
Communication to the Aarhus Convention Compliance Committee

| 2020

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I. INFORMATION ON CORRESPONDENT SUBMITTING THE COMMUNICATION

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II. PARTY CONCERNED

Bosnia and Herzegovina

III. FACT OF THE COMMUNICATION

1. The subject of this communication is the lack of proper implementation of Art. 2 (1) (5), Art. 3. (9) of the Aarhus convention in relation to environmental permits proceedings in BiH legislation.

2. Environmental permits are administrative decisions that have potentially significant environmental impact.

3. Cantonal Court in Sarajevo declined three lawsuits of the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo, which were submitted against the Decision of the FBiH Ministry of Environment and Tourism pertaining to issued environmental permits for:

- creation of the hydro accumulation „Ramici“ at Banovici municipality with the aim to secure industrial water for the needs of future Thermal Power Plant Banovici 1-350 Mwe.
- combustion facility of the Block 7 of the Thermal Power Plant Tuzla, installed capacity 450 MW, in Thermal Power Plant Tuzla

- construction of Thermal Power Plant Banovici, installed capacity 350 MW of electricity, i.e. 790 MW of „thermal energy“

The chronology of the lawsuits submitted by the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo and verdicts obtained from the Cantonal Court in Sarajevo:

a. On 15 April 2016, Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo submitted a lawsuit at Cantonal Court Sarajevo, in an attempt to challenge the Decision of the FBiH Ministry of Environment and Tourism for Banovići thermal power plant no. UPI/05/2-23-11-64-14/12 SN-I dated on 11 January 2016 due to the violation of administrative proceedings, fallacious and incompletely determined facts and incorrect implementation of substantive legislation. On 27 November 2019, Cantonal Court Sarajevo declined the lawsuit, that way justifying the decision by the fact that the plaintiff is based in Sarajevo, no. 09 0 U 026266 16 U. By acting in such manner, the Court has violated the FBiH Law on Protection of Environment, the Law on Administrative dispute and Aarhus Convention regarding the fact that the basis for declining the lawsuit was found in the address of the claimant, which was an act of discrimination.

b. On 18 April 2016, Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from submitted a lawsuit at Cantonal Court Sarajevo, in an attempt to challenge the Decision of the FBiH Ministry of Environment and Tourism on construction of the hydroaccumulation Ramici, Banovici municipality, aimed to secure industrial water for the requirements of future Thermal Power Plant Banovici 1-350 Mwe no. UPI/05/2-23-11-64-14/12 SN-II dated on 18 February 2016 due to the violation of administrative proceedings, fallacious and incompletely determined facts and incorrect implementation of substantive legislation. On 24 September 2019, Cantonal Court Sarajevo declined the lawsuit justifying the decision by the fact that the plaintiff is based in Sarajevo, no. 09 0 U 026267 16 U. By acting in such manner, the Court has violated the FBiH Law on Protection of Environment, the Law on Administrative dispute and Aarhus Convention regarding the fact that the basis for declining the lawsuit was found in the address of the claimant, which was an act of discrimination.

c. On 30 September 2016, Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from submitted a lawsuit at Cantonal Court Sarajevo, in an attempt to challenge the Decision of the FBiH Ministry of Environment and Tourism for Tuzla 7 coal thermal power plant no.: UPI/05/2-23-71/15 dated on 18 July 2016 due to the violation of administrative proceedings, fallacious and incompletely determined facts and incorrect implementation of substantive legislation. On 14 October 2019, Cantonal Court Sarajevo declined the lawsuit justifying the decision by the fact that the plaintiff is based in Sarajevo, no. 09 0 U 027237 16 U. By acting in such manner, the Court has violated the FBiH Law on Protection of Environment, the Law on Administrative dispute and Aarhus Convention regarding the fact that the basis for declining the lawsuit was found in the address of the claimant, which was an act of discrimination.

4. Bosnia and Herzegovina ('BiH') is among European countries which are mostly affected by pollution from coal fired power plants. It's one of the few countries where new coal-fired units are still being planned, with the potential to affect air quality and public health for decades. Emissions from the power plant contribute to ambient concentrations of PM2.5, NO2 and SO2, causing increases in the risk of both acute and chronic diseases and symptoms. The impacts extend several

hundreds of kilometers from the power plants, affecting air quality particularly in the neighboring countries: Croatia, Serbia, Montenegro, Albania, Slovenia and Italy. As a result, if the new plants Tuzla and Banovići were operated for a relatively short lifetime of 30 years, the health impacts would amount to a projected 960 premature deaths. The majority of the public health impact is transboundary, with 810 premature deaths per year projected to occur outside BiH. Due to the low quality coal burned, the mercury emissions from the power plants could be very large in relation to their capacity. While no precise data was available, using UNEP default emission factors, it was estimated that mercury emissions from the plants could be 270kg/year. Of this, approximately 90kg or 1/3 is estimated to be deposited into land and freshwater ecosystems. Mercury deposition rates as low as 125mg/ha/year can lead to accumulation of unsafe levels of mercury in fish (Swain et al 1992). The plants are estimated to cause mercury deposition above 125mg/ha/yr over an area of approximately 300km², in the south and east of the plants, with a population of 60,000 people. Approximately 60% of the projected deposition, or 50kg per year, takes place outside BiH¹.

IV. PROVISIONS OF THE CONVENTION WITH WHICH NON-COMPLIANCE IS ALLEGED

Article 2, paragraph 1 (5) of the Convention

Article 3, paragraph 9 of the Convention

Article 9 paragraph 2 of the Convention

Note:

Legislation of Federation of Bosnia and Herzegovina is harmonized to the Aarhus Convention in this aspect. Nevertheless, the problem in this case is produced by the implementation of the Law by Cantonal Court in Sarajevo. Denying the access to justice based on the residence of the legal entity represents discrimination and grave violation of the FBiH Law on Protection of Environment and Aarhus Convention.

V. NATURE OF ALLEGED NON - COMPLIANCE

Rationale of the judgment of the Sarajevo Cantonal Court

The Cantonal Court in Sarajevo has decided to dismiss all three lawsuits on the grounds that in the the "*Environmental Law of FB&H an interested party/body is defined as a natural and/or legal person or organization residing or working in an area of influence or area likely to be under the influence. Considering that the seat of the Plaintiff is in Sarajevo, as indicated in the Lawsuits, and that the relevant environmental permits were issued to JP Elektroprivreda Bosna i Hercegovina dd, Tuzla Thermal Power Plant and Brown Coal Mines "Banovići" dd Banovići, it can be concluded that the Plaintiff does not have the capacity of an interested party within the meaning of the Environmental Law of FB&H, as a substantive law.*"

The Cantonal Court in Sarajevo establishes that "*the Plaintiff does not have the capacity of an interested person, even within the meaning of Article 15, paragraph 1 of the Law on Administrative Disputes ("Official Gazette of the Federation of BiH," No. 9/05), which provides that when an*

¹ https://storage.googleapis.com/planet4-finland-stateless/2019/06/f3bafec8-tuzla_banovici_case-study-final-en.pdf

individual is a member of a social organization or association of citizens which by its rules (statute) has the task of protecting certain rights and interests of its members, an administrative act violates such a right or interest, and a social organization or association of citizens may, on the written consent of its member, file on its behalf a lawsuit and an administrative dispute. The content of the lawsuits does not show that the impugned decisions violated the right or legal interest of one of the Plaintiff's members and that the Plaintiff, upon the written consent of his/her member, was given the authority to sue and direct the administrative dispute on his/her behalf. "

-Non-compliance with the provisions of the Aarhus Convention and national legislation

1. This reasoning of the Cantonal Court in Sarajevo is not in accordance with the Aarhus Convention. Specifically, in this particular case, the Plaintiff must be considered to be an interested public within the meaning of the Article 9, paragraph (2) of the Aarhus Convention, which provides that *"each Party shall, within its national law, ensure that interested members of the public who a) have sufficient interest, or, alternatively, b) claim that the right has been compromised where, in administrative proceeding is required from the Signature country as a precondition, they have access to a review procedure before a court and/or other independent and impartial body established by law, with a view to contesting substantive and procedural the lawfulness of any decision, act or omission (...) What constitutes a sufficient interest and threat to the right is determined in accordance with the requirements of national law and in accordance with the objectives of giving the public concerned broad access to justice within the scope of this Convention. To this end, the interest of all non-governmental organizations meeting the requirements of Article 2 (5) shall be considered sufficient for the purposes of subparagraph (a) above. These organizations are also considered to have rights that may be jeopardized for the purposes of subparagraph (b) above."* In doing so, Article 2, paragraph 5 of the Aarhus Convention provides that *"the public concerned, designates a public that is or is likely to be influenced, or has an interest in environmental decision-making; for the purposes of this definition, non-governmental organizations promoting protecting the environment and meeting any requirements under national law will be deemed to have an interest."*

2. In addition to violating the provisions of the Aarhus Convention, the Cantonal Court in Sarajevo also violated the provisions of the Law on Environmental Protection of FB&H, as follows:

- Article 30, paragraph (2) of the Law on Amendments to the FB&H Law on Environmental Protection, which clearly stipulates that *"an interested public, within the meaning of this Law, means a public that has an interest in environmental decision-making, either because of the location of the project or **because of the nature of the intervention in the environment**, the public affected or likely to be influenced by the intended environmental intervention and **non-governmental organizations promoting the environment.**"*

The Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo is registered as a non-governmental organization promoting environmental protection, and therefore, in accordance with the aforementioned provision, represents an interested public.

- Article 31, paragraph (1) of the Environmental Protection Act, which clearly stipulates that *"in accordance with the provisions of this Law, the **public** has access to information,*

*participation in decision-making and **protection of rights before administrative and judicial authorities in matters of environmental protection without discrimination on grounds of nationality , nationality or place of residence and in the case of legal persons, without discrimination based on their place of registration or center of activity.***“

As the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM Sarajevo was registered as a legal entity, the court was not allowed to discriminate on the basis of the place of registration or the center of activity, which was done on in the court's decision. Specifically, the court states that "*the FB&H Law on Environmental Protection defines an interested party/body as a natural and/or legal person or organization residing or operating in an area of influence or area likely to be affected.*" However, this provision is not complete and the court had to be guided by sections 30 (2), 31 (1) and 39 (1) and (2) of the Environmental Protection Act. Since the court found that the Plaintiff did not have the capacity of an interested party, this way it directly violated the aforementioned articles, i.e. it violated the federal law.

- Article 39, paragraphs (1) and (2) of the FB&H Environmental Law, which clearly stipulates that "*representatives of the **interested public** who participated in the first instance proceedings have the right to appeal against the decision or part of the decision. In addition to the right to participate in licensing and environmental impact assessment procedures have the right, if one acts contrary to the environmental principles of environmental law, to initiate proceedings to protect their rights before a competent court.*"²

As the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM participated in first instance proceedings in all three cases, it is clear that as such it had the right to bring legal proceedings. Also, the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo was considered by the FBiH Ministry of Environment and Tourism as an interested party during the first degree administrative dispute.

3. We also emphasize that the court erred in fact by stating that the Association for the Protection and Promotion of the Environment, Nature and Health of EKOTIM Sarajevo does not represent an interested party/authority within the meaning of the Law on Administrative Disputes, since the right or legal interest of a person has not been violated from Plaintiff's members. However, we emphasize in this way that the Cantonal Court in Sarajevo did not check whether the right or legal interest of any of the members of the Plaintiff was violated, but based on an arbitrary assessment, reached such a conclusion, which is contrary to the law.

² <https://www.paragraf.ba/propisi/fbih/zakon-o-zastiti-okolisa.html>

VI. USE OF DOMESTIC REMEDIES

The Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo has filed three lawsuits against the environmental permits of the Federal Ministry of Environment and Tourism to the Cantonal Court in Sarajevo. Following the rulings dismissing all three lawsuits, the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM Sarajevo filed three requests for extraordinary review of court decisions with the Supreme Court of the Federation of Bosnia and Herzegovina as a higher court in October, November and December 2019. However, we have decided to file this complaint at the same time because the judicial processes in Bosnia and Herzegovina are extremely time consuming and there is no way to speed up the proceedings because environmental cases do not constitute priorities in the litigation process. The problem is even greater, as environmental permits have a term of 5 years, and court proceedings in only one instance last for a minimum of 3 years, therefore we might find ourselves in situations where the environmental permit expires before a judgment is rendered. In these cases, the remedy does not achieve its purpose. Despite warnings sent to the Sarajevo Cantonal Court on this issue in 2019, we were unable to expedite the court proceedings. Also, the Association for the Protection and Promotion of the Environment, Nature and Health EKOTIM from Sarajevo approached the Ombudsman Institution in BiH in 2019, requesting their intervention to speed up court proceedings, but the attempt was unsuccessful.

VII. USE OF OTHER INTERNATIONAL PROCEDURES

On April 14th, 2017, procedures were initiated for both Tuzla 7 and Banovići TPP cases on by the Association for the Protection and Improvement of the Environment, Nature and Health EKOTIM from Sarajevo in front of Implementation committee Convention on environmental impact assessment in a transboundary context protocol on strategic environmental assessment (ESPOO). Procedure is still pending (Report of the Implementation Committee on its forty-fifth session, page no.7, 83). The reason behind initiating mentioned proceedings in front of the Implementation Committee of the Convention on Environmental Impact Assessment in a Transboundary Context Protocol on Strategic Environmental Assessment (ESPOO) was the fact that planned Thermal Power Plants Tuzla and Banovici pose a considerable transboundary effect on Croatia and Serbia. Regarding the above stated, it is clear that planned projects bear negative influence also to the area of Sarajevo, a home to the seat of the Association for the Protection and Improvement of the Environment, Nature and Health EKOTIM.

VIII. CONFIDENTIALITY

The correspondent does not request for any information included in this communication to be kept confidential.

³https://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/45th_Session/Documents/ece.m.p.eia.ic2019.4e_advance_copy.pdf

IX SUPPORTING DOCUMENTATION (COPIES, NOT ORIGINALS)

Annex 1: Court decision no. 09 0 U 027237 16 U dated on 14 October 2019, for TPP Tuzla 7-related to paragraph V

Annex 2: Court decision no. 09 0 U 026266 16 U dated on 27 November 2019 for TPP Banovići-related to paragraph V (this verdict is identical to the verdict related to Thermal Power Plant Tuzla 7, and therefore not translated)

Annex 3: Court decision no. 09 0 U 026267 16 U dated on 24 September 2019 in relation to hydro accumulation "Ramići", Banovići municipality - related to paragraph V (this verdict is identical to the verdict related to Thermal Power Plant Tuzla 7, and therefore not translated)

Annex 4: IC form for information Tuzla 7, Espoo-related to paragraph VII

Annex 5: Letter to BiH-Tuzla 7-related to paragraph VII

Annex 6: IC form for information Banovići, Espoo-related to paragraph VII

Annex 7: Letter to BiH-Banovići-related to paragraph VII

X. SIGNATURE

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Date: 26.01.2020.

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