TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY
represented by the Presidency and the Vice-Presidency of the Energy Community

In case ECS-1/15, the Secretariat of the Energy Community against Bosnia and Herzegovina, the

ADVISORY COMMITTEE,

composed of
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 32 of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended on 16 October 2015 ('Dispute Settlement Rules 2015'),

acting unanimously,

gives the following

# OPINION

## I. Procedure

By e-mail dated 28 May 2018 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-1/15 against Bosnia and Herzegovina. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Bosnia and Herzegovina failed to fulfil its obligations arising from Energy Community law. The Secretariat argues that by failing to carry out the environmental impact assessment in case of the planned thermal power plant Ugljevik 3 fully in compliance with Article 3, of points (b), (c) and (d) of Article 5(3) and of Article 7 of Directive 2011/92/EU, Bosnia and Herzegovina failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

Bosnia and Herzegovina did not submit a reply to the Reasoned Request within the deadline ending 28 July 2018.

On 27 September 2018 the Advisory Committee held a public hearing in order to establish the facts, the applicable law and to perform the legal assessment.

## II. Provisions allegedly violated by the Contracting Party concerned

Article12 of the Treaty reads:

*Each Contracting Party shall implement the acquis communautaire on environment in compliance with the timetable for the implementation of those measures set out in Annex II.*

Article 16 of the Treaty as amended reads:

*The "acquis communautaire on environment", for the purpose of this Treaty, shall mean (i) Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU,*
*(ii) to (vii) […]*

Article 3 of Directive 2011/92/EU reads:

*The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:*
*(a) human beings, fauna and flora;*
*(b) soil, water, air, climate and the landscape;*
*(c) material assets and the cultural heritage;*
*(d) the interaction between the factors referred to in points (a), (b) and (c).*

Article 5(3) of Directive 2011/92/EU reads:

*The information to be provided by the developer in accordance with paragraph 1 shall include at least:*
*(a) a description of the project comprising information on the site, design and size of the project;*
*(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;*
*(c) the data required to identify and assess the main effects which the project is likely to have on the environment;*
*(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;*
*(e) a non-technical summary of the information referred to in points (a) to (d).*

Article 7 of Directive 2011/92/EU reads:

*1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:*
*(a) a description of the project, together with any available information on its possible transboundary impact;*
*(b) information on the nature of the decision which may be taken.*
*The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.*
*2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).*

*3. The Member States concerned, each insofar as it is concerned, shall also:*
*(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and*
*(b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.*
*4. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable time-frame for the duration of the consultation period.*
*5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.*

## III. Facts

The case regards the intended construction of a large thermal power plant with an electric power of 600 MWe, using locally mined lignite in the municipality of Ugljevik in the Republika Srpska entity of Bosnia and Herzegovina (further: TTP Ugljevik 3). TTP Ugljevik 3 is to be constructed by a private investor named Comsar on the location of an existing combustion power plant Ugljevik 1. However, it is not a substitute for the existing power plant.

TTP Ugljevik 3 falls within the requirements to perform an Environmental Impact Assessment (further: EIA) according to the Directive 2011/92/EU and laws of Republika Srpska. It is undisputed that the applicable legal framework in the Republika Srpska entity of Bosnia and Herzegovina allows for the correct implementation of the full set of provisions of Directive 2011/92/EU (further: EIA Directive). The EIA procedure was the following:

- In May 2013 the final version of the EIA study for TPP Ugljevik 3 was submitted for approval to the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska ;
- on July 10, 2013 the project received its EIA approval;
- on November 14, 2013 an environmental permit (ekološka dozvola) was issued to the investor for the project;
- on 31 May 2017, the Supreme Court of Republika Srpska annulled this environmental permit;
- a new environmental permit was issued on 24 July 2017, containing a justification for not including the plan for preventing large-scale accidents into the environmental permit and explaining the reasons for not including any transboundary requirements into the environmental permit. With the exception of these changes, the permit is identical to the one annulled by the Supreme Court;
- this second environmental permit is again under court review. The court has not decided yet, however this does not influence the dispute settlement procedure in the present case.

In its Reasoned Request, the Secretariat claims that Bosnia and Herzegovina failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof, by failing to carry out the environmental impact assessment in case of the planned thermal power plant Ugljevik 3 fully in compliance with Article 3, of points (b), (c) and (d) of Article 5(3) and of Article 7 of Directive 2011/92/EU. The specific failures the Secretariat claims are the following:

a. the EIA study fails to gather and assess important parts of information on emissions of greenhouse gases, and to identify, describe and assess the direct and indirect effects of the project on climate; thus Article 3 of Directive 2011/92/EU has been breached;
b. there is erroneous and self-contradictory information on certain other pollutant gas emissions provided by the developer in the EIA study, which make impossible the proper assessment of the direct in indirect effects of the planned installation; this again amounts to a breach of Article 3 of Directive 2011/92/EU;
c. the Secretariat submits that in the EIA study there is insufficient description of the measures envisaged to avoid and mitigate the significant adverse effects of greenhouse gas emissions, there are insufficient data to identify and assess the main effects which the project is likely to have on the environment and that there is no proper consideration of the alternatives; thus, the Bosnia and Herzegovina authorities failed to correctly implement the provisions of points (b), (c) and (d) of Article 5(3) of Directive 2011/92/EU;
d. during the EIA process, the transboundary effects of the project were not assessed properly and the authorities of Bosnia and Herzegovina did not decide to involve the neighbouring countries, namely The Republic of Croatia and the Republic of Serbia, in the EIA process; the authorities of these two countries were notified only after the EIA procedure was concluded on request of these authorities; this represents breach of the Article 7 of Directive 2011/92/EU.

Bosnia and Herzegovina presented three responses to the submissions of the Secretariat, namely:

1. First response of September 11, 2017 to the Opening Letter;
2. Second response of October 3, 2017 to the Opening Lette;r
3. Response of May 15, 2018 to the Reasoned Opinion.

There has been no response to the Reasoned Request.

In their responses, the Bosnia and Herzegovina authorities state, that:

- the environmental impact assessment study was prepared according to the law and regulations of Republika Srpska, which “constitutes a legal framework enabling the proper implementation of the provisions of the Directive 2011/92/EU to which the compliant refers to”;
- the study did not identify any transboundary effects of the project, therefore the neighbouring countries were not involved. Also, these countries did not request such involvement during the EIA procedure;
- the emissions of greenhouse gases are estimations, based on the design solutions of the developer. In their view, all opinions and assumptions about emissions and pollution from the thermal power plant are theoretical assumptions while the actual situation is reflected after the plant is put into operation when regular monitoring is carried out and when all environmental pollution systems are revised and corrected;
- in December 2014, the Croatian authorities were notified “with a reasoned environmental impact assessment procedure” and that there are no open issues with the Republic of Croatia. Also, in 2017 the authorities of Republic of Serbia requested information on the project concerned electronically. The answer was made and sent by the Bosnia and Herzegovina authorities to Republic of Serbia, also electronically. After that, there were again no open issues with Republic of Serbia regarding the thermal power plant Ugljevik 3 project.

Considering the provided documents and after hearing the case on the public hearing on 27 September 2018 the Advisory Committee finds the relevant facts to be the following:

a. Regarding the first claim, the Advisory Committee finds the fact that EIA study does not include any quantification of greenhouse gas emissions to be established. This has been confirmed by a statement of the representative of Bosnia and Herzegovina on the public hearing. Even if additional calculations of $CO_2$ emissions were indeed prepared later, they were not part of the EIA study and were not considered in issuing EIA approval. Also, due to this the EIA study lacks clear investigation and assessment of the impact of these emissions on climate and climate change. General statements in the EIA study and the replies in the preliminary procedure on the links between fossil fuels and climate change do not represent such an assessment.
b. Regarding the second claim, the Advisory Committee has no doubts that the mathematical calculations in the Reasoned Request, showing the erroneous and misleading statements on some other pollutant gas emissions (namely sulphur dioxide, nitrogen oxides and particles), are correct. Bosnia and Herzegovina has not proven otherwise, neither during the preliminary procedure nor on the public hearing. Following this, the impact of the direct and indirect effects of the project on the environment regarding the emissions of these gases were not assessed with required degree of reliability.
c. Regarding the third claim, the Advisory Committee finds:
    - It is undisputed that the EIA study and the following administrative decisions do not contain any measures to mitigate the adverse effects of the project on climate change. The statement in the EIA study that "in accordance with obligations of Bosnia and Herzegovina in relation to reduction of emission of gases with greenhouse effect, TPP Ugljevik 3 will have to, in the following period, participate in obligations that must be fulfilled at the state level" does not constitute an identification and description of mitigating measures.
    - Emissions of wastewaters in the watercourses in the area of TPP Ugljevik 3 were not established and their effects not investigated and assessed in the EIA study. There are no assessments of additional emissions of wastewaters in these rivers and of their impact on the environment, particularly given the fact that the EIA study finds the river Mezgraja to be of visibly poor quality even presently. Subsequent statements on wastewater treatment, which will result in its reuse, which were presented on the public hearing, do not rectify these omissions in the EIA study.
    - It is not disputed that the EIA study does not give proper consideration to the alternatives of the project. Bosnia and Herzegovina stated on the public hearing that development of the EIA Study was preceded by the development of the Economic Feasibility Study with Elements of Environmental Protection, where certain alternative solutions for construction of the power plant were considered. The Advisory Committee finds that this Economic Feasibility Study was not part of the EIA procedure and not available to the public and that it cannot be considered to be adequate consideration of the alternatives to the project in the EIA procedure.
d. It is undisputed that the EIA study did not provide indications of significant transboundary effects on the environment of neighbouring countries, and that the neighbouring countries were not involved during the environmental impact assessment procedure. Later actions of authorities of Republika Srpska informing the Republic of Croatia and Republic of Serbia of the project cannot rectify these omissions.

## IV. Legal Assessment

The Advisory Committee considers that the position of the Secretariat, following which the present case is to be assessed in relation to the Directive 2011/92/EU, is correct. This directive became part of the Energy Community law on October 14, 2016 by Ministerial Council Decision 2016/12/MC-EnC, which repealed Directive 85/337/EEC and replaced it with Directive

2011/92/EU in the Energy Community and amended relevant provisions of the Treaty accordingly. Although the EIA procedure in question was executed prior to this date when previous Directive 85/335/EEC has been part of the Energy Community, the breaches in question persist as of today since the environmental permit for the project, issued on July 24, 2017, is still in force. It should be taken into account that Directive 2011/72/EU is codified version of previous Directive 85/337/EEC and that provision relevant to the case are almost identical in both directives. The Court of Justice has held in a number of cases "that the Commission has standing to seek a declaration that a Member State has failed to fulfil obligations which were created in the original version of a European Union measure, subsequently amended or repealed, and which were maintained in force under the provisions of a new European Union measure." (C-52/08 Commission v Portuguese Republic paragraphs 42 and 43; C-53/08 Commission v Austria, paragraphs 131 and 132; C-365/97 Commission v Italy, paragraph 36; and some others). These failures are to be considered regarding the provisions of the new EU measure. In the present case, this means that the relevant law under which this case should be decided, is Directive 2011/92/EU.

The Advisory Committee also takes into account that this directive must be implemented in a manner which fully corresponds to its requirements, having regard to its fundamental objective which is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be the subject of an assessment with regard to their effects (C-142/07 Ecologistas en Acción-CODA v Ayuntamiento de Madrid, paragraph 33). The emphasis is on "before the consent is given". Therefore, no subsequent activities can effectively remedy omissions performed before the consent is given.

Considering this, and based on the facts of this case the Advisory Committee finds that failure on the side of the authorities of Republika Srpska:

a. to gather and assess information on quantities of greenhouse gases emissions, and to identify, describe and assess the direct and indirect effects of these emissions, and therefore of the project, on climate, represents breach of Article 3 of Directive 2011/92/EU;
b. to acquire clear and non-contradictory information on certain pollutant gas emissions from the planned installation the proper assessment of the direct and indirect effects of these emissions were not investigated and assessed in the EIA procedure, which represents breach of Article 3 of Directive 2011/92/EU;
c. to identify and describe in the EIA procedure the measures envisaged to avoid and mitigate the significant adverse effects of greenhouse gas emissions represents breach of point (b) of Article 5(3) of Directive 2011/92/EU;
d. to identify and assess the main effects which the wastewaters of the project are likely to have on watercourses represents breach of point (c) of Article 5(3) of Directive 2011/92/EU;
e. to give proper consideration to the alternatives to the project in EIA study and the whole EIA procedure represents breach of point (d) of Article 5(3) of Directive 2011/92/EU;
f. to identify and assess transboundary effects of the project properly in the EIA procedure and not to involve the neighbouring countries in this procedure represents a breach of Article 7 of Directive 2011/92/EU.

Although these were actions and omissions of the authorities of Republika Srpska, it is the State of Bosnia and Herzegovina, as a Contracting Party to the Treaty, which is responsible for ensuring the correct implementation of the provisions of Directive 2011/92/EU on the entire territory of the Contracting Party, and which is liable for breaches of Energy Community law by one of its entities. The Advisory Committee has already held that any failure of the authorities of an entity of Bosnia and Herzegovina to comply with Energy Community law has to be attributed to Bosnia and Herzegovina as Contracting Party to the Treaty (Case ECS-1/14). This position should be reiterated in the present case. Therefore, the above listed failures to

comply with the Directive 2011/72/EU are failures of Bosnia and Herzegovina as Contracting Party to the Treaty.

## IV. Conclusions

**The Advisory Committee therefore considers that by failing to carry out the environmental impact assessment in case of the planned thermal power plant Ugljevik 3 fully in compliance with Article 3, with points (b), (c) and (d) of Article 5(3) and with Article 7 of Directive 2011/92/EU, Bosnia and Herzegovina has failed to fulfil its obligations under the Articles 12 and 16 of the Energy Community Treaty.**

Done in Vienna on 6 November 2018

On behalf of the Advisory Committee

Wolfgang Urbantschitsch, President