

Dear Sir/Madam,

With reference to the Communication of the Center for Ecology and Sustainable Development (CEKOR) Association from Subotica sent to the Aarhus Convention Compliance Committee about the second phase of the TPP Kostolac B Project for the construction of the third coal-fired block of thermal power plant Kostolac B of the installed capacity of 350 MW (hereinafter: TEKO B3) and non-compliance of the Republic of Serbia with Articles 6 and 9 of the Aarhus Convention, we herewith inform you about the following:

The relevant Communication of the CEKOR Association, which was sent to the Aarhus Convention Compliance Committee, states an opinion of the CEKOR Association that the implementation of the TEKO B3 Project is not in compliance with the provision of Article 6(4) of the Aarhus Convention, which envisages “early public participation, when all options are open and when effective public participation can take place”, and Article 6(8), which defines that “each Party shall ensure that in the decision due account is taken of the outcome of the public participation”, and/or with the provision of Article 9(4) of the Aarhus Convention, which regulates the imposition of injunctive relief that is not prohibitively expensive.

In this regard, the following text of this document shall present the position of the Republic of Serbia regarding allegations of the CEKOR Association in the part concerning the TEKO B3 Project, following the order in which the topics were presented in the Communication:

## **1. Public participation in environmental decision-making**

### **1.1. Public participation in the Environmental Impact Assessment procedure for the Project for the construction of TEKO B3 (2013)**

***A) A reply to the objection concerning the application of Article 6(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09)***

1. For the purposes of the Project for the construction of new block B3 at TTP Kostolac B, an Environmental Impact Assessment Study was conducted in December 2013, according to the Decision on the specific scope and content issued by the Ministry of Energy, Development and Environmental Protection (registered under No. 353-02-00547/2013-05 dated 17 May 2013).
2. The Study was conducted by a consortium: The Faculty of Mechanical Engineering from Belgrade and the Faculty of Mining and Geology from Belgrade
3. The Decision on the approval of the Ministry of Energy, Development and Environmental Protection (registered under No. 353-02-02191/2013-05 dated 30 December 2013) was issued following the Study.

Pursuant to the Law on Environmental Impact Assessment (“Official Gazette of the RS” No. 135/04 and 36/09), a public inspection procedure has been conducted by interested bodies and organisations and the interested public since the submission of a request for determining the scope and content of the environmental impact assessment study until the adoption of a decision on the approval of the study, including provision of information to interested bodies and organisations and the interested public about the outcome of the environmental impact assessment procedure. All activities related to public inspection and a public debate are published on the website of the Ministry of Environmental Protection as well as in at least one daily newspaper in the area that will be affected by the planned project or activity.

The request for determining the scope and content states the basic characteristics and description of the Project for the construction of TEKO B3.

By inspecting the explanation of the Decision on the specific scope and content issued by the Ministry of Energy, Development and Environmental Protection (registered under No. 353-02-00547/2013-05 dated 17 May 2013), it was concluded that the interested bodies and organisations were notified as well as the interested public and that access was provided to the data from the request for determining the scope and content of the Environmental Impact Assessment Study and project developer's documentation, in accordance with the provisions of Article 14 and relating to Article 29 of the Law on Environmental Impact Assessment ("Official Gazette of the RS" No. 135/04 and 36/09).

No objections were submitted within the legal time limit, after which the Ministry of Energy, Development and Environmental Protection of the Republic of Serbia issued a decision and determined the scope and content of the study.

In the procedure for granting an approval of the Environmental Impact Assessment Study for the Project for the construction of TEKO B3, it was stated that interested bodies and organisations as well as the interested public were notified and the Environmental Impact Assessment Study was made available through publication on the website of the Ministry of Environmental Protection of the Republic of Serbia and in a daily newspaper. A public hearing in connection with the relevant Study was conducted in the city administration of the City of Požarevac on 25 November 2013. The CEKOR Association from Subotica participated in the procedure for granting an approval and submitted objections to the relevant Study, which is stated in the explanation of the Decision on the approval of the Ministry of Energy, Development and Environmental Protection (registered under No. 353-02-02191/2013-05 dated 30 December 2013). The Technical Commission of the Ministry of Energy, Development and Environmental Protection considered the objections at the meetings held on 5 December 2013 and 27 December 2013 and expressed a positive opinion about the amended Study on 30 December 2013.

A special Contract Agreement for the Second Phase of KOSTOLAC-B POWER PLANT PROJECTS (PE EPS No. 127/26-13 dated 20 November 2013), which refers to the contracted works related to the construction of new block B3 and expansion of the capacity of Open Pit Mine (OPM) Drmno for the total agreed price of USD 715,600,000, was concluded on 20 November 2013 between PE EPS as the Ordering Party and company "Termoelektrane i Kopovi Kostolac" as the End User, on the one hand, and SMES as the Contractor, on the other hand. It became effective, i.e. entered into force on 25 May 2015 after fulfilling all the previous conditions stated in the Agreement.

In view of the above stated, it was concluded that the procedure for the public inspection of interested bodies and organisations as well as the interested public was initiated with the submission of the request for determining the scope and content on 9 April 2013 and with the publication of the communication about the inspection of the request on the website of the Ministry of Environment and in a daily newspaper, in which basic characteristics and description of the Project for the construction of TEKO B3 were stated, that the Contract Agreement was signed on 20 November 2013 and that it became effective, i.e. came into force on 25 May 2015.

In view of the above stated, it follows that the procedure for the drafting of the Environmental Impact Assessment Study and obtaining an approval of the Study was completed on 31 December 2013. It may be concluded that the procedure was executed in the period from the signing of the Contract Agreement to the date when the Contract Agreement became effective, i.e. began to apply.

Also, participation of the interested public concerned and obtaining an approval of impact assessment is not conducted in the context of the agreement, which comprehensively regulates the relationship between the party implementing the project and its contractors, but in the context of impact or environmental impact assessment (as one of project segments) and, **as such, it does not** deal with the economic justification of the project, conditions and a specific form of financial and legal structure for its implementation, etc., which means that public participation **can not be placed in the context** of the time when the project implementation agreement was concluded. It may only be observed in the context of environmental impact assessment. In that sense, the CEKOR Association should have specified which impacts of the relevant project are not satisfactory in terms of the technical solution and it is possible to discuss about it, whereas this is not the case with the relevant communication. Please also note that environmental impact assessment is a preventive environmental protection measure based on the development of studies and conducting

consultations with public participation and an analysis of alternative measures in order to collect data and predict harmful effects of certain projects on human life and health, flora and fauna, land, water, air, climate and landscape, material and cultural goods and interaction of these factors, as well as to identify and propose measures by which harmful impacts may be prevented, reduced or eliminated by taking into account the feasibility of these projects. With environmental impact assessment the execution of works is not approved, rather environmental protection measures and conditions of a certain facility are determined. Also, environmental impact assessment does not take into account economic or financial impacts, nor is the moment of signing the agreement relevant for the environmental impact assessment procedure.

The following is a brief chronology of important events related to the 2013 Study:

- On 6 May 2014, according to the lawsuit of the CEKOR Association from Subotica, an administrative dispute was initiated against the act of the ministry in charge of environmental protection, which granted approval of the Environmental Impact Assessment Study;
- On 31 December 2015, the disputed Study ceased to be valid due to the expiration of the period for which it was issued;
- In February 2016, PE EPS initiated a procedure for drafting a new Environmental Impact Assessment Study;
- On 24 June 2016, court proceedings initiated before the competent Administrative Court by the CEKOR Association from Subotica were completed with the adoption of a claim, which clearly shows that the regulations and practice of the judicial authorities of the Republic of Serbia provide legal protection in environmental protection matters.

**All of the above stated shows that there has been no violation of Article 6(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09) which stipulates that “Each Party shall provide for early public participation, when all options are open and effective public participation can take place”.**

***B) A reply to the objection about the application of Article 6(8) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09)***

The CEKOR Association points out the alleged violation of the provision of Article 6(8) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09) which stipulates that: "Each Party shall ensure that in the decision due account is taken of the outcome of the public participation", in which sense it considers that at least two building permits were issued with Decision No. 353-02-00111/2017/07 dated 14 July 2017, which allows the construction of the funnel of TEKOB3, and Decision No. 351-02-00112/2017/07 dated 14 July 2017, which allows the construction of water treatment plants on TEKOB2, respectively, contrary to the provision of the relevant Article.

Article 18 of the Law on Environmental Impact Assessment (“Official Gazette of the RS” No. 135/04 and 36/09) stipulates that “The EIA Study and approval of the EIA Study and/or the decision that states that EIA shall not be needed, shall make inseparable part of documentation that is submitted along with the application for building permit or with the notification of the commencement of the project implementation (construction, workmanship, technology change, change in business activity and other activities)”. Pursuant to this legal provision, the application for obtaining the building permit was accompanied with the final version of the Environmental Impact Assessment Study for the Project for the construction of TEKOB3, whereas the application for the registration of works was accompanied with the Decision on approval of the Environmental Impact Assessment Study, considering that the Certificate of registration of works from the competent ministry may not be obtained without previously obtaining the Decision on the approval of Environmental Impact Assessment Study. Thus, execution of works cannot be started. The entire

procedure for the registration of works according to the regulations of the Republic of Serbia was fully complied with by PE EPS.

Article 5 of the Law on Environmental Impact Assessment prescribes that the developer of a project for which impact assessment is mandatory and of a project for which need for impact assessment has been established, shall not start implementation and/or construction and realisation of the project without the approval of the EIA Study from the competent authority. Therefore, the stated provision of the Law on Environmental Impact Assessment does not prescribe that the building permit may not be issued without the approval of the competent authority for the Environmental Impact Assessment Study. Rather, it prescribes that the construction of a facility may not start without the relevant certificate.

**All the above stated shows that there has been no violation of Article 6(8) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09) which stipulates that “Each Party shall ensure that in the decision due account is taken of the outcome of the public participation”.**

### **1.2 Public participation in the procedure for the development of environmental impact assessment for the Project for the construction of TEKO B3 (2017)**

Considering that from 31 December 2015, the validity of the Approval of the Environmental Impact Assessment Study for the Project of the construction of new block B3 at HPP Kostolac B expired, a new environmental impact assessment procedure was conducted and the Decision on approval was obtained (decision No. 353-02-00124/2017-16 dated 28 September 2017).

According to the CEKOR Association, the public participation procedure began on 14 February 2017 with the publication of a request for determining the scope and content (in the text it is defined as the second environmental impact assessment) when, as further stated, "all options were no longer open, because the decision on the construction of block Kostolac B3 has already been made".

In this part, having in mind the goals and context of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09), as well as relevant national regulation, the resulting fact is that the question of project's impact on the environment and the "openness of all options", including the possibility of not implementing the project at all, may not be asked at every phase of the project life cycle, especially not if the project was initiated in accordance with the relevant national legislation, including the provisions of the Aarhus Convention, which became its integral part with ratification. Otherwise, the constant possibility for the entire project to be questioned by the interested public would be completely contrary to the principles of legitimacy, legal security, equality of participants in the procedure, as well as contrary to proclaimed goals and principles on which international organisations and environmental protection forums are based and, thus, contrary to the relevant Aarhus Convention.

In that sense, we would like to emphasise that the environmental impact assessment procedure in 2017 was conducted within the already initiated project, for which all the necessary approvals and consents of the competent authorities and institutions were obtained in accordance with the regulations of the Republic of Serbia. Also, the environmental impact assessment from 2017 was fully conducted in accordance with the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09).

**CONCLUSION: We believe that in both procedures for the drafting of the Environmental Impact Assessment Study (2013 and 2017), the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention (“Official Gazette of the RS” No. 38/09) was fully implemented.**

We would also like to point out that in the early phase of project implementation, specifically during the drafting of the planning document (which was used as a basis for the issuance of the location permit and/or location conditions that are one of the preconditions for obtaining the scope and content of the Impact Assessment Study and its drafting and adoption), the Spatial Plan for the special purpose area of the Kostolac coal basin ("Official Gazette of the RS" No. 01/2013), which was drafted in 2011 and 2012, is ensured public participation in accordance with applicable regulations of the Republic of Serbia. Namely, public inspection of the Draft Spatial Plan was conducted in the period between 6 February and 6 March 2012. During that period the interested public could inspect documents and submit written objections. A public presentation of the Draft Spatial Plan and the Strategic Environmental Impact Assessment Report was held on 22 February 2012 in Požarevac. Written objections were, among others, submitted by several associations and natural persons. After public inspection, a public session of the Commission for Public Inspection was held on 19 March 2012 in Požarevac, in which the persons making objections took an active part.

In order to have a clearer view of the above stated and the procedure for early public participation in making specific project-related decisions, we herewith provide the following chronology:

- The public participated in the procedure for the adoption of the Spatial Plan for the Special Purpose Area of the Kostolac Coal Basin with the Strategic Impact Assessment in 2011 and 2012;
- The public participated in the procedure for the adoption of the Environmental Impact Assessment Study in 2013;
- The public participated in the procedure for the adoption of the Environmental Impact Assessment Study in 2017.

In support of the above stated, we would like to point out a case from the practice of the Aarhus Convention Compliance Committee - the Case of Issuing a Waste Incineration Permit in the French City of Fos-sur-Mer (ACCC/C/2009/36). In this case, the competent administrative body made several decisions on the basis of the application for the issuance of a permit for the construction of a waste incineration plant. The first decision, made in 2003, concerns the question of whether waste incineration should be allowed as a method of waste management.

After the decision allowing waste incineration, the competent administrative body decided on the location where the plant would be built and announced a tender for contractors. In 2005, the competent administrative body selected a contractor. The concluding construction contract additionally determines the manners of handling waste in the incineration process. The public is allowed to participate only after these decisions have been made. The question that arose was whether the public is still able to participate in making this environmental decision? Is the public involved in the decision-making process too late, at a stage when it can no longer substantially influence decision-making? In 2009, the Aarhus Convention Compliance Committee issued an opinion on this occasion that, although the public is involved at a later stage, it is still able to substantially influence decision-making.

## **2. Access to Justice in environmental matters**

*A) (A reply to the objection concerning the application of Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention ("Official Gazette of the RS" No. 38/09)*

The second part of the Communication of the CEKOR Association refers to the alleged violation of the provision of Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters - Aarhus Convention ("Official Gazette of the RS" No. 38/09) which prescribes that: "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive that make their use difficult...". The text further states "that the Republic Serbia does not comply with Article 9(4) of the Aarhus Convention because it does not meet the requirements regarding injunctive relief when denying environmental permits as well as building permits for environmental impact assessment projects. It is further stated that the national legislation provides for the possibility of imposing

injunctive relief under Article 23 of the Law on Administrative Disputes, however, it is considered that the wording is limited because suspension of the execution of an administrative act may be requested only if execution would cause damage to the prosecutor, which could hardly be compensated, and the suspension is not contrary to the public interest. It is further stated that by failing to anticipate the possibility of ordering the suspension of permit issuance on the basis of potential environmental damage that could be difficult to compensate, the Serbian legal framework is not harmonised with the requirement of Article 9(4) of the Aarhus Convention.

In a reply to the objection on the application of Article 9(4) of the Aarhus Convention, we herewith state that, with the adoption of the new Law on General Administrative Procedure in 2018, a possibility that protection includes not only compensation for the damage threatening the prosecutor but also the interests for which it was engaged, including environmental protection, is prescribed by Article 44(3) which envisages that representatives of collective interests and representatives of wider public interests, engaged in accordance with regulations, may have the status of a party to administrative proceedings if the outcome of administrative proceedings may affect the interests being represented. This provision points to the application of an extended notion of party legitimacy, which includes various forms of organisation for environmental protection purposes.

One of the examples in which the court made a decision on the suspension of the execution of the disputed decision, until the adoption of a decision on the legality of that decision, which allows construction, due to the consequences which the commencement of construction works may have on the environment, may be found in the practice of the Administrative Court. The Ministry of Construction, Transport and Infrastructure issued the Decision on the building permit for preparatory works (Building permit No. 351-02-00063/2019-07) on 1 April 2019, which allows investor PE "Ski Resorts of Serbia" and co-financier the City of Belgrade to execute preparatory works for the construction of gondola station "Kalemegdan", which include the installation of a construction fence, setting up temporary installations and equipment for the execution of works, earthworks and works on the stabilisation of the terrain and securing excavations facing adjacent plots with drilled piles, all on cadastral plot number 64/17 CM Stari Grad, in the city of Belgrade. Based on the issued building permit, the competent ministry issued a certificate on the registration of the execution of preparatory works (Certificate ROP-MSGI-1317-WA-3/2019 No. 351-06-00347/2019-07) on 5 April 2019, for the construction of the gondola station in the manner defined in the described building permit. On 17 April 2019, the Renewables and Environmental Regulatory Institute (hereinafter: RERI) filed a lawsuit to the Administrative Court against the Ministry of Construction, Transport and Infrastructure, for the annulment of the issued decision on the building permit dated 1 April 2019 as being illegal, with a request to suspend the execution of the final administrative act (injunctive relief). This lawsuit is based on a series of legal arguments and evidence that the permit for preparatory works was issued illegally and that the ministry approved preparatory works without a decision on the approval of the environmental impact assessment study. On 19 April 2019, the Administrative Court issued Decision 7 U 6063/19, with which it adopted the (RERI) prosecutor's request and postponed the execution of the decision of the Ministry of Construction, Transport Infrastructure No. 351-02-00063/2019-07 dated 1 April 2019 until the adoption of a court decision. This means that the Administrative Court, evaluating the submitted arguments and evidence, adopted RERI's request for the suspension of the execution of the decision. RERI's request was based on Article 23 of the Law on Administrative Disputes, which prescribes that, at the request of the prosecutor, the court may suspend the execution of the final administrative act that was used to judge on its own merits in an administrative matter, until a court decision has been made, if the execution would cause damage to the prosecutor, which would be difficult to compensate, and the suspension is not contrary to the public interest, nor would the suspension cause greater or irreparable damage to the opposing party and/or to the interested

person. In the relevant case, the Administrative Court concluded that the prosecutor's request was founded, that the cumulatively prescribed conditions referred to in Article 23(2) of the Law on Administrative Disputes for the suspension of the execution of the relevant decision have been met, and it especially pointed out that, having in mind that relevant preparatory works should be performed on immovable cultural property of exceptional importance, according to the court, the execution of the decision (building permit) would cause damage to wider public interests for whose protection the prosecutor was engaged in accordance with regulations, which could be difficult to compensate, and the suspension is not contrary to the public interest, nor would the suspension cause irreparable damage to the opposing party. The lawsuit before the Administrative Court and the decision of the Administrative Court stopped continuation of the implementation of the Ušće - Kalemegdan gondola project. This Decision of the Administrative Court is not final. The final judgment is pending. What we can conclude with certainty is that in this case the application of available legal remedies was one of the important factors that enabled the protection of the public interest and environment and preserved the Belgrade Fortress.