

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–9/21

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter: “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 (hereinafter: “Dispute Settlement Rules”),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

BOSNIA AND HERZEGOVINA

is seeking a Decision from the Ministerial Council that

by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan, Bosnia and Herzegovina fails to comply with Articles 4(3),4(6) and 16 of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

The Secretariat of the Energy Community submits the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

1. Introduction

- (1) The present case concerns non-compliance of Bosnia and Herzegovina with the provisions of Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants² (hereinafter: “Directive 2001/80/EC”) by not respecting the emission ceilings for sulphur dioxide, nitrogen oxides and dust as established by the National Emission Reduction Plan (hereinafter: “NERP”) and by not applying effective and dissuasive penalties for breaches of the NERP ceilings.

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

² OJ L 309, 27.11.2001, p. 1.

- (2) According to Article 90 of the Treaty, the Energy Community Secretariat (hereinafter: “the Secretariat”) may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council.

2. Background

- (3) Directive 2001/80/EC forms part of the Energy Community environmental *acquis communautaire* since the signature of the Treaty in 2005. The purpose of the Directive is to combat air pollution by reducing emissions of sulphur dioxide, nitrogen oxides and dust from large combustion plants that are significant contributors to emissions into the air and the negative consequences thereof, such as acidification, eutrophication, and ground-level ozone.
- (4) According to point 3 of Annex II of the Treaty, each Contracting Party shall implement Directive 2001/80/EC by 31 December 2017.
- (5) On 24 October 2013, the Ministerial Council adopted Decision 2013/05/MC-EnC on the implementation of Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants (hereinafter: “Decision 2013/05/MC-EnC”), whereby Directive 2001/80/EC was adapted for the specific needs of the Energy Community. Decision 2013/05/MC-EnC introduced amendments for the implementation of Article 4(6) of Directive 2001/80/EC in the Energy Community, which provides Contracting Parties the possibility to define and implement a NERP. By choosing that implementation alternative, Contracting Parties may establish emission ceilings for one or more of the pollutants covered by the scope of the Directive for a conglomerate of existing³ large combustion plants. The NERP shall reduce the total annual emissions of the pollutants covered by Directive 2001/80/EC from existing plants to the levels that would have been achieved by applying the Directive’s emission limit values for the plants in operation in the year 2012.
- (6) By consequence, there are two alternative avenues for Contracting Parties to implement Directive 2001/80/EC for existing plants, namely a) by complying with the emission limit values stipulated in Parts A of Annexes III to VII at individual plant level,⁴ or b) by defining and implementing a NERP.⁵ The two implementation alternatives may also co-exist, as it is not mandatory to include all existing large combustion plants under the scope of the NERP, should the Contracting Party opt for that implementation alternative. In such a case, large combustion plants not covered by the scope of the NERP must comply with Article 4(1) and point a) of Article 4(3) of Directive 2001/80/EC by meeting the relevant emission limit values listed in its Annexes III to VII on an individual basis.
- (7) On 19 December 2014, the Secretariat published Policy Guidelines on the application of Article 4(6) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC of the Ministerial Council, in an Energy Community context (hereinafter: “Policy Guidelines”).⁶ The Policy Guidelines were developed on the basis of point d) of the fifth subparagraph of Article 4(6) of Directive 2001/80/EC, as adapted by Article 7 of Decision 2013/05/MC-EnC, whereby the Secretariat was requested to assist Contracting Parties opting for the development of a NERP. The Policy Guidelines provide such assistance for Contracting Parties intending to make use of the option to define and implement a NERP, and set out the principles by which compliance with the NERPs will be verified by the Secretariat. In the Policy Guidelines, the Secretariat elaborated the calculation methods according to which the contributions of large combustions plants to the

³ In accordance with the definition provided by Article 2(10) of Directive 2001/80/EC (as amended by Decision 2013/05/MC-EnC), “existing plant” means any combustion plant for which the original construction licence or, in the absence of such a procedure, the original operating licence was granted before 1 July 1992.

⁴ Compliance with Article 4(1) and point a) of Article 4(3).

⁵ Compliance with point b) of Article 4(3) and Article 4(6).

⁶ Policy Guidelines 03/2014 by the Energy Community Secretariat on the Preparation of National Emission Reduction Plans, ANNEX 1.

overall NERP ceilings for the three pollutants covered by the Directive's scope are to be calculated. These methods are based on the emission limit values of Directive 2001/80/EC (for the implementation years 2018-2025) and Directive 2010/75/EU on industrial emissions (hereinafter: "Directive 2010/75/EU")⁷ (for the implementation years 2026-2027).

- (8) Bosnia and Herzegovina submitted emissions data of its large combustion plants, as required by Annex VIII.B of Directive 2001/80/EC for the preceding reporting years, in March 2019, April 2020, March 2021, March 2022 and March 2023, respectively.

3. Legal framework governing emissions into the air from large combustion plants in the entities of Bosnia and Herzegovina

- (9) In Republika Srpska, Article 38 of the Law of Air Protection⁸ obliges operators of large combustion plants to prepare emission reduction plans with objectives and related target values, measures and deadlines to reach the objectives, as well as a procedure for the monitoring of the realization of the plan. In 2017, the Law was amended. The newly introduced Article 42a makes direct reference to the obligations under the Energy Community Treaty.
- (10) In the Federation of Bosnia and Herzegovina, Articles 8 and 9 of the Rulebook on emission limit values for combustion plants⁹ describe the adoption procedure of an emission reduction plan for large combustion plants.
- (11) Following a consultation procedure involving both entities, the Council of Ministers of Bosnia and Herzegovina adopted a NERP on 30 December 2015.¹⁰ The following eight large combustion plants are covered by the NERP:

Emission report code	Plant name
T-5	TPP Tuzla 5
T-6	TPP Tuzla 6
K-6	TPP Kakanj 6
K-7	TPP Kakanj 7
UKO-4	ICHPP Natron Hayat UKO-4
LUKO-4	ICHPP Natron Hayat LUKO-4
G-1	TPP Gacko
U-1	TPP Ugljevik

- (12) The emission ceilings established by the NERP for the conglomerate of these large combustion plants are presented in Annex 5 to the present Reasoned Request.

⁷ OJ L 334, 17.12.2010, p. 17.

⁸ Official Gazette of Republika Srpska 124/11 and 46/17, ANNEX 2.

⁹ Official Gazette of FBiH 3/13 and 92/17, ANNEX 3.

¹⁰ Decision adopted at the 37th session of the Council of Ministers, ANNEX 4.

II. Relevant Energy Community Law

(13) 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”.¹¹

(14) 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.

(15) 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.

(16) Article 16 of the Treaty reads:

*The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean (...)
(iii) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants,(...)*

(17) Article 3 of Directive 2001/80/EC reads:

Not later than 1 July 1990 Contracting Parties shall draw up appropriate programmes for the progressive reduction of total annual emissions from existing plants. The programmes shall set out the timetables and the implementing procedures.

(18) Article 4(3) of Directive 2001/80/EC¹² reads:

Without prejudice to Directive 96/61/EC and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Contracting Parties shall, by 1 January 2018 at the latest, achieve significant emission reductions by:

(a) taking appropriate measures to ensure that all licences for the operation of existing plants contain conditions relating to compliance with the emission limit values established for new plants referred to in paragraph 1; or

(b) ensuring that existing plants are subject to the national emission reduction plan referred to in paragraph 6;

and, where appropriate, applying Articles 5, 7 and 8.

(19) Article 4(6) of Directive 2001/80/EC¹³ reads:

Contracting Parties may, without prejudice to this Directive and Directive 96/61/EC, and taking into consideration the costs and benefits as well as their obligations under Directive 2001/81/EC

¹¹ Article 3(1) of the Dispute Settlement Procedures.

¹² As amended by Article 3 of Decision 2013/05/MC-EnC.

¹³ As amended by Article 5 of Decision 2013/05/MC-EnC.

of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants and Directive 96/62/EC, define and implement a national emission reduction plan for existing plants, taking into account, inter alia, compliance with the ceilings as set out in Annexes I and II.

The national emission reduction plan shall reduce the total annual emissions of nitrogen oxides (NO_x), sulphur dioxide (SO₂) and dust from existing plants to the levels that would have been achieved by applying the emission limit values referred to in paragraph 3 to the existing plants in operation in the year 2012, (including those existing plants undergoing a rehabilitation plan in 2012, approved by the competent authority, to meet emission reductions required by national legislation) on the basis of each plant's actual annual operating time, fuel used and thermal input, averaged over the last five years of operation up to and including 2012.

The closure of a plant included in the national emission reduction plan shall not result in an increase in the total annual emissions from the remaining plants covered by the plan.

The national emission reduction plan may under no circumstances exempt a plant from the provisions laid down in relevant Community legislation, including inter alia Directive 96/61/EC.

The following conditions shall apply to national emission reduction plans:

(a) the plan shall comprise objectives and related targets, measures and timetables for reaching these objectives and targets, and a monitoring mechanism;

(b) Contracting Parties shall communicate their national emission reduction plan to the Secretariat no later than 31 December 2015;

(c) within nine months of the communication referred to in point (b) the Secretariat shall evaluate whether or not the plan meets the requirements of this paragraph. When the Secretariat considers that this is not the case, it shall inform the Contracting Party and within the subsequent three months the Contracting Party shall communicate any measures it has taken in order to ensure that the requirements of this paragraph are met;

(d) the Secretariat shall, no later than 27 November 2002, develop guidelines to assist Contracting Parties in the preparation of their plans.

National emission reduction plans shall be in use up to 31 December 2027 at the latest.

The ceilings for the year 2018 shall be calculated on the basis of the applicable emission limit values at the time of submission of the plan as set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used.

The ceilings for the year 2023 shall be calculated on the basis of the applicable emission limit values in that year set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used. The ceilings for the years 2019 to 2022 shall be set providing a linear trend between the ceilings of 2018 and 2023.

The ceilings for the year 2026 and 2027 shall be calculated on the basis of the relevant emission limit values set out in Part 1 of Annex V to Directive 2010/75/EU or, where applicable, the

relevant rates of desulphurisation set out in Part 5 of Annex V to Directive 2010/75/EU. The ceilings for the years 2024 and 2025 shall be set providing a linear decrease of the ceilings between 2023 and 2026.

(20) Article 16 of Directive 2001/80/EC¹⁴ reads:

The Contracting Parties shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.

(21) Annex VIII.B of Directive 2001/80/EC¹⁵ reads:

Contracting Parties shall establish, starting in 2018 and for each subsequent year, an inventory of SO₂, NO_x and dust emissions from all combustion plants with a rated thermal input of 50 MW or more. The competent authority shall obtain for each plant operated under the control of one operator at a given location the following data:

- *the total annual emissions of SO₂, NO_x and dust (as total suspended particles);*
- *the total annual amount of energy input, related to the net calorific value, broken down in terms of the five categories of fuel: biomass, other solid fuels, liquid fuels, natural gas, other gases.*

A summary of the results of this inventory that shows the emissions from refineries separately shall be communicated to the Secretariat every three years within twelve months from the end of the three-year period considered. The yearly plant-by-plant data shall be made available to the Secretariat upon request. The Secretariat shall make available to the Contracting Parties a summary of the comparison and evaluation of the national inventories within twelve months of receipt of the national inventories.

Contracting Parties implementing a national emission reduction plan in accordance with Article 4(6) shall report annually to the Secretariat the plant-by-plant fuel use and emission data for all plants covered by the plan. With the aim of demonstrating progress in implementation, this report shall also include emission projections for scenarios taking into account ongoing investments for which financing is secured and a well-defined implementation timeline is drawn up.

III. Preliminary procedure

- (22) According to Article 12(2) of the Dispute Settlement Procedures, the Secretariat may initiate the preliminary procedure by way of an Opening Letter in case of a breach of Energy Community law. After the Secretariat has repeatedly recalled the significant non-compliance with the provisions of Directive 2001/80/EC,¹⁶ the present case was initiated on 16 March 2021.
- (23) In the Opening Letter,¹⁷ the Secretariat preliminarily concluded that by not meeting the ceilings for sulphur dioxide, nitrogen oxides and dust in the 2018 and 2019 reporting years and by not establishing effective, proportionate and dissuasive penalties for such breaches, Bosnia and Herzegovina failed to comply with Articles 12 and 16 of the Treaty read in conjunction with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC. The Secretariat requested the Ministry of

¹⁴ As amended by Article 7 of Decision 2013/05/MC-EnC.

¹⁵ As amended by Article 6 of Decision 2013/05/MC-EnC.

¹⁶ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 47; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, p. 55.

¹⁷ ANNEX 6.

Foreign Trade and Economic Relations of Bosnia and Herzegovina to submit its reply on the points of fact and of law raised in the Opening Letter by 16 May 2021.

- (24) The Ministry of Foreign Trade and Economic Relations provided a reply to the Opening Letter on 10 May 2021.¹⁸ In its reply, the Ministry referred to ongoing investments that would, in their view, ensure compliance with the NERP ceilings and claimed that restrictive measures related to the Covid-19 pandemic delayed the implementation of those investments. As the information provided was not sufficient to dispel the concerns raised in the Opening Letter, the Secretariat submitted a Reasoned Opinion to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina on 21 February 2022 and requested its reply on the points of fact and of law raised therein by 21 April 2022.¹⁹
- (25) The Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina submitted a reply to the Reasoned Opinion on 15 April 2022.²⁰ In its reply, the Ministry, supported by the entity Ministries responsible for environmental issues, offer several arguments to justify non-compliance with the provisions of Directive 2001/80/EC. The reply provides information and arguments related to the applicable legal basis of the present case,²¹ the state of play of investments necessary for compliance with the NERP ceilings²² and effects of force majeure related to the Covid-19 pandemic.²³ The Secretariat will refer to the information provided in the reply in the legal assessment below.
- (26) The Secretariat reiterated its call to address non-compliance with Directive 2001/80/EC to the authorities of the Bosnia and Herzegovina in its 2021 and 2022 Implementation Reports²⁴ and to the representatives of the Contracting Party at the 20th²⁵, 22nd²⁶ and 23rd²⁷ meetings of the Environmental Task Force of 11 May 2020, 6 December 2021 and 13 June 2022, respectively.
- (27) As will be argued below, the Secretariat considers that the authorities of Bosnia and Herzegovina did not provide sufficient evidence of developments or arguments that would dispel the concerns raised in the Opening Letter and concluded in the Reasoned Opinion. Therefore, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council.

IV. Legal Assessment

- (28) The present Reasoned Request addresses the non-compliance of Bosnia and Herzegovina with the obligation to comply with the emission ceilings for sulphur dioxide, nitrogen oxides and dust established by the NERP for the eight large combustion plants covered by the plan's scope for the 2018 and 2019 reporting years which extends uninterrupted into the following reporting years up until 2022, and the failure to apply effective and dissuasive penalties for breaches of the NERP ceilings.

¹⁸ ANNEX 7.

¹⁹ ANNEX 8.

²⁰ ANNEX 9.

²¹ Pp. 2-3 of the letter of the Federal Ministry of Environment and Tourism dated 11 April 2022 (ref. no.: 04/3-19-3-250-1/21).

²² Pp. 2-3 of the letter of the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska dated 25 March 2022 (ref. no.: 15.04-052-1425/22) and its annexes 1-3; letter of the Federal Ministry of Environment and Tourism dated 5 April 2022 (ref. no.: 04/3-19-3-250-1/21) and its annexes.

²³ Point 1 of the Reply.

²⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 48-49; Annual Implementation Report of the Energy Community Secretariat, 1 November 2022, pp 46-47.

²⁵ ANNEX 10.

²⁶ ANNEX 11.

²⁷ ANNEX 12.

- (29) As a Contracting Party to the Treaty, Bosnia and Herzegovina is under an obligation to implement, *i.e.* to transpose at national level and to apply the *acquis communautaire* on environment, including Directive 2001/80/EC as amended by Decision 2013/05/MC-EnC, as referred to in Article 12 of the Treaty and defined by Annex II thereof. Point 3 of Annex II to the Treaty establishes the general implementation deadline for Directive 2001/80/EC as 31 December 2017.
- (30) With regard to the constitutional structure of Bosnia and Herzegovina and to the fact that environmental protection measures fall within the responsibility of the entities of the Contracting Party, the Secretariat submits that according to Article 3(2) of the Dispute Settlement Procedures, “[f]ailure by a Party to comply with Energy Community law may consist of any measure by the public authorities of the Party (central, regional or 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.” It is therefore the state of Bosnia and Herzegovina, as a Contracting Party to the Treaty, which is responsible for ensuring the correct implementation of the provisions of Directive 2001/80/EC in the entire territory of the Contracting Party, and which is liable for breaches of Energy Community law by one (or more) of its entities.²⁸

1. Breach of the NERP ceilings

- (31) According to Article 4(3) of Directive 2001/80/EC, Contracting Parties are under an obligation to *achieve significant emission reductions of emissions* of sulphur dioxide, nitrogen oxides and dust from large combustion plants *by 1 January 2018 at the latest*.²⁹ This obligation corresponds to Article 6 of the Energy Community Treaty. According to the so-called duty of sincere cooperation, which mirrors the one laid down in Article 4(3) TEU, Contracting Parties are under an obligation “*to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty*”. This implies the proper implementation of the obligations arising from the *acquis communautaire* by the administration in form of an *obligation of result*, namely achieving compliance by the operators of large combustion plants with the thresholds set by the NERP. This obligation exists independently of how the NERP is qualified in the administrative laws of a Contracting Party.
- (32) Article 4(3) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, requires Bosnia and Herzegovina to achieve significant emission reductions of sulphur dioxide, nitrogen oxides and dust from large combustion plants by 1 January 2018 either by implementing the Directive’s emission limit values at plant level,³⁰ or by subjecting them to a NERP.³¹ Contracting Parties do have a discretion as to the measures they consider appropriate for the purpose of achieving significant emission reductions (either by complying with the established NERP ceilings or by respecting the emission limit values). Yet, one of the two implementation alternatives are still to be complied with. In the case of choosing compliance through a NERP, the ceilings for the three pollutants are to be implemented as defined in the NERP³² and compliance verification is to be done between the combined emission totals of all plants subjected to the NERP and the annual emission ceilings.³³
- (33) In case a Contracting Party opts for the implementation of *litera (b)* of Article 4(3) of Directive 2001/80/EC for meeting the obligation to achieve significant emission reductions of emissions of sulphur dioxide, nitrogen oxides and dust beyond 1 January 2018 (as Bosnia and

²⁸ In its Opinions in Cases ECS-1/14 and ECS-1/15, the Advisory Committee held that any failure of the authorities of an entity of Bosnia and Herzegovina to comply with Energy Community law is to be attributed to Bosnia and Herzegovina as Contracting Party to the Treaty. See, to that effect, also Case C-95/97 *Région wallonne v Commission*, paragraph 7.

²⁹ Emphasis added.

³⁰ Compliance with *litera (a)* of Article 4(3) of Directive 2001/80/EC.

³¹ Compliance with *litera (b)* of Article 4(3) of Directive 2001/80/EC.

³² First subparagraph of Article 4(6) of Directive 2001/80/EC.

³³ Annex VIII.B of Directive 2001/80/EC.

Herzegovina did for the eight plants covered by the NERP's scope), Article 4(6) stipulates that a national emission reduction plan for existing plants is to be defined and *implemented* by that Contracting Party. The second subparagraph of Article 4(6) leaves no doubt that in such a case, the implementation of the NERP is legally binding, by insisting that the NERP *shall* reduce the total annual emissions of sulphur dioxide, nitrogen oxides and dust from existing plants to the levels that otherwise would have been achieved by applying the emission limit values referred to in paragraph 3 to existing plants.

- (34) The Secretariat further recalls that Article 3 of Directive 2001/80/EC includes an obligation on Contracting Parties to “*draw up appropriate programmes for the progressive reduction of total annual emissions from existing plants*”. The obligation to draw up these programmes is additional and different in scope and nature from the NERPs: while the former are supposed to serve as a general roadmap for emission reduction over time, the latter constitute one of the specific implementation alternatives under *litera* (b) of Article 4(3) and Article 4(6) of Directive 2001/80/EC. With this objective, the thresholds and deadlines prescribed therein must be accorded the same legal effect as the other alternative offered by *litera* (a) of Article 4(3), namely the default implementation alternative of applying individual emission limit values for large combustion plants and checking compliance at individual level. Otherwise, the objective of the Directive to reduce actual emissions would effectively be left to the devices of the operators of the plants in question.
- (35) By consequence, Contracting Parties that have opted for a NERP as the implementation alternative to meet their obligations stemming from Directive 2001/80/EC are under an obligation of result to comply with the thresholds provided therein not only by virtue of national, but also of Energy Community law.
- (36) As explained in the Opening Letter and concluded in the Reasoned Opinion, the emission totals of the eight large combustion plants falling under the scope of the NERP of Bosnia and Herzegovina exceed the emission ceilings established by the NERP for all three pollutants (sulphur dioxide, nitrogen oxides and dust) in the 2018 and 2019 reporting years. The emission totals reported by Bosnia and Herzegovina and their comparison to the applicable NERP ceilings are presented in Annex 13 to the present Reasoned Request.
- (37) The established non-compliance with the NERP ceilings in the cases of the 2018 and 2019 reporting years has been explicitly confirmed by the reply of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina to the Reasoned Opinion. The Secretariat submits that these breaches amount to breaches of Directive 2001/80/EC and hence amount to a failure by Bosnia and Herzegovina to comply with its obligations under the Energy Community Treaty. The breach identified in the preliminary procedure, however, does not end with the 2018 and 2019 reporting years but amounts to a systematic and persistent failure to comply with the emission ceilings established by the NERP in the case of all three pollutants. In the 2020-2022 reporting years, the ceilings set by the NERP for all three pollutants were breached again, and even with higher levels of non-compliance than in 2018 and 2019.³⁴ In the 2020 reporting year, the ceiling for sulphur dioxide was breached 9.95 times, while in the 2021 and 2022 reporting years, 8.29 and 8.23 times, respectively. In the 2020 reporting year, the ceiling for nitrogen oxides was breached 1.25 times, while in the 2021 and 2022 reporting years, 1.35 and 1.33 times, respectively. In the 2020 reporting year, the ceiling for dust was breached 1.66 times, while in the 2021 and 2022 reporting years, 3.6 and 2.92 times, respectively. Those data were communicated by the authorities of Bosnia and Herzegovina themselves and are therefore not disputed.
- (38) In comparable cases decided by the Court of Justice of the European Union in the field of air quality, that Court consistently held that “*the subject matter of an action for failure to fulfil*

³⁴ For a comparison between those ceilings and the reported emissions, see ANNEX 14 to the present Reasoned Request.

obligations which is alleged to be persistent may extend to facts subsequent to the reasoned opinion, provided that those facts are of the same nature and constitute the same conduct as the facts referred to in that opinion".³⁵ Given that Bosnia and Herzegovina's failure to comply with the NERP ceilings systematically and persistently extends beyond the years 2018 and 2019, and that the continued breaches are of the same nature as those referred to in the Reasoned Opinion and constitute the same conduct, the breaches occurring in the years 2020-2022 are included in the present Reasoned Request.

- (39) The Secretariat thus respectfully submits that Bosnia and Herzegovina fails to comply with Articles 4(3) and 4(6) of Directive 2001/80/EC by not achieving significant emission reductions of emissions of sulphur dioxide, nitrogen oxides and dust in the case of the eight large combustion plants by subject to the NERP by 1 January 2018 and until present date.
- (40) In the following, the Secretariat will address the arguments provided by the Ministry of Foreign Trade and Economic Relations in its reply to the Reasoned Opinion with the aim to justify non-compliance with the provisions of Articles 4(3) and 16 of Directive 2001/80/EC.

a. The applicable legal basis of the present case

- (41) In the reply to the Opening Letter,³⁶ the Federation of Bosnia and Herzegovina considers that the Opening Letter and the Reasoned Opinion erroneously refer to point 3 of Annex II of the Treaty and suggests that point 5 of Annex II (and hence Directive 2010/75/EU) is applicable to the implementation of the NERPs of Contracting Parties. This claim is reiterated in the reply to the Reasoned Opinion.³⁷
- (42) The Secretariat respectfully submits that this argument must be rejected. Directive 2010/75/EU forms part of the Energy Community *acquis communautaire* since 2013,³⁸ when an implementation deadline of 1 January 2018 for the Directive's minimum requirements for *new* plants (as stipulated by Chapter III and Annex V thereof) was established. For *existing* plants, a deadline of 1 January 2028 was added later, by virtue of a Decision of the Ministerial Council adopted in 2015.³⁹ The NERP, however, is an implementation alternative based on Article 4(6) of Directive 2001/80/EC, the implementation deadline of which was set for 1 January 2018 already in 2005, with the signature of the Treaty.
- (43) The reply also refers to the *travaux préparatoires*⁴⁰ of Decisions 2013/05/MC-EnC and 2013/06/MC-EnC, whereby most Contracting Parties supported the position that the deadline for implementing Directive 2010/75/EU was premature.⁴¹
- (44) In reply to that argument, it needs to be first recalled that opposition to the deadlines eventually adopted was voiced by several Contracting Parties in relation to the application of the emission

³⁵ Case C-220/22 *Commission v Portugal*, paragraph 46 and the case-law cited.

³⁶ Reply to the Opening Letter by the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina (ANNEX 7), pp. 7-8.

³⁷ Pp. 2-3 of the annex to the letter of the Federal Ministry of Environment and Tourism dated 5 April 2022 (ref. no.: 04/3-19-3-250-1/21).

³⁸ Incorporated by Decision 2013/06/MC-EnC.

³⁹ Decision 2015/06/MC-EnC. The Secretariat further clarified the distinction between new and existing plants in its Policy Guidelines 02/2014 in the context of Decision 2015/06/MC-EnC by concluding that "*combustion plants that have been granted a permit before 1 January 2018, or the operators of which have submitted a complete application for a permit before that date (provided that such plants are put into operation no later than 1 January 2019), should be considered as existing plants under Article 1(2) of Ministerial Council Decision 2013/06/MC-EnC. All other plants should be considered as new plants under Article 1(2) of Ministerial Council decision D/2013/06/MC-EnC.*"

⁴⁰ Permanent High Level Group meetings held on 19 June 2013 and 23 October 2013 and Environmental Task Force meeting held on 17 September 2013.

⁴¹ Conclusion No 9 of the 29th Permanent High Level Group meeting held on 19 June 2013 states that "[a]s regards Directive 2010/75/EU, there was general consensus on the 2018 deadline for new plants, while the proposed 2022 deadline for existing plants was considered too early."

limit values of Directive 2010/75/EU for *existing* plants, for which the original proposal of the European Commission envisaged the year 2022.⁴² Based on the compromise found to support the adoption of Decision 2013/06/MC-EnC, this deadline was changed to 2028. The applicability of NERPs adopted by Contracting Parties according to Article 4(6) of Directive 2001/80/EC as adapted by Decision 2013/05/MC-EnC was extended according to the same deadline, *i.e.* until 31 December 2027. According to the adaptations made by Decision 2013/05/MC-EnC to Article 4(6) of Directive 2001/80/EC, the emission limit values of that Directive and those of 2010/75/EU both serve as bases for the establishment of the NERP ceilings,⁴³ providing for a gradually decreasing emission trend for all pollutants between 2018 and 2027. As stipulated by the last subparagraph of Article 4(6) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, the ceilings for the year 2026 and 2027 must be calculated on the basis of the relevant emission limit values set out in Part 1 of Annex V to Directive 2010/75/EU or, where applicable, the relevant rates of desulphurisation set out in Part 5 of Annex V to Directive 2010/75/EU.

- (45) The fact that the implementation deadline for Directive 2010/75/EU with respect to *existing* plants was set for 1 January 2028 does not affect the obligations stemming from Directive 2001/80/EC for the same plants in the timeframe between 1 January 2018 and 31 December 2027. This includes the implementation of Article 4(3) of Directive 2001/80/EC, whereby Contracting Parties have to achieve significant emission reductions either by ensuring compliance with the emission limit values established in Part A of Annexes III to VII of the Directive by virtue of *litera* (a) of Article 4(3) or by drawing up and implementing a NERP, as provided for by *litera* (b) of Article 4(3) and Article 4(6) of the Directive.
- (46) The legal basis of the current case is thus Directive 2001/80/EC as the applicable *acquis communautaire* for existing large combustion plants. Directive 2010/75/EU only has relevance in relation to the establishment of the annual ceilings for the years 2026 and 2027, in accordance with the amendments to Article 4(6) of Directive 2001/80/EC made by Decision 2013/05/MC-EnC.

b. The case of ongoing investments

- (47) In accordance with the last subparagraph of Annex VIII.B of Directive 2001/80/EC,⁴⁴ Contracting Parties implementing a NERP have the possibility, with the aim of demonstrating progress in implementation, to include in their annual reports emission projections for scenarios taking into account ongoing investments for which financing is secured and a well-defined implementation timeline is drawn up. Point 13 of the Policy Guidelines further stipulates that “*a project can be considered as ongoing investment if adequate proof of availability of financial resources for the realization of the project is provided accompanied with a timetable for implementation. In that case the emission concentrations achieved after the investment (i.e. the signing of the financing agreement) should be presented together with the expected fuel consumption used for the calculation of the emissions for all years after which financing is secured. Based on this report, compliance with the NERP ceilings will be verified.*”
- (48) At the outset, the Secretariat submits that as it is clear from the wording of both Annex VIII.B of Directive 2001/80/EC and the Policy Guidelines, these provisions cannot be used for providing a justification for breaches of the NERP ceilings and therefore of Article 4(3) and 4(6) of Directive 2001/80/EC. The aim of these provisions is to provide Contracting Parties with the possibility to present, where appropriate, the expected effects of ongoing investments with the aim to comply with the NERP ceilings. The third subparagraph of Annex VIII.B of Directive 2001/80/EC

⁴² See, to that effect, the above quoted conclusion of the 29th Permanent High Level Group meeting and conclusions 20-29 of the Environmental Task Force meeting of 17 September 2013 (ANNEX 15), whereby the Secretariat was invited to draft a compromise paper on amending the Commission’s proposal according to the Task Force’s suggestions.

⁴³ See, to that effect, the last three subparagraphs of Article 4(6) of Directive 2001/80/EC (as amended by Decision 2013/05/MC/EnC) quoted in Chapter III of the present Reasoned Request.

⁴⁴ As amended by Decision 2013/05/MC-EnC.

stipulates that “ongoing investments” mean projects for which financing is secured and a well-defined implementation timeline is drawn up. In point 13 of the Policy Guidelines, the Secretariat further elaborated that a project can be considered as ongoing investment upon two conditions: a) if adequate proof of availability of financial resources for the realization of the project is provided and b) this is accompanied with a timetable for implementation. The information provided by the reply to the Reasoned Opinion will be assessed against these criteria in the following paragraphs.

- (49) It is also to be noted that the wording of Article 4(3) of Directive 2001/80/EC is very precise on the general implementation deadline by stipulating that “*Contracting Parties shall, by 1 January 2018 at the latest achieve significant emission reductions*”⁴⁵ either via the implementation of emission limit values or by defining and implementing a NERP. The case at hand is not about how and when compliance with the NERP ceilings will be achieved, but about the breach of the ceilings as established in the NERP of Bosnia and Herzegovina for all three pollutants up until the 2022 reporting year. This breach started already in the 2018 reporting year in the case of all three pollutants and has persisted uninterrupted ever since because of the same conduct, namely the failure of taking the measures necessary to achieve significant emission reductions through the implementation of the NERP, as required by Articles 4(3) and 4(6) of Directive 2001/80/EC. While Annex VIII.B of Directive 2001/80/EC and the Policy Guidelines offer the possibility for Contracting Parties implementing NERPs to include in their annual emission reports, *with the aim of demonstrating progress in implementation*, emission projections for scenarios taking into account ongoing investments, this provision cannot be considered as a replacement of the general obligation to reduce emissions of large combustion plants significantly by 1 January 2018, as required by Article 4(3) of the Directive.
- (50) The information provided in the reply to the Reasoned Opinion is neither underpinned by adequate proof of availability of financial resources for the realization of the projects, nor by a timetable for implementation.
- (51) The reply to the Reasoned Opinion refers to the ongoing and – in part – completed investments in the two large combustion plants located in Republika Srpska.⁴⁶ In particular, information on the installation of a flue gas desulphurisation (FGD) unit in TPP Ugljevik as well as a time schedule for the implementation of the measures in TPP Gacko was presented. The reply concedes that financial difficulties have been impeding the implementation of the emission abatement measures in TPP Gacko in particular.
- (52) As regards the six large combustion plants located in the Federation of Bosnia and Herzegovina, the reply to the Reasoned Opinion summarizes the planned investments aimed to achieve emissions abatement. According to the reply, though, financial difficulties impeded the securing of financing for those measures.⁴⁷
- (53) In this respect, the Secretariat notes that the breaches of the NERP ceilings in the years from 2018 to 2022 are not disputed by Bosnia and Herzegovina. Instead, the reply provides detailed information as regards the situation at the entity’s two large combustion plants (TPP Gacko and TPP Ugljevik) with the intention of demonstrating progress towards the installation of emission abatement techniques.
- (54) At the same time, the emission reporting data submitted by Bosnia and Herzegovina for the reporting years covered by this Reasoned Request prove that no achievements were made then or subsequently. The information submitted by Bosnia and Herzegovina in the reply to the Reasoned Opinion thus does not demonstrate progress in implementation of the NERP, as

⁴⁵ Emphasis added.

⁴⁶ Letter of the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska (ref. no.: 15.04-052-1425/22) dated 25 March 2022 and its annexes.

⁴⁷ Letter of the Federal Ministry of Energy, Mining and Industry (ref. no.: 05-13-3-427/22) dated 7 April 2022 and its annex.

stipulated by Annex VIII.B of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC. Quite the contrary, emissions of sulphur dioxide and dust from the plants located in Republika Srpska were showing a growing tendency, with the breach even intensifying in the 2020-2022 reporting years.⁴⁸ Furthermore, the information provided is not underpinned by adequate proof of availability of financial resources for the realization of the projects, as required by the last subparagraph of Annex VIII.B of Directive 2001/80/EC.

- (55) In relation to the information provided by *Elektroprivreda BiH d.d.* regarding ongoing investments in the large combustion plants located in the Federation of Bosnia and Herzegovina, the Secretariat notes that while the reply to the Reasoned Opinion does provide general information on the state of play of ongoing investments for the large combustion plants TPP Kakanj and TPP Tuzla, this is not underpinned by adequate proof of availability of financial resources for the realization of the projects, as required by the last subparagraph of Annex VIII.B of Directive 2001/80/EC. On the contrary, the reply concedes the failure to secure international or commercial financing of the planned emission abatement measures and the difficulties with securing own sources.⁴⁹
- (56) The information that consultants were selected in the course of 2022 to design and implement flue gas desulphurization and denitrification projects at TPP Kakanj and TPP Tuzla actually confirms that for at least four years into the implementation of the NERP, no concrete steps were taken to meet the obligations stemming from Directive 2001/80/EC. The delays in the realization of these projects suggest that based on general industrial practice, it would take several years to actually realize the significant emission reductions expected from the implementation of these emission abatement measures, as required by Article 4(3) of Directive 2001/80/EC with effect of 1 January 2018 and beyond. The significant breaches of the NERP ceilings subject to the present Reasoned Request are therefore bound to persist for years to come.
- (57) The Secretariat recalls in that respect that according to settled case-law of the Court of Justice of the European Union in the field of air quality, a failure to fulfil obligations may remain systemic and persistent even where a partial downward trend may be revealed by the data collected.⁵⁰ The slight decrease of absolute emissions of sulphur dioxide in the 2021-2022 reporting years cannot be thus considered as offering even partial remedy to the breaches of the NERP ceilings up until the 2022 reporting year, which forms the subject matter of the present case.
- (58) The Secretariat submits that the projects referred to in the reply to the Reasoned Opinion cannot be considered as “ongoing investments” as provided for by Annex VIII.B of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC and referred to by point 13 of the Policy Guidelines. As presented in paragraphs 52-56 above, not only adequate proof of availability of financial resources for the realization of the projects necessary to meet the NERP ceilings, a condition under point 13 of the Policy Guidelines for a project to be considered as ongoing, are not presented, but the reply to the Reasoned Opinion clearly admits the lack of such financial resources. A timetable for the implementation of the projects that would ensure compliance with the NERP ceilings was also not presented.
- (59) Based on the above, the Secretariat respectfully submits that the argument based on the case of ongoing investments to justify non-compliance with Article 4(3) of Directive 2001/80/EC is inoperative in the case at hand.

⁴⁸ For a comparison of the emissions of sulphur dioxide and dust of the two TPPs located in Republika Srpska in the 2018-2022 reporting years, see ANNEX 16.

⁴⁹ Letter of *JP Elektroprivreda BiH d.d.* as provided by the Reply to the Reasoned Opinion, pp. 3-4.

⁵⁰ See, to that effect, Cases C-336/16 *Commission v Poland*, paragraph 65, C-638/18 *Commission v Romania*, paragraph 70 and C-644/18 *Commission v Italy*, paragraph 77.

c. *Force majeure*

- (60) The reply to the Reasoned Opinion also contains information about the flue gas desulphurisation (FGD) plant constructed at TPP Ugljevik, the large combustion plant with the highest sulphur dioxide emissions in the Contracting Party and in the Energy Community (including the European Union) as a whole.⁵¹ The reply explains that the testing period for the FGD plant started in March 2020. However, due to restrictions in response to the Covid-19 pandemic, technical experts were allegedly unable to travel to the site and verify the technical conditions thereof. The FGD plant was completed only on 28 October 2020. During the testing period, the levels of sulphur dioxide and particulate matter emissions were compliant to the emission limit values of Directive 2001/80/EC, as transposed by the Rulebook on measures to prevent and reduce air pollution and improve air quality⁵² of Republika Srpska. Based on this information, Bosnia and Herzegovina concludes that already for the reporting years 2018 and 2019, the operation of TPP Ugljevik was compliant with Annex VIII.B of Directive 2001/80/EC on account of ongoing investments as provided by the amendments of Decision 2013/05/MC-EnC.⁵³
- (61) The Secretariat respectfully submits that this argument must be rejected. The case at hand is not about whether, how and when TPP Ugljevik is brought in compliance with the requirements of Directive 2001/80/EC or Directive 2010/75/EU by the applicable rehabilitation measures. It rather concerns the failure of Bosnia and Herzegovina to implement, for all eight large combustion plants subject to its NERP, Article 4(6) of Directive 2001/80/EC by not ensuring that the ceilings for the pollutants covered by its scope are respected in all reporting years up until the submission of the present Reasoned Request. While the installation of emission abatement techniques constitutes an important measure to ensure compliance with the NERP ceilings, compliance at individual level in itself is not sufficient to ensure compliance with the implementation alternative of the NERP. While compliance of one plant under the scope of the NERP with one of the emission limit values, here sulphur dioxide, certainly has an influence on meeting the corresponding ceilings within the NERP, compliance can only take place at the level of the conglomerate of plants subjected to the NERP. In Bosnia and Herzegovina, as demonstrated above, the ceilings for all pollutants were breached in each reporting year between 2018 and 2022. Considering the emissions of the other plants subject to the NERP, non-compliance with the ceilings for sulphur dioxide would persist in any of the reporting years between 2018 and 2022, even if the emissions TPP Ugljevik were reduced to zero.
- (62) That said, the reply to the Reasoned Opinion concedes that in the 2020 reporting year, the desulphurization unit of TPP Ugljevik was in operation for 1,218 operational hours, which constitutes approximately 17% of the plant's total operation during that year.⁵⁴ Open letters of the Board of Trade Unions of Elektroprivreda Republike Srpske (the operator of TPP Ugljevik) sent to the President, Prime Minister and Ministry of Mining and Energy of Republika Srpska on 21 September 2021 also explain that the FGD plant at TPP Ugljevik was only in operation for nine days between 1 January and 1 September 2021. However, the reply to the Reasoned Opinion claims that the reason for the limited operation of the FGD was *force majeure* caused by the Covid-19 pandemic and delays in the performance of the contractual obligations for the desulphurization unit of TPP Ugljevik.
- (63) In relation to this argument, the Secretariat recalls that even the closure of TPP Ugljevik would not be sufficient to achieve compliance with the NERP of Bosnia and Herzegovina, which renders the argument in the reply a purely hypothetical one. Furthermore, the reply to the

⁵¹ Letter of the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska (ref. no.: 15.04-052-1425/22) dated 25 March 2022, pp. 16-18.

⁵² Official Gazette of Republika Srpska 3/15, 51/15, 47/16 and 16/19.

⁵³ Letter of the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska (ref. no.: 15.04-052-1425/22) dated 25 March 2022, p. 17.

⁵⁴ According to the information submitted by Bosnia and Herzegovina, TPP Ugljevik was in operation for a total of 7,323 hours in the 2020 reporting year.

Reasoned Opinion⁵⁵ confirmed that the flue gas desulphurization unit already installed is not used consistently. This is an intentional decision by the operator of the plant and cannot be brought in connection with Covid-19 pandemic.⁵⁶

- (64) For the sake of completeness only, the Secretariat points out that in relation to the breach of air quality legislation, the Court of Justice of the European Union held that a Member State which encounters temporarily insuperable difficulties preventing it from complying with its obligations under European law may plead *force majeure* only for the period necessary in order to resolve those difficulties.⁵⁷ The emission trends of sulphur dioxide emissions of Bosnia and Herzegovina do not confirm that the FGD project of TPP Ugljevik is implemented in practice and no emission reductions achievable from such a project are visible from the emissions data submitted by Bosnia and Herzegovina. According to Part A of Annex V of Directive 2001/80/EC, a minimum desulphurisation rate of at least 94 % is required for plants greater than 500 MW_{th} (the category in which TPP Ugljevik falls) even in case the emission limit values cannot be met due to the characteristics of the fuel. According to Article 4(6) of Directive 2001/80/EC, these emission limit values and desulphurisation rates also applied as a basis when setting the NERP ceilings in the Contracting Parties. In the 2021 and 2022 reporting years, TPP Ugljevik has emitted amounts of sulphur dioxide that are close to the level of the previous reporting years. In the absence of the emission reductions that should have resulted from its application, it cannot be assumed that the FGD unit of TPP Ugljevik is systematically implemented.⁵⁸
- (65) As regards the fifth argument, related to the Covid-19 pandemic as an alleged justification for the delay in investments necessary for emission reductions to achieve compliance with the NERP ceilings, the Secretariat recalls that it is for the Contracting Party which relies on an imperative requirement to justify contraventions of European law to demonstrate that the conditions for such exemptions are satisfied, accompanied by appropriate evidence.⁵⁹ To the extent that Bosnia and Herzegovina considers this a case of *force majeure* preventing it from achieving compliance, the criteria established by the Court of Justice of the European Union would need to be fulfilled.⁶⁰ First, the failure to fulfil obligations must be the result of abnormal and unforeseeable circumstances; second, the reason of the failure must be outside the control of operator concerned and third, its consequences must have been unavoidable despite the exercise of all due diligence.⁶¹ In addition, a situation of *force majeure* may be pleaded only for the period necessary in order to resolve those difficulties.⁶² It suffices to recall in this respect that the breach of the ceilings established by the NERP of Bosnia and Herzegovina started already in the 2018 reporting year (*i.e.* two years before the outbreak of the Covid-19 pandemic) and has persisted ever since. The breach of Article 4(3) of Directive 2001/80/EC thus cannot be considered the result of these events (or attributed to them).⁶³
- (66) Based on the above, the Secretariat respectfully submits that the justification of the non-compliance with Article 4(3) of Directive 2001/80/EC based on *force majeure* is rejected.

⁵⁵ Letter of the Ministry of Spatial Planning, Construction and Ecology of Republika Srpska (ref. no.: 15.04-052-1425/22) dated 25 March 2022, p. 18.

⁵⁶ ANNEXES 12 and 13.

⁵⁷ See, to that effect, C-488/15 *Commission v Bulgaria*, paragraph 70, C-68/11 *Commission v Italy*, paragraph 64 and the case-law cited.

⁵⁸ In the 2021 and 2022 reporting years, emissions of sulphur dioxide of TPP Ugljevik stood at 86,774 and 85,526 tonnes, respectively. While this represents a slight decrease compared to the 107,402 tonnes recorded in the 2020 reporting year, it cannot be associated with measures of systemic emission reduction, which are technically capable of delivering a decrease of well over 90%.

⁵⁹ See, to that effect, Case 518/06 *Commission v Italy*, paragraph 84 and Case C-333/14 *Scotch Whisky Association*, paragraph 55.

⁶⁰ Case C-540/21 *Commission v Slovakia*, paragraphs 80-89.

⁶¹ Case C-330/14 *Szemerey*, paragraph 58; Case C-297/08 *Commission v Italy*, paragraph 85; Case 296/86 *McNicholl and Others*, paragraph 11.

⁶² Case C-540/21 *Commission v Slovakia*, paragraph 81.

⁶³ *Ibid.*

2. Lack of application of penalties linked to the breach of the NERP ceilings

- (67) Article 16 of Directive 2001/80/EC requires Contracting Parties to determine the penalties applicable to breaches of the national provisions adopted pursuant to the Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.
- (68) The same obligation also follows from Article 6 of the Treaty, whereby Contracting Parties are under an obligation “to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty”.
- (69) In this respect, established case-law of the Court of Justice of the European Union on the corresponding Article 4(3) of the Treaty on European Union,⁶⁴ sets a test of three conditions: first, where Energy Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Contracting Parties shall take all measures necessary to guarantee the application and effectiveness of Energy Community law. Second, while the choice of penalties remains within their discretion, Contracting Parties *must ensure* in particular that infringements of Energy Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Third, the national authorities must proceed, with respect to infringements of Energy Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.⁶⁵
- (70) The Secretariat concluded in the Reasoned Opinion that Bosnia and Herzegovina breaches Article 16 of Directive 2001/80/EC by not adopting and applying penalties for the failure to implement the NERP and comply with the ceilings established therein. While the Directive does not provide exact requirements on the design of penalties but leaves this to the discretion of the Contracting Parties, this is subject to the condition that the penalties are effective, proportionate and dissuasive.
- (71) In its reply to the Reasoned Opinion, the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina asserts that the penalties established by the Laws on Air Protection of Republika Srpska and the Federation of Bosnia and Herzegovina are compliant with Article 16 of Directive 2001/80/EC.
- (72) For Republika Srpska, the reply also maintains that the Law on Environmental Protection⁶⁶ establishes penalties for legal and natural persons who do not comply with the measures set out in an environmental permit. Based on the Law on Air Protection, penalties can be imposed on the operators of large combustion plants according to the reply. Bosnia and Herzegovina concludes that the NERP ceilings are part of the legally binding conditions of the environmental permits of the two large combustion plants located in Republika Srpska. In case of a breach, penalties can be imposed on their operators on the basis of the relevant provisions of the Law on Environmental Protection and the Law on Air Protection.
- (73) In the legal framework of Republika Srpska, Articles 75-77 of the Law on Air Protection stipulate the penalties applicable to the breaches or its provisions. Article 75 lists the breaches upon which fines up to 20,000 KM (equivalent of 10,225 EUR) may be imposed on the operator, including for non-compliance with the emission limit values established by the Rulebook. Furthermore, point a) of Article 77(1) of the Law on Air Protection imposes financial penalties of up to 15,000 KM (equivalent of 7,699 EUR) for misdemeanor in case the emission reduction

⁶⁴ Ex Article 5 of the Treaty establishing the European Community.

⁶⁵Case C-68/88 *Greek Maize*, paragraphs 23-25; Joined Cases C-387/02, 391/02 and 403/02 *Berlusconi and Others*, paragraphs 64-65 and the case-law cited.

⁶⁶ Official Gazette of Republika Srpska, 71/12, 79/15 and 70/20.

plan is not adopted by the operator. However, the Law on Air Protection only envisages penalties for the breach of the individual emission limit values stipulated by the Rulebook (expressed in emission concentrations, *i.e.* mg/Nm³), but not for non-compliance with the emission ceilings established by the NERP.

- (74) In the legal framework of the Federation of Bosnia and Herzegovina, Articles 35-36 of the Law on Air Protection stipulate the penalties applicable to the breaches or its provisions. Article 35 lists the breaches upon which fines up to 10,000 KM (equivalent of 5,117 EUR) may be imposed on the operator, including for the failure to inform the competent authority about exceeding the emission limit values set by the Rulebook on emission limit values for combustion plants and for disregarding orders to suspend the operation of an emission source until necessary measures are implemented to meet the emission standard. No penalties are established, however, for the breach of the NERP ceilings.
- (75) The penalty schemes and their application in Bosnia and Herzegovina is to be assessed in light of the relevant case-law on the effectiveness and dissuasiveness principles of the Court of Justice of the European Union.
- (76) For a penalty to be considered effective within the meaning of provisions of European law such as the one stipulated by Article 16 of Directive 2001/80/EC, the Court of Justice of the European Union has consistently held that efficiency is to be assessed in relation to whether the aim of a directive is actually achieved.⁶⁷
- (77) It is clear from its recitals 5 and 6 that the aim of Directive 2001/80/EC is to reduce acidifying emissions across the Community. Since existing large combustion plants are significant contributors to emissions of sulphur dioxide and nitrogen oxides, it is necessary to reduce their emissions. Article 4(3) of Directive 2001/80/EC translates this objective into the obligation of achieving significant emission reductions of sulphur dioxide, nitrogen oxides and dust beyond 1 January 2018. In case a Contracting Party opts for the implementation of *litera* (b) of Article 4(3) of Directive 2001/80/EC for meeting this obligation (as Bosnia and Herzegovina did for the eight plants covered by the NERP's scope), the obligation is implemented via compliance with the NERP ceilings and the penalties established under national legislation must ensure their effective enforcement.
- (78) Furthermore, even after more than five years into the implementation of the NERP of Bosnia and Herzegovina, the ceilings established therein are not complied with. In the case of all pollutants, the breaches have even intensified. This mere fact confirms that the sanctions regimes established by Bosnia and Herzegovina cannot be considered as satisfying the notion of effectiveness in the sense that it would be sufficient for achieving the aims Directive 2001/80/EC by significantly reducing emissions from large combustion plants by 1 January 2018 and beyond.
- (79) Therefore, the Secretariat does not consider that the penalties applied in Bosnia and Herzegovina as sufficiently efficient for achieving the aim of Directive 2001/80/EC and thus compliant with the notion of effectiveness principle as required by Article 16 of Directive 2001/80/EC.
- (80) As regards the dissuasive character of a penalty, the Court of Justice of the European Union has consistently held that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect.⁶⁸ The Court of Justice of the European Union further held that the economic benefit

⁶⁷ Case C-180/95 *Draehmpaehl*, paragraph 24 and Case C-14/83 *Van Colson and Kamann*, paragraph 18.

⁶⁸ See, *inter alia*, Case C-544/19 *Ecotex Bulgaria*, paragraph 100; Case C-255/14 *Chmielewski*, paragraph 23, Case C-81/12 *Asociatia Accept*, paragraph 63 and C-565/12 *LCL Le Cr dit Lyonnais*, paragraph 45.

derived from the infringement shall be considered when assessing the dissuasiveness of penalties established under national legislation.⁶⁹

- (81) In Bosnia and Herzegovina, penalties can be imposed on the operators of large combustion plants for non-compliance with a breach of air emission norms, albeit not directly related to the NERP ceilings. At the same time, as it is also evident from the requirement of the case-law quoted in paragraph 80 above, that the economic benefit derived from the infringement is to be assessed when deciding on compliance of financial penalties established for breaches of European law with the principle of dissuasiveness.
- (82) Where financial penalties are imposed in a European law context,⁷⁰ the point of departure for setting the penalty amount is the turnover of the company causing the infringement of European law, *i.e.* the value of sales of goods or services. Given that the large combustion plants subject to the NERP of Bosnia and Herzegovina are operated by *Elektroprivreda BiH d.d.*, *Elektroprivreda Republike Srpske* and *Natron-Hayat d.o.o.*, dissuasiveness can be assessed in the light of the turnover of those companies. According to its last publicly available Financial Statement for the year 2022,⁷¹ the sales of *Elektroprivreda BiH d.d.*, amounted to 1,306,893,000 KM (equivalent of 668,203,781 EUR) in 2022 and to 1,118,290,000 KM (equivalent of 571,772,598 EUR) in 2021, while its net profits were at 2,744,000 KM (equivalent of 1,402,985 EUR) and 12,391,000 KM (equivalent of 6,335,418 EUR), respectively. According to its last publicly available Financial Statement for the year 2021,⁷² the sales of *Elektroprivreda Republike Srpske* amounted to 845,400,000 KM (equivalent of 432,246,156 EUR) in 2021 and to 644,569,000 KM (equivalent of 329,562,896 EUR) in 2020, while its net profits were at 79,855,000 KM (equivalent of 40,829,213 EUR) and -34,670,000 KM (equivalent of -17,726,490 EUR), respectively. *Natron-Hayat d.o.o.* does not have a publicly available financial statement. The amount of lump sum penalties applicable under domestic legislation, *i. e.* the fines of up to 20,000 KM (an equivalent of 10,225 EUR) in Republika Srpska or up to 10,000 KM (equivalent of 5,117 EUR) in the Federation of Bosnia and Herzegovina in case of non-compliance with the emission limit values therefore cannot, by any means, be considered as ensuring a genuinely dissuasive effect in Bosnia and Herzegovina for the breach of the NERP ceilings. These amounts represent insignificant percentages of the average annual turnovers (average of 0.0009% in case of *Elektroprivreda BiH d.d.* and average of 0.003% in case of *Elektroprivreda Republike Srpske*) of both companies and are even negligible compared to their net profits (average of 0.22% in case of *Elektroprivreda BiH d.d.* and 0.02% in case of *Elektroprivreda Republike Srpske* in 2021⁷³). These numbers clearly show that penalties established by the law of Bosnia and Herzegovina neither commensurate with the seriousness of the infringements for which they can be imposed, nor they ensure a genuinely dissuasive effect as no operator would be dissuaded by such a level of penalties from continuing with the breach of the Energy Community *acquis communautaire*.
- (83) It is also to be recalled that the Court of Justice of the European Union also held that in light of the assessment of the economic benefit, low financial sanctions imposed as the sole sanction for breaches of EU law might not effectively deprive those responsible of the economic benefit derived from their infringement and thus such a sanction would be neither effective nor dissuasive.⁷⁴ This is precisely the case in Bosnia and Herzegovina. The amount of penalties imposed for exceeding the limit values for dust in the case of TPP Gacko,⁷⁵ as presented by the reply to the Reasoned Opinion (misdemeanor penalties of 2,000 KM (equivalent of 1,023 EUR)

⁶⁹ Joined Cases C-418/00 and C-419/00 *Commission v France*, paragraph 65 and Case C-77/20 *K.M.*, paragraphs 38 and 47-48.

⁷⁰ Guidelines of the European Commission (2006/C 210/02), point 13.

⁷¹ ANNEX 17, pp. 7-8.

⁷² ANNEX 18, p. 6.

⁷³ In 2020, the company reported a negative financial result.

⁷⁴ Case C-77/20 *K.M.*, paragraph 48.

⁷⁵ *Ibid.*, pp. 2-3.

for legal persons and 1,000 KM (equivalent of 511 EUR) for a natural person responsible with the legal person, imposed once per year) cannot be considered as meeting the requirement of dissuasiveness, as stipulated by Article 16 of Directive 2001/80/EC. Such level of penalties also do not consider the economic benefit derived from the infringement, namely through the significant revenues via the continuous sale of electricity produced by non-compliant plants which includes exports to the EU market, as established by the case-law of the Court of Justice of the European Union cited in paragraph 80 above.

- (84) Based on the above, the Secretariat does not consider the penalties applied in Bosnia and Herzegovina as commensurate with the seriousness of the infringements for which they are imposed and capable of ensuring a genuinely dissuasive effect and thus compliant with the notion of dissuasiveness as required by Article 16 of Directive 2001/80/EC.
- (85) The failure of Bosnia and Herzegovina to adopt and apply effective and dissuasive sanctions for the breaches of the NERP ceilings up until the 2022 reporting year thus constitutes a breach of Article 16 of Directive 2001/80/EC.
- (86) Finally, the Secretariat respectfully submits that beyond fulfilling the criteria of efficiency and dissuasiveness, penalties need to be actually applied in practice to cases, such as the one at hand, where the breach of Article 4(3) of Directive 2001/80/EC, namely the NERP ceilings for all reporting years up to 2022 is well-documented and straight-forward. It follows from Article 6 of the Treaty and In the light of the criteria set by the Court of Justice of the European Union when interpreting Article 4(3) TEU that any penalty can only be considered effective and dissuasive within the meaning of Article 16 of Directive 2001/80/EC if it is applied in administrative procedures. This is, however, not the case in Bosnia and Herzegovina. Only minimal sanctions were imposed for the breach of emission limit values, while the established and admitted breaches of the NERP have not been subject to any enforcement action and thus Article 16 of Directive 2001/80/EC cannot be considered as implemented.
- (87) To be compliant with the requirements of the Large Combustion Plants Directive and Article 6 of the Treaty, the contributions of plants to the NERP ceilings would have to be translated into individual, enforceable permit conditions for operators and enforced through the application penalties in case of breaches.
- (88) The reply to the Reasoned Opinion provided information compiled by the Administration for Inspection Activities of Republika Srpska.⁷⁶ This information confirms the findings of the Secretariat, namely that no penalties are issued for the non-compliance with the NERP ceilings, only for the breach of the emission limit values stipulated by the Rulebook.
- (89) In the case of TPP Ugljevik, a deadline for meeting the sulphur dioxide ceiling was initially set for 2026. Only following a renewal of the environmental permit in February 2021, *i.e.* more than a year after the effective date of the 2018 and 2019 ceilings and due to installation of the desulphurisation plant, the plant had to comply with the NERP ceilings. No penalties were however imposed for their breaches.
- (90) The environmental permit of TPP Gacko, revised after the adoption of the NERP of Bosnia and Herzegovina, stipulates the following deadlines for meeting the ceilings: dust until 2019, nitrogen oxides until 2023 and sulphur dioxide until 2026. The installation of corresponding emission abatement techniques is foreseen by the permit according to the same deadlines. In relation to the 2018 and 2019 ceilings, only the 2019 dust ceiling was thus enforceable according to the explanation provided, which rules out the application of any penalties for any breach of the

⁷⁶ Letter of the Administration for Inspection Activities of Republika Srpska, ref. no. 24.090/9993-132-2/22, dated 18 March 2022.

ceilings for sulphur dioxide and nitrogen oxides. The same holds true for ceilings of nitrogen oxide up until 2023 and ceilings for sulphur dioxide up until 2026.

- (91) There is no information available for the Federation of Bosnia and Herzegovina which would allow to conclude that any penalty was ever imposed for breaches of the NERP ceilings.

V. Conclusion

- (92) Based on the above, the Secretariat respectfully submits that by failing to implement the measures necessary to comply with Article 16 of Directive 2001/80/EC by not imposing effective and dissuasive penalties for the established breaches of the large combustion plants falling under the scope of its NERP, Bosnia and Herzegovina fails to comply with Articles 12 and 16 of the Energy Community Treaty.

ON THESE GROUNDS

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

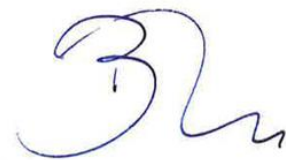
by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan, Bosnia and Herzegovina fails to comply with Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

On behalf of the Secretariat of the Energy Community,

Vienna, 13 July 2023

A handwritten signature in blue ink that reads "Artur Lorkowski".

Artur Lorkowski
Director

A handwritten signature in blue ink that reads "Dirk Buschle".

Dirk Buschle
Deputy Director / Legal Counsel

List of Annexes

- ANNEX 1 Policy Guidelines 03/2014 by the Energy Community Secretariat on the Preparation of National Emission Reduction Plans
- ANNEX 2 Law of Air Protection of Republika Srpska of 2011 (the Secretariat can provide translation upon request)
- ANNEX 2a Amendments to the Law of Air Protection of Republika Srpska of 2017 (the Secretariat can provide translation upon request)
- ANNEX 3 Rulebook on emission limit values for combustion plants of the Federation of Bosnia and Herzegovina of 2013 (the Secretariat can provide translation upon request)
- ANNEX 3a Amendments to the Rulebook on emission limit values for combustion plants of the Federation of Bosnia and Herzegovina of 2017 (the Secretariat can provide translation upon request)
- ANNEX 4 National Emission Reduction Plan of Bosnia and Herzegovina, as adopted by a Decision of the Council of Ministers, 30 December 2015
- ANNEX 4a Decision of the Council of Ministers, 30 December 2015
- ANNEX 5 Emission ceilings established by the NERP of Bosnia and Herzegovina
- ANNEX 6 Opening Letter in Case ECS-9/21, 16 March 2021
- ANNEX 7 Reply to the Opening Letter by the Ministry of Foreign Trade and Economic Relations, dated 10 May 2021
- ANNEX 8 Reasoned Opinion in Case ECS-9/21, 21 February 2022
- ANNEX 9 Reply to the Reasoned Opinion by the Ministry of Foreign Trade and Economic Relations, 15 April 2022 (accompanied by Annexes 9a-9d, appendices to the reply to the Reasoned Opinion)
- ANNEX 10 Conclusions of the 20th meeting of the Environmental Task Force, 11 May 2020
- ANNEX 11 Conclusions of the 22nd meeting of the Environmental Task Force, 6 December 2021
- ANNEX 12 Conclusions of the 23rd meeting of the Environmental Task Force, 13 June 2022
- ANNEX 13 Emission totals of large combustion plants under the NERP of Bosnia and Herzegovina and their comparison to the ceilings established for the 2018 and 2019 reporting years
- ANNEX 14 Emission totals of large combustion plants under the NERP of Bosnia and Herzegovina and their comparison to the ceilings established for the 2020-2022 reporting years
- ANNEX 15 Conclusions of the 6th Environmental Task Force meeting, 17 September 2013

- ANNEX 16 Emissions of sulphur dioxide and dust of the large combustion plants located in Republika Srpska in the 2018-2020 reporting years
- ANNEX 17 Financial Statement of *Elektroprivreda BiH d.d.* for the year 2022
- ANNEX 18 Financial Statement of *Elektroprivreda Republike Srpske* for the year 2021