

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone
Email
Web

+43 (0)1 535 2222
contact@energy-community.org
www.energy-community.org

Opening Letter

in Case ECS-3/19

By the present Opening Letter, the Energy Community Secretariat (“the Secretariat”) initiates dispute settlement proceedings against Albania for non-compliance with the Treaty establishing the Energy Community (“the Treaty”), and in particular with Articles 5, 6 and 8 of Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment with amendments introduced by Directive 2014/52/EU of 16 April 2014 (“Directive 2011/92/EC”), read in conjunction with Articles 12 and 16 of the Treaty.

Under the Rules of Procedure for Dispute Settlement under the Treaty (the “Dispute Settlement Procedures”),¹ the Secretariat may initiate a preliminary procedure against a Contracting Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Articles 13 and 26 of the Dispute Settlement Procedures, the Secretariat may address a possible non-compliance by way of an Opening Letter, and shall do so if the matter was brought to its attention by way of a complaint. The present case was initiated upon complaint received on 29 February 2019 by three environmental organizations based in Albania, Austria and Germany.

I. Background

1. Domestic legal framework

Environmental impact assessment in Albania is governed the Law No 10431/2011 on Environmental Protection. That Law requires that an environmental impact assessment procedure is carried out and an environmental permit is obtained prior to the construction of a project. The procedure is governed by the Law No 10440/2011 on Environmental Impact Assessment” (“the EIA Law”), as amended in 2015. Moreover, Decision of the Council of Ministers No 13/2013 (“the 2013 Rules on EIA Procedures”) applied to the environmental impact assessment of the HPP Poçem project. Furthermore, the Decision of the Council of Ministers No 247/2014 on the determination of the rules and requirements of the procedures for information and involvement of the public in environmental decision making (“the 2014 Rules on Public Participation”) apply to the procedures subject to the present case.

Under this legislation, the Ministry of Environment is responsible for issuing environmental permits. Under the EIA Law, the Ministry of Environment, upon proposal of the National Environment Agency, also issues a decision approving the environmental impact assessment

¹ Procedural Act No 2008/01/MC-EnC of 27 June 2008, as amended by Procedural No 2015/04/MC-EnC of 16 October 2015.

report (the so-called “EIA approval” or “environmental statement”), an administrative act which closes the environmental impact assessment procedure. It is a precondition for obtaining a development permit.² The National Environment Agency (under the Ministry of Environment) is the body operationally in charge of environment impact assessment.

2. Project concerned

The case concerns the environmental impact assessment of a hydro power plant (“HPP”) project on the Vjosa river in Albania, HPP Poçem. The Vjosa (in Greek: Aoös) river runs over 272 km. It originates in the Pindus mountains (Greece), crosses Albania in the southwestern part of the country, and flows into the Adriatic Sea north of the city of Vlora.

The Vjosa river is part of the candidate Emerald site “Protected landscape of the wetland complex Vjose – Narte”, which was officially nominated by Albania in 2011. As such, it is subject to Recommendation No. 157 (2011) on the status of candidate Emerald sites and guidelines on the criteria for their nomination, and is protected by the Convention on the Conservation of European Wildlife and Natural Habitats (“the Bern Convention”), to which Albania is a Contracting Party. Whilst the Poçem and Kalivac³ HPP schemes are not within a protected area, according to the Standing Committee of the Bern Convention they could have a significant negative impact on the Vjose–Narte Protected Landscape because of alterations to the flow and sediment regimes.⁴

Furthermore, the Standing Committee of the Bern Convention, characterized the Vjosa river as home to a “*rich variety of wildlife reported to inhabit the river, the areas of the planned catchments and their terrestrial environment, including a population of the Eurasian otter (*Lutra lutra*) and many rare or endangered fish species type, such as the European eel, and various loach, salmon and sturgeon species*”. Furthermore, the Standing Committee noted that “*the Vjosa river gravel bars in the braided river reaches provide breeding habitat for many bird species, such as the stone curlew (*Burhinus oedicnemus*) and little ringed plover (*Charadrius dubius*), although population numbers and their dynamics are uncertain due to lack of systematic surveys*”

In 2016, the Standing Committee of the Bern Convention opened a case against Albania on the “*Presumed negative impact of hydro-power plant development on the Vjosa river (Albania)*”.⁵ By its Recommendation No. 202/2018 of 30 November 2018, the Standing

² Point 7 of Article 6 of the EIA Law.

³ The HPP Kalivac project is also located on the Vjosa river. While the present case addresses the environmental impact assessment procedure of HPP Poçem, HPP Kalivac is also of relevance due to geographical proximity, water usage and potential cumulative effects. Both projects are subject to the complaint procedure at Standing Committee of the Bern Convention.

⁴ Standing Committee of the Bern Convention, 38th meeting (Strasbourg, 27-30 November 2018); Case file T-PVS/Files(2018)43, p.5: <https://rm.coe.int/possible-file-presumed-negative-impact-of-hydro-power-plant-developmen/16808e85f8>

⁵Case No. 2016/5.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

 Phone
 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
 www.energy-community.org

Committee of the Bern Convention expressed its worries “*that the unique river ecosystem of the Vjosa is in immediate danger due to the planned hydro energy developments*”.⁶ The Committee recommended Albania to suspend – among others – the Poçem hydropower plant project due to compliance concerns with the Bern Convention⁷, and to develop “*a study of the potential impacts of Poçem and Kalivac HPP schemes on the sediment regime of the Vjosa River and implications for the environment as an essential requisite to a comprehensive EIA*”⁸ and to repeat “*the EIA study for the Poçem HPP project taking into account the River Basin Management Plan (...), the sediment study (...), data from NGOs and any local or indigenous knowledge*”⁹.

At its session of 3 December 2019, the Standing Committee “*urged the national authorities to implement the relevant provisions of Recommendation No. 202 (2018) and to prepare an integrated River Basin Management Plan, and strategic environmental impact assessment including social aspects, before any new development takes place in respect of the HPPs subject to the complaint. It recalled that a programme of work on the implementation of the Recommendation is still not provided by the authorities.*”¹⁰

The project developer for HPP Poçem is *Kovlu Energji sh.p.k*, a special purpose vehicle formed by two Turkish companies, the energy company *Ayen Enerji Şirketi Anonymous* and the construction company *Çinar-San Hafriyat Nakliyat Turizm Insaat San Ve Tic Ltd.Sti.*

The project is situated on the Vjosa River at the village of Poçem. The project includes a dam of 23-25 meters in height and a reservoir covering a surface of 23.5 km² with a volume of 295 million m³ of water. The installed capacity is envisaged to be 99.5 MW and the annual electricity output 305.4 GWh. The area affected includes 13 villages, namely Vllahina, Sevester, Shkoze, Dusharak, Allirajt, Dautajt, Poçem, Kuta, Krahas, Bregas, Agaraj, Banaj and Kalivaç, 2,500 hectares of land and 247 people.

The project required a mandatory environmental impact assessment under the Annex I to the EIA Law. On 18 February 2015, a notification concerning the project, together with an environmental impact assessment report drafted on behalf of the developer, was published on the website of the National Environment Agency for 20 days. A meeting with the public was organized by the developer on 28 February 2015, at which the draft environmental impact assessment report was presented. The hearing took place in the town of Fier, at a distance of over 50 km from the 13 villages concerned. The environmental impact assessment report was finalized in March 2015. On 24 April 2015, the Minister of Environment issued the EIA approval

⁶ T-PVS(2018)10; <https://rm.coe.int/recommendation-on-the-planned-hydro-power-plant-developments-on-the-vj/16808e84ee>, Recitals 6 and 7.

⁷ Point 1 of Recommendation No. 202/ 2018 of 30 November 2018.

⁸ Point 3 of Recommendation No. 202/ 2018 of 30 November 2018.

⁹ Point 5 of Recommendation No. 202/ 2018 of 30 November 2018.

¹⁰ List of Decisions and adopted texts of the 39th meeting of the Standing Committee of the Bern Convention, <https://rm.coe.int/mis-e-2019/1680992dca>, p. 10.

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 Phone
 Email
 Web

 +43 (0)1 535 2222
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 www.energy-community.org

upon the proposal of the National Environment Agency,¹¹ and following consultations with the local forestry and environmental authorities. The EIA approval lists as “*The main reasons and considerations on which this decision is based: the development of this activity does not affect or impair: Protected areas - Forest Fund - Special / vital water resources - Cult objects, cultural monuments of religious, historical, archaeological importance - The life and health of the surrounding inhabitants.*” The EIA approval also contains a number of measures required to prevent or mitigate the impact of the construction on the environment, agriculture, safety and aesthetics in the surroundings.

On 21 April 2016, a committee established by the Minister of Infrastructure and Energy selected *Kovlu Energij*, the only bidder, as the winner of a tender for a concession. On 9 May 2016, the government awarded a concession agreement to the consortium, which was signed on 5 September 2016 between the consortium and the Ministry of Energy and Infrastructure. The concession does not include a development consent or permit.

In December 2016, the complainants, together with 38 inhabitants from the village of Kuta, filed a lawsuit at the Administrative Court of First Instance (“the Court”) against the Ministry of Infrastructure and Energy, the Ministry of Environment and the National Environment Agency. The lawsuit was based on the claim that the EIA report was inadequate as well as on the absence of proper public consultation of the affected residents. The Court on 2 May 2017 ruled in favour of the action and declared the EIA Approval null and void on account of a flawed environmental impact assessment.¹² In particular, the Court found that the environmental impact assessment breached national rules on the involvement of certain authorities as well as the public concerned. The Court also ruled that the nullity of the EIA Approval invalidates all other acts and decisions based on it, including the award of the concession to *Kovlu Energij* and the concession agreement. The Ministry of Infrastructure and Energy, the Ministry of Environment and *Kovlu Energij* appealed the ruling to the Administrative Court of Appeal in Tirana. To the Secretariat’s knowledge, a ruling has not been rendered yet.

II. Legal framework

Energy Community law is defined in Article 1 of the Dispute Settlement Procedures as “*a Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]*”.

A violation of Energy Community law occurs if “[a] *Party fails to comply with its obligations under the Treaty if any of these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community law*”.¹³

¹¹ Environmental Statement issued by the Minister of Environment, with identification No. 19, Decision No. 17, Prot. No. 663, 24 April 2015.

¹² Judgment No 1813/2017.

¹³ Article 3(1) of the Dispute Settlement Procedures.

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 Phone
 Email
 Web

 +43 (0)1 535 2222
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Article 3(2) of the Dispute Settlement Procedures reads:

“Failure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional, local as well as legislative, administrative or judicative), including undertakings within the meaning of Article 19 of the Treaty, to which the measure is attributable.”

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.*

Annex II of the Treaty reads:

“1. Each Contracting Party shall implement 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 by 14 October 2016.”

Article 1(2) of Directive 2011/92/EU reads:

For the purposes of this Directive, the following definitions shall apply:

(...)

(d) ‘public’ means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) ‘public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

(f) ‘competent authority or authorities’ means that authority or those authorities which the Contracting Parties designate as responsible for performing the duties arising from this Directive.

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:

Bank	Raiffeisenlandesbank
IBAN BIC	AT953200000015102825 RLNWATWW

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Am Hof 4, Level 5, 1010 Vienna, Austria

 Phone
 Email
 Web

 +43 (0)1 535 2222
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 www.energy-community.org

- (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 6 of Directive 2011/92/EU reads:

1. *Contracting Parties shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Contracting Parties shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Contracting Parties.*
2. *The public shall be informed, whether by public notices or by 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:*

Bank	Raiffeisenlandesbank
IBAN	AT953200000015102825

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 Phone
 Email
 Web

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- (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 at which, and the 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.

3. Contracting Parties shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
- (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Contracting Parties.

Bank	Raiffeisenlandesbank
IBAN	AT953200000015102825

 BIC
 RLNWATWW

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 Web

 +43 (0)1 535 2222
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6. Reasonable time-frames for the different phases shall be provided for, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in the environmental decision-making subject to the provisions of this Article.

Article 8 of Directive 2011/92/EU reads:

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.

Article 9(1) of Directive 2011/92/EU reads:

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:

- (a) the content of the decision and any conditions attached thereto;*
- (b) 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;*
- (c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.*

III. Preliminary legal assessment

a. Applicable Law

The present case concerns an environmental impact assessment procedure carried out in the past but produce persistent legal and factual effects, most notably as precondition for the relevant concessions and construction permit for the HPP Poçem project. Its compliance with the relevant Energy Community *acquis communautaire* is the subject matter of the present case.

The procedure for HPP Poçem was carried out at a time when Directive 85/337/EEC was still applicable in the Energy Community. Directive 2011/92/EU, which codified and replaced Directive 85/337/EEC, was incorporated in the Energy Community by Ministerial Council Decision 2016/12/MC-EnC with an implementation deadline of 14 October 2016, while the amendments to Directive 2011/92/EU by Directive 2014/52/EU were due for implementation on 1 January 2019. The obligations under Directive 85/337/EEC essentially correspond to those under Directive 2011/92/EU. Therefore, according to the case law of the Court of Justice

Bank	Raiffeisenlandesbank
IBAN BIC	AT953200000015102825 RLNWATWW

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 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
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of the European Union, the circumstances of the environmental impact assessment procedure carried out for the HPP Poçem project is to be assessed under Directive 2011/92/EU.¹⁴

b. Scope of Directive 2011/92/EU

The fundamental objective of Directive 2011/92/EU 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 are made subject to a prior assessment with regard to their effects.¹⁵

According to Article 4(1) of Directive 2011/92/EU, projects listed in Annex I to the Directive are subject to a mandatory environmental impact assessment. Point 15 of Annex I lists “*dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic meters*”. The HPP Poçem project falls within this category.

c. The adequacy of the environmental impact assessment report

According to Article 3 of Directive 2011/92/EU, the purpose of an environmental impact assessment is the identification, description and assessment of the direct and indirect impacts of the project on a number of factors, namely population and human health, biodiversity, fauna and flora, land, soil, water, air and climate, material assets, cultural heritage and the landscape as well as the interaction between all those factors. The competent authority needs to carry out an examination of the substance of the information gathered in order to conclude whether the direct and indirect effects of the projects on the factors laid down under the Article 3 exist, as well as the interaction between those factors.¹⁶ To identify, quantify, and evaluate the nature and magnitude of these effects is the very purpose of the environmental impact assessment. In the first place, the environmental report is to be submitted by the developer under Article 5(1) of Directive 2011/92/EU to the competent authority, and shall contain the information listed in Annex IV to that Directive. In accordance with point 4 of that Annex, the description in the EIA report should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

For the HPP Poçem project, an environmental impact assessment report was prepared by the project developer in 2015. Its approval by the Ministry is subject to court proceedings in Albania. The environmental impact assessment report of 78 pages is part of the case file. Under the title “Potential Impacts to the Environment from the Project Development”, the report identifies and briefly assesses potential impacts on the environment, including in categories

¹⁴ Judgements in Cases C-36/14 Commission v Poland, paragraph 24; C-52/08 Commission v Portugal, paragraphs 41 to 43; C-365/97 Commission v Italy, paragraph 36; C-416/07 Commission v Greece, paragraph 28; confirmed for the Energy Community in Opinion of the Advisory Committee in Case ECS-1/15 Ugljevik of 6 November 2018, page 6.

¹⁵ Judgment in Case C-287/98 Linster, paragraph 52.

¹⁶ Court of Justice judgment in Case C-50/09 Commission v. Ireland, paragraph 38.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

 Phone
 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
 www.energy-community.org

such as hydrology and surface water, biological and physical impact, impact on natural resources and geology/geomorphology, impact on land and groundwater, on irrigation and on climate and air quality. The report also includes a number of measures for the prevention and mitigation of the impacts essentially resulting from the construction works.

Upon review of the environmental impact assessment report, the Secretariat is not convinced that based on the information provided therein, the impacts of the planned project on environment can be assessed properly, as required by Articles 3(1) and 5 of Directive 2011/92/EU.

The report focuses on the construction period itself, and is superficial at best when it comes to the long-term impacts of the project¹⁷ on aquatic habitats, flora and fauna. Such impacts seem to be rather significant according the Standing Committee of the Bern Convention which, in its 2018 Recommendation, assumes that the Vjosa river is a unique ecosystem with specific biodiversity, and that the HPP project in Poçem is likely to have significant effects on that ecosystem.

More particularly, the report fails to provide “*a description of the reasonable alternatives studied by the developer, which are relevant to the project and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the project on the environment*” as required by Article 5(3)(d) of Directive 2011/92/EU.

Furthermore, the report fails to provide assessment of the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources, as required by point 4 of Annex IV of Directive 2011/92/EU. Having in mind that both the HPP Poçem and HPP Kalivaç projects are located on the Vjosa river and additional 32 hydropower projects are planned in the area, an assessment of the accumulation of effects should be integral part of the report.

For the Kalivaç project, a draft environmental and social impact assessment (ESIA) report was disclosed to the Secretariat in September 2020, which also lacks proper assessment of the cumulative effects of the project. Although the HPP Poçem is mentioned on several occasions in draft ESIA report, in *Chapter 6.9.11 (Cumulative Impact)*, there is no assessment of the potential accumulation of effects of the two projects.

d. The environmental impact assessment procedure

Environmental impact assessment, as conceived by European law and transposed by the 2011 EIA Law in Albania, is essentially an administrative process. The steps outlined in the Directive 2011/92/EU need to be followed before a development consent is issued and construction of

¹⁷ Court of Justice judgment in Case C-142/07 Ecologistas en Acción-CODA, paragraph 42.

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Am Hof 4, Level 5, 1010 Vienna, Austria

 Phone
 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
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a project can start. Under Albanian law, compliance with the process is certified by an administrative act, the EIA approval. Within the procedure, consultations with the authorities likely to be concerned and the public concerned is of particular importance. Article 8 of Directive 2011/92/EU requires that the results of consultations and the information gathered are taken into consideration in the development consent procedure.

aa. Participation of the public concerned

Effective public participation enables decision-makers to take account of opinions and concerns outside the public administration which may be relevant to the decision. This also increases accountability and transparency of the decision-making process.¹⁸ In this respect, Directive 2011/92/EU implements the UNECE Aarhus Convention which Albania has also ratified.¹⁹ Article 6 of Directive 2011/92/EU requires, on the one hand, information to the (general) public (Article 6(2) and (5) of the Directive) and, on the other hand, information to and participation by the public concerned²⁰ as the ultimate beneficiary of the Directive (Article 6(3), (4) and (5) of the Directive).

The Directive leaves to the Contracting Parties the task of determining the detailed arrangements for informing the public and for its participation in decision-making in environmental matters, provided, however, that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the *acquis communautaire* (principle of effectiveness).²¹ Article 6(4) of the Directive also guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment.²² National arrangements may thus not amount to an obstacle to exercising the right to effective participation granted by Article 6.²³

Information to the general public specified further by Article 6(2) of Directive 2011/92/EU is to be provided by public notices or by other appropriate means and as soon as reasonably possible in the procedure. Article 6(5) of the Directive lists as examples for appropriate means of communication to the public "*bill postings within a certain radius or publication in local newspapers*". Article 6(3) of the Directive requires that information further specified by this paragraph is made available to the public concerned for the purpose of consultation, and Article 6(4) grants the public concerned the right "*to express comments and opinions when all options*

¹⁸ Recital 16 of Directive 2011/92/EU.

¹⁹ By Law No 8672 of 26 October 2000.

²⁰ The notion of public concerned is defined in Article 1(2)e) of Directive 2011/92/EU as "*the public affected or likely to be affected by, or having an interest in the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*"

²¹ Judgment in Case C-280/18 Flausch and Others, at paragraph 27.

²² Judgment in Case C263/08 Djurgarden-Lilla Värtans Miljöskyddsförening, paragraph 36.

²³ Judgment in Case C-216/05 Commission v Ireland, paragraphs 31 and 32, 38, 43 and 44.

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 Phone
 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
 www.energy-community.org

are open to the competent authority or authorities before the decision on the request for development consent is taken.” Article 6(5) of the Directive lists as an example for appropriate means consulting the public concerned “written submissions or (...) public inquiries”.

bb. Application to the case at hand

The Albanian legislator transposed the requirements of Article 6 of the Directive by the 2011 EIA Law and the 2014 Rules on Public Participation. As the application of the requirements established by Article 6 of Directive 2011/92/EU depends on the circumstances of the individual case as well as on local specifics, it is for Albania to ensure that the purpose, namely effective and early information and consultation of the general public and the public concerned is fully achieved in each individual procedure.²⁴ In this respect, the national authorities are to be guided by the wide scope and the broad purpose of the Directive.²⁵

In the Albanian transposition of Directive 2011/92/EU, public participation is essentially ensured by the possibility to make written comments, and by conducting a public hearing. Article 17 of the 2011 EIA Law requires that the National Environment Agency (NEA) conducts a hearing with the public and interested NGOs, *“aiming at gathering their opinions for the purpose of the final decision on the project.”* The hearing is to be conducted in cooperation also with the local government unit and with the project developer. Points 4, 6 and 7 of Chapter II of the 2014 Rules on Public Participation allocate roles and competences in organizing the public hearing. The procedure outlined by this provision may be summarized as follows: the developer shall notify the NEA and the public about the public hearing. The NEA, as well the regional environmental agency and the local government unit shall post the notification for the public hearing together with the non-technical summary of the EIA report in their official premises and on their webpages. The latter two shall also make available printed copies of the full EIA report at their premises. Besides, the developer shall inform about the public hearing in local audio-visual media and press, by placing a sign at the location of the project for 20 days, and by displaying the documents for the hearing (print copies of the non-technical summary of the EIA report) at the premises of the local government unit.

The local government unit shall encourage the inclusion of the community to participate in the public hearing. The hearing shall be organised *“in an adequate venue that is as close as possible to the site of the project and not earlier than the 30th calendar day from the date NEA is notified by the developer”*. The developer, together with the experts who drafted the EIA report, shall present it to the public and authorities shall be present. A representative of the regional environmental agency shall take notes at the event, and send a report to the NEA, which publishes them on its website and forwards them to the developer. The latter shall take

²⁴ See, for comparison, judgment in Case C-243/15 Lesoochranarske oskupenie VLK and Others, paragraph 46, 68-73.

²⁵ Judgment in Case C-72/95 Kraaijeveld and Others, paragraph 31.

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Phone
Email
Web

+43 (0)1 535 2222
contact@energy-community.org
www.energy-community.org

into account the opinions and requests of the public during the hearing and reflect them in the final EIA report or explain the reasons for not taking them into account. The opinions and the requests of the public shall also be taken into account by the NEA when preparing the EIA approval.

It is to be recalled that a meeting with the public, at which the draft environmental impact assessment report was presented, was actually held on 28 February 2015. The hearing took place in the town of Fier, some 50 km away from the 13 villages directly concerned by the HPP Poçem project. Fier is the seat of Fier County, the administrative entity in which the villages are located.

In the Secretariat's preliminary view, the organization of public hearings with the involvement of the project developer and their consultants, as in the present case, may be an appropriate means to achieve early and effective participation of the public concerned within the meaning of Article 6(4) of Directive 2011/92/EU, especially if it – through involvement of local authorities and tailored advertisement – is adapted to the local circumstances and necessities. By adoption of the 2011 EIA Law and the 2014 Rules on Public Participation, Albania set the standards of effectiveness, as required by the case law of the Court of Justice. While such codification is legitimate, and even supportive for achieving the purposes of Article 6 of Directive 2011/92/EU in individual cases, a violation of these national standards in a given case also amounts to a failure to comply with Article 6(2) of the Directive.

As regards the HPP Poçem project, the Administrative Court considered that the 2011 EIA Law and the relevant secondary legislation on public participation had not been abided by. Firstly, the regional environmental agency and the local government units "*have not participated at all in the exercise of their responsibilities.*" Secondly, the Administrative Court held that the developer failed to inform the public about the public hearing in line with the 2014 Rules on Public Participation by not including the information required by those Rules, by not publishing the information in local audio-visual media and in the press, as well as in the media of a national nature, by not placing of informative signs on the project, by not displaying the material relevant for the hearing-related materials at the relevant offices of the local government unit, etc. Thirdly, with regard to participation of the public concerned, the Administrative Court concluded that by the organization of only one public hearing in the town of Fier, the competent authorities did not discharge with their duties under Albanian legislation. As Fier is not located in the area where the HPP Poçem project was to be constructed (the effected villages are in the Kute Administrative Unit), almost none of the inhabitants of the area where the project was to be built participated.²⁶

If these findings are indeed accurate, the failure to comply with Albanian legislation would amount also to breaches of Article 6 of Directive 2011/92/EU. The Secretariat has no reason

²⁶ Judgment of 2 May 2017 in Case No. 7214/878 NR. 1813, pp. 42-43.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

 Phone
 Email
 Web

 +43 (0)1 535 2222
 contact@energy-community.org
 www.energy-community.org

to doubt that the Administrative Court established the facts on which it based its findings correctly.

Firstly, non-involvement of the local authorities designated by Article 15 of the 2011 EIA Law and the 2014 Rules on Public Participation in the HPP Poçem project would not only constituted a breach of Article 6(1) of Directive 2011/92/EU, but also affect the proper organization of the public hearing in accordance with the 2014 Rules on Public Participation, which crucially depends on the involvement of local authorities.

Secondly, as regards the information provided to the (general) public, it is to be recalled that Article 6(4) of Directive 2011/92/EU requires Contracting Parties to ensure that the members of the public concerned are given an effective opportunity to express their opinion before development consent is granted for a project. Article 6(2) generally requires for that purpose "*public notices or ... other appropriate means*" are used for the communication with the public. These leaves the choice of appropriate media used for e.g. inviting to a public hearing generally to the authority in charge. In referring to "*bill postings within a certain radius or publication in local newspapers*", Article 6(5) of the Directive emphasizes that the channels of communication must be aimed at and suitable for the local public concerned. The competent authorities hence need to ensure that the information provided to the public is distributed via media which, adapted to local specifics, warrant a certain likelihood that the information submitted is actually received in a useful manner by the public concerned. In the words of the Standing Committee of the Aarhus Convention, „*public authorities should seek to provide a means of informing the public which ensures that all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate*“.²⁷ The Court of Justice also underlined that „*[t]he competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure*“.²⁸ The competent authorities must select and use the most suitable means of communication, which includes posting notices in the most frequented places in the area concerned and at the project site.²⁹ Depending on internet penetration and usage rates in the areas concerned, posting information on an internet website may alone not be sufficient to be easily accessible by the public concerned.

Thirdly, as regards the organization of the only public hearing in the town of Fier, the Administrative Court found that the developer and ultimately the competent authority failed to involve the public concerned. In this respect, the Secretariat recalls that to ensure that the purpose of Article 6 of Directive 2011/92/EU is to achieve, in an effective manner, full and early

²⁷ ACCC/2006/16; ECE/MPP/2008/5/Add.6, 4 April 2008, paragraph 67

²⁸ Judgment in Case C-280/18 Flausch and Others, paragraph 32.

²⁹ Judgment in Case C-280/18 Flausch and Others, paragraphs 34 and 35.

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone
Email
Web

+43 (0)1 535 2222
contact@energy-community.org
www.energy-community.org

engagement of the public concerned. In order to achieve that purpose, the competent authorities of a Contracting Party must ensure not only the appropriate communication channels and content of the information, suitable to reach the inhabitants of the local communities affected by the construction of the project, but also enable their actual and meaningful participation. According to the case law of the Court of Justice quoted above, the consultation should have taken place at a location where most of the public concerned resided or owned property (i.e. in the affected villages along the Vjosa river), and/or would have had effective and easy access. The determination of this location is to be made on a case-by-case basis and upon factual criteria. It does not necessarily have to coincide with the administrative delineation of a county, as it seems to have in the present case. For the same reason, a choice of venue for convenience reasons does not satisfy the requirements of Article 6 of Directive 2011/92/EU. The selection of the proper location for organizing the public hearing is even more important in cases where such hearing is the central instrument to ensure public participation, as in Albania.

It may be preliminarily concluded that the failures to involve the local authorities as required by domestic law, the failure to provide the relevant information concerning the environmental impact assessment of the HPP Poçem project to the public in a manner and through channels adapted to the local public concerned and the failure to ensure participation by the public concerned by the environmental impact assessment of the HPP Poçem project in a manner adapted to local circumstances, constitute a breach of Article 6 of Directive 2011/92/EU.

e. Article 8 of Directive 2011/92/EU

As a consequence of the non-compliance with Articles 5(1) and 6 of Directive 2011/92/EU during the environmental impact assessment procedure, the results of consultations and the information gathered could not be taken into consideration in the development consent procedure, as required by Article 8 of Directive 2011/92/EU. The reflection of the public participation process in the EIA approval, for instance, is limited to the following: *“Information on the public consultation process conducted: Public consultation: During the meeting, the project was presented, suggestions of participants were heard and will be taken into account by investors during the exploitation period. The investors ensured the participants they would take all necessary measures to eliminate the negative impact in the environment, while not affecting the lives of inhabitants.”* Potential comments and opinions the public concerned, which could have had expressed in a properly prepared public meeting, are not reproduced in the EIA Approval, which is likely to be due to the fact that the design of the participation of the public concerned by the project was not suitable for such meaningful participation.

f. Article 9(1) of Directive 2011/92/EU

As a consequence of the non-compliance with Articles 5(1), 6 and 8 of Directive 2011/92/EU, as identified in the above points c and d of the present Opening Letter, the Secretariat considers that the competent authority, when granting development consent for the Pocem

Bank	Raiffeisenlandesbank
IBAN	AT953200000015102825
BIC	RLNWATWW

Energy Community Secretariat

Am Hof 4, Level 5, 1010 Vienna, Austria

Phone
Email
Web

+43 (0)1 535 2222
contact@energy-community.org
www.energy-community.org

project, was unable to justify how the concerns and opinions of the public concerned were examined, and thus could not properly assess all reasons and considerations on which the decision is based, as required by Article 9(1).

IV. Conclusion

Based on the above, the Secretariat preliminarily concludes that Albania failed to comply with Articles 3, 5, 6, 8 and 9(1) of Directive 2011/92/EU, read in conjunction with Articles 12 and 16 of the Treaty, by not implementing the latter provisions correctly in the case of the environmental impact assessment procedure for the HPP Poçem project.

In accordance with Article 13 of the Dispute Settlement Procedures, the Government of Albania is requested to submit its observations on the points of fact and of law raised in this letter within a period of two months, *i.e.* by

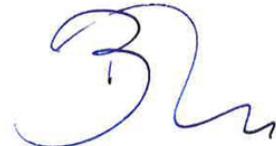
14 November 2020

to the Secretariat.

Vienna, 14 September 2020



Janez Kopač
Director



Dirk Buschle
Deputy Director / Legal Counsel