

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

REASONED REQUEST

in Case ECS-13/16

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community ("the Treaty") and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

UKRAINE

is seeking a Decision from the Ministerial Council that Ukraine,

by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3, 4(2), 5(2), 6(2), 7, 9(2) and point (i) of point 3 of Annex II of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC and Directive 2003/35/EC ("Directive 85/337/EEC")² by the deadline set by point 1 of Annex II of the Energy Community Treaty and Article 2(1) of the Protocol concerning the Accession of Ukraine to the Treaty establishing the Energy Community, Ukraine has failed to fulfil its obligations under the Energy Community Treaty, and in particular Articles 6 and 12 thereof as well as Directive 85/337/EEC.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

1. Introduction

- (1) Directive 85/337/EEC establishes rules for the assessment of the environmental effects of public and private projects which are likely to have significant effects on the environment, including several categories of projects from the energy sector.³ In the European Union, this legislation entered into force on 3 July 1985.

¹ Procedural Act No. 2015/04/MC-EnC of 16 October 2015.

² OJ L 175, 5.7.1985, p.40.

³ Projects listed in points 1, 2, 14, 16, 20, 21 and 22 of Annex I and point 3 in Annex II of Directive 85/337/EEC.

- (2) Directive 85/337/EEC is part of the Energy Community *acquis communautaire* with the signature of the Treaty on 25 October 2005.⁴ According to point 1 of Annex II of the Treaty, the original Contracting Parties were to implement the provisions of Directive 85/337/EEC upon the entry into force of the Treaty, *i.e.* by 1 July 2006.
- (3) Ukraine acceded to the Energy Community on 1 February 2011. According to the Protocol concerning the Accession of Ukraine to the Treaty establishing the Energy Community (“the Accession Protocol”), the deadline for implementation of Directive 85/337/EEC in Ukraine was 1 January 2013.⁵

2. Legal framework in Ukraine

- (4) In Ukraine, there is no single law transposing Directive 85/337/EEC. Instead, the legislative framework in Ukraine governing environmental impact assessment consists of several pieces of primary and secondary legislation (Law on Environmental Protection,⁶ Law on Ecological Expertise,⁷ Decree on the List of Activities and Objects which Pose Increased Environmental Danger⁸ and Decree on the Approval of the Involvement of the Public to Discuss the Decisions that may Affect the Environment⁹).
- (5) The Law on Environmental Protection sets out general rules on the monitoring of emissions and other impacts on the environment¹⁰ and establishes the general obligation and objectives of the so-called state ecological expertise.¹¹ While the Law uses different terminology, the concept of state ecological expertise seems to correspond broadly to the concept of environmental impact assessment underlying Directive 85/337/EEC. A mandatory state ecological expertise is required for activities and objects of high environmental hazard, which are listed in the Decree on the List of Activities.
- (6) The Law requires that state ecological expertise is carried out by governmental bodies¹² that are designated by the Law on Ecological Expertise for this task.¹³ Furthermore, the Law requires that no project can be carried out without a positive conclusion resulting from the state ecological expertise.¹⁴ Therefore, the competent authorities for carrying out environmental impact assessments in Ukraine are the bodies designated for state ecological expertise by the Law on Ecological Expertise.
- (7) At the same time, the Law establishes the so-called public ecological expertise, whereby experts independent of the bodies designated for the so-called state ecological expertise are also allowed to carry out environmental assessments at the cost of the public organizations or local authorities requesting the application of such expertise. The conclusions of such environmental assessments can be considered by the governmental bodies responsible for state ecological expertise. This process, however, cannot replace state ecological expertise.¹⁵

⁴ Point i) of Article 16 of the Treaty.

⁵ Row 8 of Article 2(1) of the Accession Protocol.

⁶ Law No. 1264 of 25 June 1991 (version as of 4 October 2016), in the following: “Law on Environmental Protection” – ANNEX 1.

⁷ Law No. 45/95 of 9 February 1995 (version as of 18 November 2012), in the following: “Law on Ecological Expertise” – ANNEX 2.

⁸ Decree No. 808 of 28 August 2013 of the Cabinet of Ministers on the List of Activities and Objects which Pose Increased Environmental Danger, as amended by Decree of the Cabinet of Ministers No. 1160 of 30 December 2015, in the following: “Decree on the List of Activities” – ANNEX 3.

⁹ Decree No. 771 of 29 June 2011 of the Cabinet of Ministers on the Approval of the Involvement of the Public to Discuss the Decisions that may affect the Environment, in the following: “Decree on Public Participation” – ANNEX 4.

¹⁰ Articles 22 and 51 of the Law on Environmental Protection, as amended by Law No. 5456 of 16 October 2012.

¹¹ Articles 26-27 of the Law on Environmental Protection, as amended by Law No. 5456 of 16 October 2012.

¹² Article 28 of the Law on Environmental Protection, as amended by Law No. 5456 of 16 October 2012.

¹³ According to Article 13 of the Law on Ecological Expertise, state ecological expertise is organized and conducted by the environmental expert departments, specialized agencies, organizations of regional, Kyiv and Sevastopol city state administrations, and the executive body of the Autonomous Republic of Crimea for environmental protection, with the involvement of other organs of executive power.

¹⁴ Article 29 of the Law on Environmental Protection, as amended by Law No. 5456 of 16 October 2012.

¹⁵ Article 30 of the Law on Environmental Protection, as amended by Law No. 5456 of 16 October 2012.

- (8) Developers of projects can also make use of the so-called other ecological expertise, which is to be financed by the developer on a contractual basis.¹⁶ Similar to the conclusions provided by public environmental expertise, this can only influence but cannot replace state ecological expertise.
- (9) Furthermore, the Law on Environmental Protection establishes provisions for the settlement of disputes in the field of environmental protection both in a domestic and in an international context.¹⁷
- (10) The Law on Ecological Expertise establishes ecological expertise as a conclusion based on a science-based risk assessment identifying the measures to protect the environment and ensuring compliance with the applicable environmental legislation.¹⁸
- (11) The Law subjects a wide range of projects to ecological expertise¹⁹ and establishes a system by which this assessment is organized and conducted by the environmental expert departments of regional and local authorities, involving also other relevant bodies of state executive power in the process.²⁰ Developers of projects are obliged to apply for the conduct of state ecological expertise at these authorities. They operate under the supervision of the Ministry of Ecology and Natural Resources of Ukraine, which is the central authority governing state ecological expertise.²¹ The Law also sets out specific requirements for the documentation of projects subject to state ecological expertise, which must be submitted to the competent authority.²² Moreover, the Law includes provisions related to public participation in the process of ecological assessments²³ and the way decisions taken by the competent authorities can be challenged in a court of law.²⁴ The Law on Ecological Expertise also determines the general requirements by which a natural or legal person is entitled to deliver an expert opinion on environmental matters.²⁵
- (12) The Decree on Public Participation establishes procedural rules for the involvement of the public in environmental decision-making, with particular regard to environmental impact assessments.

¹⁶ Article 17 of the Law on Ecological Expertise.

¹⁷ Article 67 of the Law on Environmental Protection, as amended by Laws No. 762 of 15 May 2003 and 5456 of 16 October 2012.

¹⁸ Article 1 of the Law on Ecological Expertise.

¹⁹ Article 13(3) of the Law on Ecological Expertise, as amended by Law No. 5456 of 16 October 2012. The list of projects subject to state ecological assessment is established in the Decree on the List of Activities, which renders the following activities under its scope: thermal power plants; equipment for the production of electricity, steam and hot water heat output of 200 kW or more using fossil fuels; hydropower on rivers regardless of their power (including small hydropower); pumped storage power plants; extraction of minerals, except minerals of local importance that are extracted by land users and landowners within their land plots for domestic and household use; new construction, reconstruction, renovation and overhaul of main product pipelines (pipelines for transporting gas, ammonia, oil or chemicals); storage, processing and transportation of hydrocarbons (natural gas, gas shale strata, gas dissolved in oil, gas central-basin type, gas (methane) of coal deposits, condensate, oil, bitumen, oil, liquefied natural gas) and technical decision on gas supply of population and industry; oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and equipment for the gasification and liquefaction of coal or bituminous shale; power lines (air, cable) and substations with a voltage of 330 kV or more.

²⁰ Article 13(1)-(2) of the Law on Ecological Expertise, as amended by Laws No. 1642 of 6 April 2000, No. 1026 of 16 May 2007, No. 3038 of 17 February 2011, No 3530 of 16 June 2011 and No. 5456 of 16 October 2012.

²¹ Articles 4(5) and 4(14) of Decree No. 32 of 21 January 2015 of the Cabinet of Ministers on the Approval of the Ministry of Ecology and Natural Resources of Ukraine.

²² Article 15 of the Law on Ecological Expertise

²³ Articles 10-11 of the Law on Ecological Expertise.

²⁴ Article 44 of the Law on Ecological Expertise.

²⁵ Article 27-30 of the Law on Ecological Expertise.

II. Relevant Energy Community Law

- (13) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a Treaty obligation or to implement a Decision or Procedural Act addressed to [a Party] within the required period”. A violation of Energy Community Law occurs if “a Party fails to comply with its obligation under the Treaty if any of its measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law”.²⁶
- (14) In the following, a selection of provisions of Energy Community law relevant for the present case is compiled. This compilation is for convenience only and does not imply that no other provisions may be of relevance for the legal assessment hereto.
- (15) Article 6 of the Treaty reads:
The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community’s tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.
- (16) Article 12 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.
- (17) Article 16 of the Treaty²⁷ reads:
The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean (i) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, (...)
- (18) Article 94 of the Treaty reads:
The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities.
- (19) Point 1 of Annex II of the Treaty reads:
Each Contracting Party shall implement Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directives 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, on the entry into force of this Treaty.
- (20) Row 8 of the table in Article 2(1) of the Accession Protocol concerning the accession of Ukraine to the Energy Community reads:
For the purposes of compliance with Title II of the Treaty establishing the Energy Community and its related Annexes, the timetable for implementation of the acquis communautaire is defined as follows:

<i>Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC and Directive 2003/35/EC</i>	<i>By 1st January 2013</i>
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²⁶ Article 3(1) of the Dispute Settlement Rules.

²⁷ Article 16 of the Treaty was amended by Ministerial Council Decision D/2016/12/MC-EnC of 14 October 2016 adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community (“Decision 2016/12/MC-EnC”), replacing Directive 85/337/EEC with Directive 2011/92/EU with effect of 14 October 2016. However, as this Decision was adopted by the Ministerial Council after the initiation of the present case by the Secretariat, the present Reasoned Request is based on the provisions of Directive 85/337/EEC.

(21) Article 3 of Directive 85/337/EEC 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 11, the direct and indirect effects of a project on the following factors:

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

(22) Article 4(1) and (2) of Directive 85/337/EEC reads:

1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

Member States may decide to apply both procedures referred to in (a) and (b).

(23) Article 5(2) of Directive 85/337/EEC reads:

1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6 (1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information.

Member States may require the competent authorities to give such an opinion, irrespective of whether the developer so requests.

(24) Article 6(2) of Directive 85/337/EEC reads:

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

(25) Article 7 of Directive 85/337/EEC 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, and 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 Article 6(3)(a) and (b).

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 those authorities 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.

(26) Article 9 of Directive 85/337/EEC reads:

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

— the content of the decision and any conditions attached thereto,

— having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

— a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article. The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.

III. Preliminary procedure

- (27) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with the Energy Community Law to the attention of the Ministerial Council. Pursuant to Article 11(1) and (2) of the Dispute Settlement Procedures, the Secretariat shall carry out a preliminary procedure before submitting a Reasoned Request to the Ministerial Council with the purpose to establish the factual and legal background of cases of alleged non-compliance, and to give the Party concerned ample opportunity to be heard.
- (28) The deadline for Ukraine to transpose and implement Directive 85/337/EEC expired on 1 January 2013. Ever since then, the Secretariat pointed to the non-compliance of the existing legal framework in Ukraine with the Energy Community *acquis* on environment.
- (29) In the course of 2014 and 2015, several draft Laws on Environmental Impact Assessment were developed in Ukraine,²⁸ which the Secretariat has reviewed and to which it provided comments.²⁹
- (30) In its Annual Implementation Report of 2014, the Secretariat urged the Ukrainian authorities to proceed with the adoption of the draft Law on Environmental Impact Assessment, taking the comments of the Secretariat on board.³⁰ In its Annual Implementation Report of 2015, the Secretariat pointed out that “[d]espite the two draft Laws developed with a view to transpose the Environmental Impact Assessment Directive into national law, Ukraine still falls short of compliance with the provisions of the Directive.”³¹
- (31) In the absence of any progress on the adoption of the draft laws, the Secretariat sent an Opening Letter to Ukraine on 6 September 2016. In the Opening Letter, the Secretariat preliminarily concluded that Ukraine failed to transpose and implement certain provisions³² of Directive 85/337/EEC.³³ Ukraine has not provided any reply to the Opening Letter.
- (32) On 4 October 2016, the Verkhovna Rada (Parliament) of Ukraine adopted the Law on Environmental Impact Assessment.³⁴ In order for the Law to enter into force, it has to be signed by the President of Ukraine. On 31 October 2016, however, the President of Ukraine refused to sign the Law and referred it back to the Verkhovna Rada for reconsideration.³⁵
- (33) As the Law on Environmental Impact Assessment did not enter into force, the Secretariat issued a Reasoned Opinion on 12 January 2017, including an assessment of the grounds of the Presidential veto.³⁶
- (34) Ukraine was given two months to submit its observations on the points of fact and of law raised in the Reasoned Opinion, *i.e.* by 12 March 2017.
- (35) Ukraine did not reply to the Reasoned Opinion either. In the Verkhovna Rada, the Law on Environmental Impact Assessment was resubmitted for review to the Parliamentary Committee on Environmental Policy and the Consequences of the Chernobyl Disaster on 2 February 2017. On 15 May 2017, a version addressing the proposals of the President of Ukraine was endorsed by the Committee and was submitted to the Verkhovna Rada. However, the Law was not adopted. As the breaches identified in the Reasoned Opinion

²⁸ Registration No. 4972, 2910, 2009a and 2009a-d at the Verkhovna Rada of Ukraine.

²⁹ Comments provided on 23 July 2014 and 29 July 2015 via email, see paragraphs 16-17 of the Reasoned Opinion.

³⁰ Annual Implementation Report of the Energy Community Secretariat, 1 September 2014, p.186.

³¹ Annual Implementation Report of the Energy Community Secretariat, 1 September 2015, p. 221.

³² Articles 3, 4(2), 5, 6(1), 6(2), 7, 9, 10a, points (d) and (i) of point 3 of Annex II; Annex IV.

³³ ANNEX 5.

³⁴ ANNEX 6.

³⁵ ANNEX 7.

³⁶ ANNEX 8, paragraphs 45-56.

were thus not rectified, the Secretariat decided to refer this case to the Ministerial Council for decision.

- (36) As to the incomplete transposition of point (d) of point 3 of Annex II and Article 9(1) of Directive 85/337/EEC, which still featured in the Reasoned Opinion, the Secretariat decided to discontinue the case following an additional review of the applicable Ukrainian legislation.

IV. Legal Assessment

1. Introduction

- (37) The present Reasoned Request concerns non-compliance of Ukraine with the obligation to adopt and implement the laws, regulations and administrative provisions necessary to comply with several provisions of Directive 85/337/EEC.
- (38) As a Contracting Party to the Treaty, Ukraine is under an obligation to implement, *i.e.* to transpose into national law and to apply Directive 85/337/EC as amended by Directive 97/11/EC and Directive 2003/35/EC. For Ukraine, the deadline for adopting the laws, regulations and administrative provisions necessary to comply with Directive 85/337/EEC expired on 1 January 2013.³⁷
- (39) As a point of departure, the Secretariat notes that according to the established case-law of the Court of Justice of the European Union, while directives do not have to be transposed into national law *ad verbatim*, national measures have to ensure the full application of the provisions of a directive in a sufficiently clear and precise manner.³⁸
- (40) Furthermore, the Court of Justice of the European Union has constantly held that the scope of Directive 85/337/EEC is wide and its purpose is very broad and that this particular nature of the Directive needs to be reflected also when transposing it into national law.³⁹
- (41) Despite the fact that in Ukraine, even in the absence of a Law on Environmental Impact Assessment, there is a legal framework governing the subject matter of Directive 85/337/EC, as described above, the Secretariat found that certain articles of the Directive have not been transposed into national legislation in their entirety, while other articles have been transposed in an incorrect or incomplete manner which cannot safeguard their proper implementation in accordance with the objectives of Directive 85/337/EEC.

2. Incomplete transposition of Article 3 of Directive 85/337/EEC

a. The obligation to assess the direct and indirect impacts of the project

- (42) Article 3 of Directive 85/337/EEC establishes the purpose of an environmental impact assessment, which is the identification, description and assessment of the direct and indirect impacts of the project on a number of factors, namely human beings, fauna and flora, soil, water, air, climate, landscape, material assets, cultural heritage and the interaction between all those factors. As stated in Article 2(1) of the Directive, that assessment is to be carried out before the consent applied for to proceed with a project is given.
- (43) According to the established case-law of the Court of Justice of the European Union, the assessment obligation in Article 3 is a fundamental provision of Directive 85/337/EEC and

³⁷ Row 8 of Article 2(1) of the Accession Protocol.

³⁸ See to that effect, *inter alia*, C-363/85 *Commission v Italy*, paragraph 7; C-361/88 *Commission v Germany*, paragraph 15; C-332/04 *Commission v. Spain*, paragraph 38; C-427/07 *Commission v Ireland*, paragraphs 54-55.

³⁹ C-72/95 *Kraaijeveld and Others*, paragraphs 31, 39; C-435/97 *WWF and Others*, paragraph 40; C-2/07 *Abraham and Others*, paragraphs 32, 42; C-275/09 *Brussels Hoofdstedelijk Gewest and Others*, paragraph 29.

needs to be transposed explicitly. The transposition of the procedural provisions in Articles 4 to 11 alone cannot be regarded as automatically transposing Article 3.⁴⁰

b. The transposing Ukrainian legislation

- (44) In Ukraine, Articles 4 and 5 of the Law on Ecological Expertise defines the purpose and the main objectives of the environmental assessment carried out by the competent authorities responsible for state ecological expertise. According to the Law, the purpose of an environmental assessment is to prevent the negative impact of human activities on the “*state of the natural environment*” and human health and the assessment of environmental safety of economic activities and the ecological situation in certain areas and objects.⁴¹
- (45) Furthermore, Article 5 of the Law on Ecological Expertise defines the main objectives of an environmental assessment, referring to a science-based risk assessment, the identification of the measures to protect the environment and ensuring compliance with the applicable environmental legislation.
- (46) The factors listed by Article 3 of Directive 85/337/EEC⁴² could only be possibly addressed by the Ukrainian legislation under the umbrella term of “*state of the natural environment*”. It is not clear, however, what is the exact scope of this provision – while it may possibly be assumed that fauna and flora, soil, water and air could be covered, this is not obvious at all for climate, landscape, material assets and cultural heritage.
- (47) In that respect, the Court of Justice has consistently held that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty.⁴³ When assessing the Irish legislation meant to transpose Directive 85/337/EEC, the Court of Justice ruled that general concepts of “*proper planning*” and “*sustainable development*”, even if those encompass the criteria referred to in Article 3 of Directive 85/337/EEC, do not suffice to properly transpose the said article into national law.⁴⁴
- (48) These terms provide a similar degree of generality as “*state of the natural environment*” under the applicable Ukrainian legislation,⁴⁵ which therefore cannot be considered as fully and effectively transposing Article 3 of Directive 85/337/EEC into Ukrainian law.
- (49) Furthermore, the Ukrainian legislation does not make any reference either to the indirect effects of the project as required by the introductory wording of Article 3 of Directive 85/337/EEC, or to the cumulative effects it may have which is stipulated in the fourth indent of the same article. In that respect, the Secretariat recalls that the Court of Justice of the European Union has held that clear and precise legal obligations in the transposing national legislation on both the assessment of the direct and indirect effects of the project⁴⁶ and the assessment of its cumulative effects⁴⁷ are key for the proper transposition and implementation of Article 3 of Directive 85/337/EEC, which is considered a fundamental provision of the Directive. The Court of Justice insisted that the competent authority needs to be instructed to examine all direct and indirect impacts on the environment of the project in question when carrying out an environmental impact assessment.⁴⁸ Based on the currently applicable Ukrainian legislation, however, this cannot be guaranteed.

⁴⁰ C-50/09 *Commission v Ireland*, paragraphs 36-41.

⁴¹ Article 4 of the Law on Ecological Expertise.

⁴² Fauna and flora, soil, water, air, climate, landscape, material assets and cultural heritage.

⁴³ C-197/96 *Commission v France*, paragraph 15; C-207/96 *Commission v Italy*, paragraph 26; C-32/05 *Commission v Luxembourg*, paragraph 3; C-427/07 *Commission v Ireland*, paragraph 55.

⁴⁴ C-50/09 *Commission v Ireland*, paragraph 49.

⁴⁵ Articles 4 and 5 of the Law on Ecological Expertise.

⁴⁶ C-332/04 *Commission v Spain*, paragraphs 33-36; C-2/07 *Abraham and Others*, paragraphs 43-44; C-142/07 *Ecologistas en Acción-CODA*, paragraph 39; C-50/09 *Commission v Ireland*, paragraphs 36-40.

⁴⁷ C-404/09 *Commission v Spain*, paragraphs 78-80.

⁴⁸ C-50/09 *Commission v. Ireland*, paragraphs 36-41.

c. Conclusion

- (50) Based on the above, the provisions included in the existing Ukrainian legislation cannot be considered as sufficient for transposing the obligations stemming from the Directive. Implementation of the provisions of Article 3 of Directive 85/337/EEC thus cannot be safeguarded. Consequently, Ukraine failed to properly transpose into national law Article 3 of Directive 85/337/EEC.

3. Incomplete transposition of Article 4(2) read in conjunction with Annex II of Directive 85/337/EEC

a. The screening obligation

- (51) Network energy as defined in Article 2(2) of the Treaty covers the electricity, gas and oil sectors and related projects. Consequently, projects related to one of these sectors may fall under the scope of Directive 85/337/EEC in the Energy Community. Annex I of Directive 85/337/EEC includes a number of network energy-related projects, while point 3 of Annex II (Energy industry) also lists a number of activities that are either different from⁴⁹ or identical to the ones in Annex I but below the thresholds set therein.⁵⁰
- (52) Article 4 of Directive 85/337/EEC establishes a dual system for environmental impact assessments by requiring that in the case of projects subject to Article 4(1) and listed in Annex I, a mandatory environmental impact assessment must be carried out, while projects listed in Annex II shall undergo first a so-called screening procedure under Article 4(2) of the Directive. The objective of the screening is to decide on the necessity of a full environmental impact assessment. In case of projects subject to Article 4(2), Contracting Parties have the liberty to opt either for a case-by-case examination or for thresholds and criteria set by law and determining whether the project should undergo an environmental impact assessment.
- (53) As the Court of Justice of the European Union held, even a small-scale project can have significant effects on the environment, e.g. if it is in a location where the environmental factors set out in Article 3 of Directive 85/337/EEC, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.⁵¹

b. The transposing Ukrainian legislation

- (54) In Ukraine, Article 13(3) of the Law on Ecological Expertise provides that the implementation of the state environmental expertise is required for activities and objects of high environmental hazard, which are listed in the Decree on the List of Activities. The Ukrainian legislation does not make a difference between mandatory assessment and screening. Instead it includes most of the (network energy-related) projects that are subject to Annex I and Annex II of Directive 85/337/EEC, which requires a mandatory environmental impact assessment for all these projects. In particular, industrial installations for the production of electricity, steam and hot water (projects not included in Annex I); industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I); surface storage of natural gas; surface storage of fossil fuels; industrial briquetting of coal and lignite; installations for the processing and storage of radioactive waste (unless included in Annex I) and installations for hydroelectric energy production are included in the Decree on the List of Activities.
- (55) However, installations for the harnessing of wind power for energy production (wind farms) as requested by point (i) Annex II of Directive 85/337/EEC are not included in the Decree on the List of Activities. Wind farms are economic activities in Ukraine, and the Secretariat is

⁴⁹ E.g. point 3(c) of Annex II: Surface storage of natural gas.

⁵⁰ E.g. point 3(a) of Annex II: Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I).

⁵¹ C-392/96 *Commission v. Ireland*, paragraph 66; C-435/09 *Commission v Belgium*, paragraph 50.

aware of ongoing wind projects. Their exclusion from the Decree means that the environmental impacts of any projects related to these activities are not assessed.

c. Conclusion

- (56) Based on the above, Ukraine has failed, in relation to installations for the harnessing of wind power for energy production (wind farms), to correctly transpose into national law the provisions of Article 4(2) read in conjunction with point (i) of point 3 of Annex II of Directive 85/337/EEC.

4. Lack of transposition of Article 5(2) of Directive 85/337/EEC

a. Obligation by the competent authority for a preliminary review

- (57) Article 5(1) of Directive 85/337/EEC, with reference to its Annex IV, stipulates the information to be submitted by the developer in case an environmental impact assessment is to be carried out. In order to increase certainty for project developers, the EU and subsequently the Energy Community legislator established a procedure to enable the developer to obtain an opinion from the competent authorities on the content and extent of the information to be elaborated and supplied for the assessment.⁵² Article 5(2) of Directive 85/337/EEC requires that developers of projects must be given the right to seek and obtain an opinion of the competent authority on the information to be supplied by the developer.

b. The lack of transposing Ukrainian legislation

- (58) The existing Ukrainian legislation includes no provision establishing the right to obtain a preliminary opinion from the competent authority before submitting an application for development consent, as required by Article 5(2) of Directive 85/337/EEC. In the absence of transposing national legislation, it is also not possible to exercise the right granted by Article 5(2) of the Directive.

c. Conclusion

- (59) Based on the above, Ukraine has failed to transpose into national law Article 5(2) of Directive 85/337/EEC.

5. Lack of transposition of Article 7 of Directive 85/337/EEC

a. Obligation of transboundary environmental impact assessment

- (60) Article 7 of Directive 85/337/EEC governs cases of potential transboundary environmental impact assessment, *i.e.* when a project is likely to have significant effects on the environment in another Party to the Treaty (a Contracting Party or a Member State of the European Union). In such cases, or where a Contracting Party or Member State likely to be significantly affected so requests, that Contracting Party or Member State shall be included in the environmental impact assessment process.

b. The lack of transposing Ukrainian legislation

- (61) Article 71 of the Law on Environmental Protection provides that Ukraine participates in international cooperation in the field of environmental protection at state level in accordance with the legislation of Ukraine and international law. Article 51 of the Law on Ecological Expertise stipulates that international cooperation in the environmental impact assessment is

⁵² Recital 13 of Directive 2011/92/EU. The wording of Article 5(2) therein is identical to that of Directive 85/337/EEC.

to be carried out in accordance with international agreements. Both provisions stipulate that “if an international treaty, duly ratified by Verkhovna Rada of Ukraine, establishes other rules than those provided in the legislation of Ukraine on environmental protection, the provisions of the international treaty shall prevail”. There is no explicit obligation for the competent authorities in Ukraine to involve neighboring states in any environmental impact assessment.

- (62) Relevant international agreements applicable to transboundary environmental impact include the Espoo Convention adopted under the framework of the United Nations Economic Commission for Europe (UNECE) which deals with transboundary environmental impact assessment,⁵³ as well as the Energy Community Treaty which includes Article 7 of Directive 85/337/EEC, the provision at stake in the present case. Ukraine ratified both. While Directive 85/337/EEC transposes the Espoo Convention into European Union law, both instruments are not identical.
- (63) In the Secretariat’s view, the term “international treaty, duly ratified by the Verkhovna Rada of Ukraine” does not make it clear to which treaties and which provisions within these treaties it refers to. They may also be not entirely congruent with each other in terms of their material scope and procedures, as it is the case for the Espoo Convention and Directive 85/337/EEC, which differ e.g. in their geographical scope as well as regarding the projects covered by their scope. It is unclear what would be the consequence of Article 71 of the Law on Environmental Protection and Article 51 of the Law on Ecological Expertise if provisions of different international treaties are not identical and which provisions would prevail in such a case.
- (64) A mere reference to “international cooperation in the environmental impact assessment” and “international agreements ratified by the Verkhovna Rada of Ukraine” is also not sufficiently precise to guarantee that individuals can rely upon this provision before the competent national authorities and courts in order to maintain their right that transboundary environmental impact assessments will be carried out as required by Directive 85/337/EEC, and in particular its Article 7. Even in the European Union, where the principles of direct effect and supremacy have been explicitly recognized by the Court of Justice as part of the Union’s constitutional order, the provisions of a Directive still needs to be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty.⁵⁴
- (65) Even if Article 71 of the Law on Environmental Protection and Article 51 of the Law on Ecological Expertise contained an explicit reference to Article 7 of Directive 85/337/EEC, according to the Court of Justice, transposition of a directive by reference to it can be accepted as a valid method of transposition only when the directive in question is of a purely technical nature, meaning that it is so detailed that it does not leave any margin of discretion, it does not offer any options, nor contains any vague notion needing further precisions to be applicable.⁵⁵
- (66) This is not the case for Article 7 of Directive 85/337/EEC, which cannot be considered as not leaving any discretion, not offering any options or containing no vague notions needing further precisions to be applicable. On the contrary, Article 7 uses terms such as “as soon as possible”, “inter alia”, “reasonable time” and “may include”, which leave ample discretion to the Contracting Parties and/or require further precisions. Furthermore, Article 7(5) of the Directive sets out that the detailed arrangements for implementing Article 7 may be determined by the Contracting Parties concerned.
- (67) The Secretariat also notes that Ukraine is subject to a decision adopted by the Meeting of the Parties to the Espoo Convention, in which the Parties expressed deep concern that the respective legislative measures for the implementation of the Convention have not yet been

⁵³ Convention on Environmental Impact Assessment in a Transboundary Context (1991).

⁵⁴ See, *inter alia*, C-427/07 *Commission v Ireland*, paragraphs 54-55.

⁵⁵ Case C-311/10 *Commission v Poland*, paragraphs 49-50. Paragraphs 81 and 83 of the Advocate General's Opinion in Case C-320/13 *Commission v Poland* interprets this further and concludes that for the transposition of Article 17(3) of Directive 2009/28/EC, Poland must explicitly transpose the provisions into national law.

adopted.⁵⁶ In letters dated 20 January 2016, the Under-Secretary General of the United Nations Economic Commission for Europe also urged Ukraine to adopt the draft law with an aim to comply with the recommendations in Decision VI/2.⁵⁷ At its thirty-eighth session on 20-22 February 2017, the Implementation Committee of the Espoo Convention concluded that since the sixth session of the Meeting of the Parties in June 2014, Ukraine had not taken the necessary practical steps to bring the project into compliance with the Convention.⁵⁸

- (68) In the absence of a proper transposition of Article 7 of Directive 85/337/EEC into national legislation, it is also not possible for Ukraine to apply and to implement this provision.

c. Conclusion

- (69) Based on the above, Ukraine has failed to transpose into national law Article 7 of Directive 85/337/EEC.

6. Lack of transposition of Articles 6(2) and 9(2) of Directive 85/337/EEC

a. Obligation to involve the public in the decision-making in relation to transboundary environmental impact assessment

- (70) Article 6(2) of Directive 85/337/EEC requires Contracting Parties to involve the public early in the environmental decision-making procedures and lists the documents and information which shall be made available to the public as a minimum. Point (b) of Article 6(2) of Directive 85/337/EEC requires that Contracting Parties inform the public about the fact that the project is subject to Article 7, where relevant.
- (71) The Ukrainian legislation stipulates that developers of projects requiring a state environmental assessment shall announce this fact through mass media, making reference to the environmental effects of the project.⁵⁹ The Decree on Public Participation sets out that the public discussion includes the following elements: informing the public about the beginning of the procedure and the opportunity to take part in it; public access to the draft decision and other related necessary information; allowing the public to submit proposals (comments) to the draft decision; participation in public hearings and other forms of public discussion; review of submitted proposals (comments) by the public and information on how those were taken into account, indicating the reason; and providing information to the public on the decision.⁶⁰
- (72) Since the Ukrainian legislation does not contain provisions governing transboundary impact assessments as required by Article 7 of Directive 85/337/EEC, it cannot be considered as fully and effectively transposing and implementing Article 6(2) of Directive 85/337/EEC either. In the absence of legislation establishing a procedure for transboundary environmental impact assessments, the fact that the project is subject to such a procedure obviously cannot be made available to the public.

b. Obligation to inform the affected Contracting Party in the case of transboundary environmental impact assessment

- (73) Article 9(2) of Directive 85/337/EEC requires Contracting Parties to inform the Contracting Party affected by a project and consulted pursuant to Article 7 of a decision reached (whether it grants or refuses development consent to the project). The competent authority or

⁵⁶ Decision VI/2, adopted at the 6th session of the Meeting of the Parties (2-5 June 2014), paragraph 18 – ANNEX 9.

⁵⁷ 2016/OES/21/ENV/631 – ANNEX 10, 2016/OES/23/ENV/632 – ANNEX 11, 2016/19/ENV/630, ANNEX 12.

⁵⁸ ECE/MP.EIA/IC/2017/2, Report of the Implementation Committee on its thirty-eighth session, Geneva, 20-22 February 2017, p.5. – ANNEX 13.

⁵⁹ Article 10 of the Law on Ecological Expertise, as amended by Law No. 1642 of 6 April 2000.

⁶⁰ Article 4 of the Decree on Public Participation.

authorities shall forward the information required by Article 9(1)⁶¹ to the affected Contracting Party.

- (74) As the Ukrainian transposing legislation does not contain provisions governing transboundary impact assessment as required by Article 7 of Directive 85/337/EEC, Article 9(2) of Directive 85/337/EEC cannot be considered as transposed into Ukrainian law and implemented either.

c. Conclusion

- (75) Based on the above, Ukraine has failed to transpose into national law Articles 6(2) and 9(2) of Directive 85/337/EEC.

V. Conclusions

- (76) Under those circumstances, the Secretariat submits that by failing to transpose and implement Articles 3, 4(2), 5(2), 6(2), 7, 9(2) and point (i) of point 3 of Annex II of Directive 85/337/EEC by the deadline set by Article 2(1) of the Accession Protocol, Ukraine has failed to fulfill its obligations under Directive 85/337/EEC as well as Articles 6 and 12 read in conjunction with point (i) of Article 16 of the Treaty.

⁶¹ The content of the decision and any conditions attached thereto; an examination of the concerns and opinions expressed by the public concerned; the main reasons and considerations on which the decision is based (including information about the public participation process) and a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the project.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with point (a) of Article 91(1) of the Treaty that:

by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3, 4(2), 5(2), 6(2), 7, 9(2) and point (i) of point 3 of Annex II of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC and Directive 2003/35/EC ("Directive 85/337/EEC")⁶² by the deadline set by point 1 of Annex II of the Energy Community Treaty and Article 2(1) of the Protocol concerning the Accession of Ukraine to the Treaty establishing the Energy Community, Ukraine has failed to fulfil its obligations under the Energy Community Treaty, and in particular Articles 6 and 12 thereof as well as Directive 85/337/EEC.

On behalf of the Secretariat of the Energy Community

Vienna, 19 May 2017



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel

⁶² OJ L 175, 5.7.1985, p.40.

List of Annexes

- ANNEX 1 Law No. 1264 of 25 June 1991 on Environmental Protection (version as of 4 October 2016)
- ANNEX 2 Law No. 45/95 of 9 February 1995 on Ecological Expertise (version as of 18 November 2012)
- ANNEX 3 Decree No. 808 of 28 August 2013 of the Cabinet of Ministers on the List of Activities and Objects which Pose Increased Environmental Danger, as amended by Decree of the Cabinet of Ministers No. 1160 of 30 December 2015
- ANNEX 4 Decree No. 771 of 29 June 2011 of the Cabinet of Ministers on the Approval of the Involvement of the Public to Discuss the Decisions that may affect the Environment
- ANNEX 5 Opening Letter in Case ECS-13/16, dated 6 September 2016
- ANNEX 6 Law on Environmental Impact Assessment, as adopted by the Verkhovna Rada on 4 October 2016
- ANNEX 7 Proposals of the President of Ukraine to the Law of Ukraine “On Environmental Impact Assessment”, dated 31 October 2016
- ANNEX 8 Reasoned Opinion in Case ECS-13/16, dated 12 January 2017
- ANNEX 9 Decision VI/2, adopted at the 6th session of the Meeting of the Parties of the Espoo Convention (2-5 June 2014)
- ANNEX 10 UNECE letter to H.E. Arseniy Yatsenyuk, 2016/OES/21/ENV/631, dated 20 January 2016
- ANNEX 11 UNECE letter to H.E. Iryna Herashchenko, 2016/OES/23/ENV/632, dated 20 January 2016
- ANNEX 12 UNECE letter to H.E. Volodymyr Groysman, 2016/OES/19/ENV/630, dated 20 January 2016
- ANNEX 13 Report of the Implementation Committee of the Espoo Convention on its thirty-eighth session, Geneva, 20-22 February 2017