Assessment Addendum*¹¹ from October 2009. In the Addendum the need for assessment of the project’s carbon capture readiness and carbon capture feasibility is addressed in Part 5: „Assessment of alternatives and whether the project is carbon capture ready and is carbon capture feasible in this area“. The document states that the „Unit 6 is designed as CCS Ready and in the spatial plans for the construction of Unit 6, there is also a location for the completion of the carbon capture technology. The modernisation project provides, next to the unit, extra space for constructing the separator unit from flue gases (CO₂ – CCS Ready), in case the future legislation should require it. All solutions related to treatment of flue gases have been prepared in view of possible upgrading of the plant“.

Via the communication with the Bank¹², we were informed that in line with EIB policy on financing new

⁹ Clean Energy for Europe: A reinforced EIB Contribution, p.4, 2007 at: http://www.eib.org/attachments/clean_energy_for_europe.pdf.

¹⁰ http://www.eib.org/attachments/strategies/complaints_mechanism_policy_en.pdf.

¹¹ http://www.eib.org/attachments/pipeline/20060319_eis_en.pdf.

¹² E-mails dated from 22/9/2011 and 7/10/2011.

coal-fired power plants, such installations must use best available technology and be considered „carbon capture ready“. The Bank has confirmed that in agreement with the Promoter’s engineers, EIB technical experts concluded that there is no physical or technical impediment to retrofitting the unit with existing post-combustion carbon capture technology.

According to the Bank, it has reviewed the “CCS study” undertaken by the Electric Power Research Institute, dated May 2010¹³, and concluded it did not adequately assess potential storage sites for the project and that it lacked the economic feasibility analyses. As a result, the promoter commissioned a second study dated September 2010¹⁴ to address these issues, which was also reviewed by the Bank. Allegedly, in the Bank’s view, and from EIB due diligence perspective, the two studies together reasonably meet the assessment conditions of the CCS Directive.

Bank stated that as regards to meeting the requirements of the CCS Directive, the Directive is not particularly prescriptive, requiring assessment of the following conditions: i) suitable storage sites are available, ii) transport facilities are technically and economically feasible, and iii) it is technically and economically feasible to retrofit for CO2 capture and that it is not the responsibility of the EIB, but rather that of the competent authority, to determine compliance.

Insufficient review and lack of standard for the CCS assessment under the Bank’s policy

We have been concerned that the studies provided by the project operator do not comply with what should be reasonably expected by the provisions of the Art. 33.1 of the Directive and we have carried out the review of these documents¹⁵. The assessment of the documents shows that the submitted documents fail to comply with Art. 33.1 of the Directive because of:

1. 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;
2. the lack of consideration of local geographical conditions’ impact on technical feasibility, in particular for building pipelines;
3. the absence of any information beyond already available data from GeoCapacity on suitability of storage sites;
4. 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 Art. 33.1 of Directive. It does not allow for the assessment of the feasibility of the project – neither technical nor economic feasibility, nor the availability of suitable storage sites, thus the project was not subject to an appropriate carbon capture readiness assessment as required under CCS Directive and therefore it is not possible to sufficiently examine the carbon capture readiness. In result, the project cannot be considered as the “carbon capture ready”.

Though, it is primarily the duty of the Slovenian authorities to ensure the compliance with the CCS Directive and Art. 33.1, we are persuaded that the Bank is under an obligation to thoroughly review and assess the

¹³ Study *CO2 Capture Readiness of Unit 6 in Thermal Power Plant Šoštanj*, Paper nr: 2034 Ljubljana, May 2010 concludes that: „The evaluation of the possibility of retrofitting carbon capture plant to the new Unit 6 of the Thermal power plant Šoštanj examines above all the space, technical, environmental and safety aspects. It passes an estimation of »capture readiness« of the new Unit 6. The study »CO2 capture readiness of Unit 6 in Thermal power plant Šoštanj« passes the estimation of the possibility of retrofitting of carbon dioxide capture plant to Unit 6 of the Thermal power plant Šoštanj. It establishes that the new Unit 6 is capture ready from the technical as well as from the space point of view. “

¹⁴ Study *CO2 Capture Readiness of Unit 6 in Thermal Power Plant Šoštanj (Addition)*, Paper nr: 2034 Ljubljana, September 2010 states that the study from May „confirms that Unit 6 of Power plant Šoštanj fulfils requirements of capture readiness defined in European legislation and that an addition to the study in greater detail analyzes availability of CO2 storage sites in Slovenia, nearby countries and North Sea, it analyses economical parameters of retrofitting carbon capture and storage technology to Unit 6 like investment cost, operational & maintenance cost, transport and storage cost.

¹⁵ CCS readiness at Šoštanj: Ticking boxes or preparing for the future? Bellona Foundation, Environmental Law Service, November 2011. http://aa.ecn.cz/img_upload/a6ff2d4939ff74268dd80e1c2102b42/Ticking_boxes_or_preparing_for_the_future_2.pdf.

submitted documents and to carefully establish the quality threshold for such assessment. The Bank shall also examine whether Slovenian legal and procedural framework comply with the CCS Directive as the CCS readiness is one of the requirements established under its own policy document "*Clean Energy for Europe*".

We consider that the Bank has failed to ensure that the TEŠ project complies with the EU legislation, thus has committed maladministration. More specifically, the Bank did not ensure that CCS Directive was properly implemented in this project. Throughout the email communication the Bank did not provide any supporting evidence which shows that the Bank carried out a review of the CCS studies submitted by the operator, neither has provided any documents in relation to the review of the assessment.

Further, the Bank should be aware of, that on the national level, Slovenian authorities had not included neither they had assessed the CCS studies during their decision-making about the project. Quoting 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."

Thus, the Slovenian authorities have not reviewed nor assessed the materials that are obligatory under the EU legislation and in our opinion the Bank shall communicate this EU requirements with them due to its general obligation to comply with the EU law and to contribute to Community policies, and secondly because CCS readiness is included in the Bank's own policies objectives and requirements for the new power plants. The Bank cannot provide support for the project that is in breach with its own policy and objectives, therefore in case the TEŠ project is not "carbon capture ready" the Bank shall not disburse the funding.

Additionally, because of the insufficient CCS assessment (specifically in relation to the economic feasibility of the CCS retrofit) it is not possible to properly assess the overall economic viability of the project in the future. Thus, the Bank shall stop its support for the project till the quality assessment is made showing that it is economically feasible and viable.

Furthermore, the Slovenian case may recur in relation to other combustion plants in other countries, 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 Bank, 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 EU legislation and EU climate policy in general.

2. Public procurement for the Civil works for main technological plant of Unit 6 of the TEŠ, Invitation for tenders from 18/1/2011

In relation to the public procurement for the projects financed by the Bank, the Bank's policy is to "ensure that its funds are used rationally, in the interests of the project it finances and in the interests of the EU. The

Bank verifies that a fair process of international tendering takes place according to procedures set out in the EIB Guide to Procurement¹⁶. The EIB Guide to Procurement establishes that in projects located within the EU, the Bank requires that the applicable EU Law on public procurement, in particular the relevant EU procurement Directives concerning competitive tendering on the basis of fair and non-discriminatory terms, has to be complied with.

As stated in the Guide, for the promoters who fall under the EU Directives on procurement, whether they are public or private institutions or companies, the Bank will take further steps during project implementation, to the extent necessary, to control compliance with applicable procurement Directives in order to ensure the rational employment of the Bank's funds, protect the soundness of the project and reduce the risks involved.

The project of TEŠ located in the EU falls under the EU Directives on procurement, particularly under the requirements of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

The Bank has been already informed¹⁷ about concern that TEŠ did not follow the procedures prescribed for awarding of public procurement by Directive 2004/17/EC during invitation for tenders for the execution of civil works for the main technological plant of the new Unit 6 from 18.1.2011 and we respectfully ask the Bank's experts to take steps during this stage and to control compliance with the procurement rules and requirements and to ensure that all public procurement calls are carried out in line with the relevant legislation. In case the call and consequently the public procurement procedure are not in compliance with the rules, the Bank shall withdraw its support.

3. Questionable economic viability of the project

During the project appraisal Bank carries out appraisal that includes Investment cost (information on project costs and its detailed components; comparison with cost of similar projects) and Profitability (information on financial profitability and related indicators, information on economic profitability). The Bank shall monitor the project during its implementation and shall ensure its compliance with the Bank's objectives and requirements.

Bank's Statute¹⁸, Article 18 states that the Bank shall ensure that its funds are employed as rationally as possible in the interests of the Union. Furthermore, the Bank may grant loans or guarantees only where, in the case of investments by undertakings in the production sector, interest and amortisation payments are covered out of operating profits,...

However, an independent analysis prepared by Dutch consultancy CE Delft¹⁹ reveals a number of unsubstantiated claims and methodological mistakes in the investment plan for the TEŠ 6 lignite plant in Slovenia²⁰. Correct calculations show that the internal rate of return is in reality lower than estimated by the project promoter. The report²¹ highlights several methodological mistakes in the calculations from the investment plan. Lignite prices, lignite consumption at TEŠ 6 after 2028 and CO2 costs have all been underestimated in the calculations made by project promoter TEŠ, while the expected demand for the electricity produced by the plant is overestimated. All of these elements have made it possible for promoter TEŠ to present the Slovenian government and potential foreign investors with a higher expected rate of return for the new block than it is in fact realistically possible.

It is also important to note, with regard to the requested state guarantee for the project, the valid Slovenian

¹⁶ <http://www.eib.org/projects/cycle/procurement/index.htm>.

¹⁷ Letter from 17/11/2011 from Ms. Živčič to Mr. Rop - Two TES 6 Complaints to the European Commission.

¹⁸ http://www.eib.org/attachments/general/statute/eib_statute_2009_en.pdf.

¹⁹ CE Delft is an independent research and consultancy organisation specialised in developing innovative solutions to environmental problems, <http://www.cedelft.eu>.

²⁰ <http://bankwatch.org/news-media/for-journalists/press-releases/independent-analysis-questions-economic-viability-tes-6>.

²¹ A critical examination of the investment proposals for Unit 6 of the Šoštanj Power Plant, Delft, November 2011, available at <http://bankwatch.org/sites/default/files/Sostanj-TEŠ6-economics.pdf>.

rules have to be respected and followed, in particular the Slovenian “Decree on the uniform methodology for the preparation and treatment of investment documentation in the field of public finance” (Official Gazette RS, No. 60/2006) that requires the expected rate of return on investments, which must exceed the 7%. In addition, with regard to the high degree of risk of the project, the Slovenian government demanded in April 2011 a rate of 9% that is in line with the sectoral policy for the energy sector²². The Bank should ensure that the project complies with the national rules set up for this kind of investments and in case it is not sufficiently proved that it is in line with these requirements, the Bank shall not provide its support.

Lastly, as already outlined above, because of the insufficient CCS assessment (specifically in relation to the economic feasibility of the CCS retrofit) it is not possible to properly assess the overall economic viability of the project in the future.

Therefore, we call for the investigation and examination of the project’s profitability and we ask for the proper assessment of economic aspects of this project.

Conclusion

In relation to this project, the complainant ask the following.

We expect the Bank to ensure the compliance of the TEŠ project with the EU legislation and the objectives of the EU Community, mainly by the review and revision of the CCS assessment delivered by the project promoter. If it is not in line with the EU legislation, the Bank shall cancel its support as otherwise it will undermine its own policy and will be in breach with the Bank’s competence. Secondly, we call for the Bank to establish the methodology and best practise guidelines on basis of which the future projects falling under the “carbon capture ready” obligation will be assessed²³.

Concerning the public procurement, we respectfully ask the Bank to review the call for tenders in relation to this project and refuse them in case they do not comply with the relevant Bank’s rules and EU legislation.

The Bank shall ensure that all the projects that it finances are economically viable and its funds are employed as rationally as possible. Therefore we are persuaded that the Bank shall review the investments plan presented by the project promoter, review the calculations and methodology used and to ensure that the proper economic estimations are applied throughout the project appraisal. The Bank shall also release the information supporting that it took into consideration all economic aspects of the project.

We thank you for examining this complaint and look forward to your response.

Yours sincerely,

Kristína Šabová

(Lawyer, Environmental Law Service)

Lidija Živcic

(Senior expert, Focus, association for sustainable development)

²² http://www.mg.gov.si/fileadmin/mg.gov.si/pageuploads/Energetika/Dokumenti/Sektorska_politika_Energetika_Final.pdf.

²³ The example of such guidance might be the Guide for preparation of flood risk management schemes, 2007, available at: http://www.eib.org/attachments/strategies/flood_risk_management_guide_en.pdf.