

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–8/21

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

KOSOVO*

is seeking a Decision from the Ministerial Council that

by failing to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of its National Emission Reduction Plan, Kosovo* 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 Kosovo* 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 ceiling for sulphur dioxide for the 2018 reporting year, and the emission ceilings for sulphur dioxide, nitrogen oxides and dust for the 2019 reporting year 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 Adapted by Ministerial Council Decision 2013/05/MC-EnC of 24 October 2013 on the implementation 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.

- (2) According to Article 90 of the Treaty establishing the Energy Community (hereinafter: "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.³
- (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 existing⁴ 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,⁵ or b) by defining and implementing a NERP.⁶ 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").⁷ 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 Guidelines, the Secretariat elaborated the methods according to which the contributions of large combustion plants to the overall NERP

³ Recitals (3), (5) and (6) of Directive 2001/80/EC.

⁴ 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.

⁵ Compliance with Article 4(1) and point a) of Article 4(3).

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

⁷ Policy Guidelines 03/2014 by the Energy Community Secretariat on the Preparation of National Emission Reduction Plans, ANNEX 1.

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”)⁸ (for the implementation years 2026-2027).

- (8) Kosovo* 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, March 2020, March 2021, March 2022 and January 2023, respectively. In June 2022, Kosovo* submitted corrected emissions data for the 2021 reporting year.

3. Legal framework governing emissions into the air from large combustion plants in Kosovo*

- (9) At the time of its adoption, Articles 75 and 77 of Administrative Instruction 06/2007 on the rules and standards of discharges on air by stationary sources of pollution⁹ set the rules for the adoption of a NERP in Kosovo*. According to these provisions, the NERP was to be adopted by the Government of Kosovo* upon a proposal by the Ministry of Environment and Spatial Planning. Furthermore, Article 77(2) of the Administrative Instruction stated that the NERP shall reduce the emissions of sulphur dioxide, nitrogen oxides and dust in accordance with the international obligations of Kosovo*.
- (10) The Government of Kosovo* adopted a NERP on 29 May 2018.¹⁰ The following four large combustion plants are covered by the NERP, all of which are operated by the Kosovo Energy Corporation (Korporata Energjetike e Kosovës, hereinafter: “KEK”):

Emission report code	Plant name
XK0001	TC Kosova A3
XK0002	TC Kosova A4
XK0003	TC Kosova A5
XK0004 XK0005	TC Kosova B1+B2 ¹¹

- (11) The emission ceilings established by the NERP for the conglomerate of these large combustion plants are presented in Annex 4 to the present Reasoned Request.
- (12) On 23 June 2022, a new version of the Law on Air Protection from Pollution¹² was adopted by the Assembly of Kosovo*, Article 32(2) of which regulates the legal status of the NERP at the level of primary legislation and requires that operators of combustion plants covered by its scope must ensure that until 31 December 2017 and in the years thereafter the emission ceilings specified for each year in the NERP are being met. The Law was published on 13 July 2022¹³

⁸ OJ L 334, 17.12.2010, p. 17.

⁹ ANNEX 2. On 29 July 2021, Administrative Instruction 07/2021 on the rules and standards of discharges on air by stationary sources of pollution repealed Administrative Instruction 06/2007.

¹⁰ No. 12/49, ANNEX 3.

¹¹ TC Kosova B1 and B2 are separate units of the Kosova B plant operated through a common stack and thus were considered as one large combustion plant under the NERP. At the same time, the emissions of the two units are reported separately.

¹² Law No. 08/L-025, ANNEX 5.

¹³ Official Gazette of Kosovo* 18/2022.

and entered into force 15 days after its publication, *i.e.* on 28 July 2022. According to its Article 56, a fine between twenty thousand and forty thousand euros can be imposed in case the provisions of Article 32 of the Law (*i.e.* the obligation to respect the NERP ceilings) are not respected.

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*”.¹⁴

(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/EC¹⁵ 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

¹⁴ Article 3(1) of the Dispute Settlement Procedures.

¹⁵ As amended by Article 3 of Decision 2013/05/MC-EnC.

(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/EC¹⁶ 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 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

¹⁶ As amended by Article 5 of Decision 2013/05/MC-EnC.

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/EC¹⁷ 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/EC¹⁸ 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.

¹⁷ As amended by Article 7 of Decision 2013/05/MC-EnC.

¹⁸ As amended by Article 6 of Decision 2013/05/MC-EnC.

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,¹⁹ the present case was initiated on 16 March 2021.
- (23) In the Opening Letter,²⁰ the Secretariat preliminarily concluded that by not meeting the ceilings for sulphur dioxide in the 2018 reporting year and the ceilings for sulphur dioxide, nitrogen oxides and dust in the 2019 reporting year and by not establishing proportionate, effective and dissuasive penalties for such breaches, Kosovo* 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 Economy and Environment of Kosovo* to submit its reply on the points of fact and of law raised in the Opening Letter by 16 May 2021.
- (24) In the absence of a reply to the Opening Letter, the Secretariat submitted a Reasoned Opinion to the Ministry of Economy of Kosovo* on 21 February 2022 and requested its reply on the points of fact and of law raised therein by 21 April 2022.²¹
- (25) The Ministry of Economy and the Ministry of Environment, Spatial Planning and Infrastructure submitted a reply to the Reasoned Opinion on 21 April 2022.²² 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 Kosovo* in its 2021²³ and 2022²⁴ Implementation Reports and to the representatives of the Contracting Party at the 20th,²⁵ 22nd²⁶ and 23rd²⁷ meetings of the Environmental Task Force of 11 May 2020 and 6 December 2021, respectively.
- (27) As will be argued below, the Secretariat considers that the authorities of Kosovo* 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 Kosovo* with the obligation to comply with the emission ceilings for sulphur dioxide, nitrogen oxides and dust established by the NERP for the four large combustion plants covered by the plan's scope for the 2018²⁸ and 2019²⁹ 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.

¹⁹ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 85; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, pp. 93-94.

²⁰ ANNEX 6.

²¹ ANNEX 7.

²² ANNEX 8.

²³ Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 87-88.

²⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2022, pp. 81-82.

²⁵ ANNEX 9.

²⁶ ANNEX 10.

²⁷ ANNEX 11.

²⁸ Non-compliance with the ceiling for sulphur dioxide.

²⁹ Non-compliance with the ceilings for sulphur dioxide, nitrogen oxides and dust.

- (29) As a Contracting Party to the Treaty, Kosovo* 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.

1. Breach of the NERP ceilings

- (30) 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*.³⁰ 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.
- (31) Article 4(3) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, requires Kosovo* to achieve significant emission reductions of sulphur dioxide, nitrogen oxides and dust from large combustion plants by 1 January 2018 by either implementing the Directive’s emission limit values at plant level,³¹ or by subjecting them to a NERP.³² 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 is 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 NERP³³ and compliance verification is to be done between the combined emission totals of all plants subjected to the NERP and the annual emission ceilings.³⁴
- (32) 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 Kosovo* did for the four 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.
- (33) 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

³⁰ Emphasis added.

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

³² Compliance with litera (b) of Article 4(3) of Directive 2001/80/EC.

³³ First subparagraph of Article 4(6) of Directive 2001/80/EC.

³⁴ Annex VIII.B of Directive 2001/80/EC.

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.

- (34) By consequence, Contracting Parties that have opted for a NERP as their 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.
- (35) As explained in the Opening Letter and concluded in the Reasoned Opinion, the emission totals of the four large combustion plants falling under the scope of the NERP of Kosovo* exceed the emission ceilings established by the NERP for sulphur dioxide in the 2018 reporting year and for all three pollutants (sulphur dioxide, nitrogen oxides and dust) in the 2019 reporting year. The emission totals reported by Kosovo* and their comparison to the applicable NERP ceilings are presented in Annex 12 to the present Reasoned Request.
- (36) The established non-compliance with the NERP ceilings in the cases of the 2018 and 2019 reporting years have been explicitly confirmed by the reply of the Ministry of Economy and the Ministry of Environment, Spatial Planning and Infrastructure 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 Kosovo* to comply with its obligations under the 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, with the breach even intensifying in the following reporting years. 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 2019.³⁵ In the 2020 reporting year, the ceiling for sulphur dioxide was breached 1.97 times, while in the 2021 and 2022 reporting years, 1.45 and 1.8 times, respectively. In the 2020 reporting year, the ceiling for nitrogen oxides was breached 2.23 times, while in the 2021 and 2022 reporting years, 1.95 and 2.59 times, respectively. In the 2020 reporting year, the ceiling for dust was breached 1.78 times, while in the 2021 and 2022 reporting years, 3.85 and 6.64 times,³⁶ respectively. Those data were communicated by the authorities of Kosovo* themselves and are therefore not disputed.
- (37) 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 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”*.³⁷ Given that Kosovo*'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.
- (38) The Secretariat thus respectfully submits that Kosovo* 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 four large combustion plants by subject to the NERP by 1 January 2018 and until present date.

³⁵ For a comparison between those ceilings and the reported emissions, see ANNEX 13 to the present Reasoned Request.

³⁶ The significant increase in the breach of the dust ceiling is related to the gradual decrease of that ceiling, as established by the NERP.

³⁷ Case C-220/22 *Commission v Portugal*, paragraph 46 and the case-law cited.

- (39) In their reply to the Reasoned Opinion, the Ministry of Economy and the Ministry of Environment, Spatial Planning and Infrastructure of Kosovo* offer several arguments to justify non-compliance with Directive 2001/80/EC and refers to the age of the plants concerned,³⁸ the affordability of energy prices,³⁹ the failure of timely reporting⁴⁰ and the difficulties in the national administrative system related to the transposition and implementation of Directive 2001/80/EC.⁴¹
- (40) The first argument relates to the age of the plants and the challenges posed by their technical characteristics to the implementation of Directive 2001/80/EC and the NERP of Kosovo*. The Secretariat respectfully submits that this argument must be dismissed. The age of the plants as well as their technical characteristics were readily available to the competent authorities of Kosovo* not only at the time of drafting and adoption of the NERP but already at the time of signature of the Treaty. In that context, the Secretariat recalls that the timespan between the Treaty's entry into force (1 July 2006) and the entry into force of the obligations under Directive 2001/80/EC (1 January 2018) was over eleven years, providing ample time for Contracting Parties to prepare for the implementation of the Directive's provisions.
- (41) As regards the second argument, namely that the operation of the power plants is crucial to maintain prices at an affordable level, the Secretariat submits that in accordance with the established case-law of the Court of Justice of the European Union, measures impinging on European rules and principles cannot be justified by purely economic aims.⁴²
- (42) The Secretariat also recalls that investments in the modernisation of power plants, including emission abatement measures, can and should be reflected in the costs of the electricity produced by the operator and sold on the domestic and regional markets. Foregoing such investments because of social concerns not only amounts to Kosovo* breaching the *acquis communautaire*, but also affects the level-playing field for regional electricity trade and the life and health of its citizens. Moreover, it is to be clarified that Energy Community law does not prevent Kosovo* from providing compensatory liquidity support to KEK as the operator of large combustion plants and/or end customers of electricity, as legitimate remedies to address the recent price surge. In the European Union, this possibility was explicitly acknowledged in the European Commission's REPowerEU plan.⁴³ Furthermore, it is to be noted that the European Commission provided Kosovo* with a significant energy support package to overcome the energy price surge. On 24 February 2023, a Financial Agreement between the European Commission and the Government of Kosovo* was signed, with the first tranche of 75 million euros immediately available for energy bill subsidies and to help households and micro, small, and medium enterprises increase energy efficiency.⁴⁴ Breaches of the environmental *acquis*, however, were never and cannot be considered as legitimate remedies.
- (43) As regards the third argument, namely the difficulties in the national administrative system related to the transposition and implementation of Directive 2001/80/EC, the Secretariat submits that provisions, practices or situations prevailing in the domestic legal order cannot be used to justify failure to observe obligations arising under European law in accordance with the

³⁸ Point 1 of the Reply.

³⁹ Point 1 of the Reply.

⁴⁰ Point 2 of the Reply.

⁴¹ Points 3 and 5 of the Reply.

⁴² See, inter alia, Cases C-288/83 *Commission v Ireland*, paragraphs 10 and 28. C-164/99 *Portugaia Construções*, paragraph 26 and C-324/93 *Evans Medical*, paragraph 36.

⁴³ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions REPowerEU: Joint European Action for more affordable, secure and sustainable energy COM/2022/108 final, 8.3.2022, p. 3; see also Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.

⁴⁴ https://www.eeas.europa.eu/delegations/kosovo/energy-support-package-eu-grants-eur-75-million-kosovo-help-it-cope-energy_en?s=321

established case-law of the Court of Justice of the European Union.⁴⁵ This jurisprudence both applies to the application of obligations related to the transposition⁴⁶ and the implementation⁴⁷ of obligations stemming from Community law. Contracting Parties can therefore not use administrative delays as justification for a failure to comply with the Energy Community *acquis communautaire*.

- (44) The same applies to the fourth argument, namely the failure of timely reporting on the implementation of the NERP due to frequent changes of Government, consequent reorganisations in the national administrative system. However, the Secretariat recalls that Kosovo* actually did comply with its reporting obligations for all reporting years up until the 2022 one, as required by Annex VIII.B of Directive 2001/80/EC.⁴⁸ In any event, compliance with the reporting obligation under Annex VIII.B of Directive 2001/80/EC, cannot be considered as justifications for the non-compliance with its Article 4(3), namely the non-compliance with the NERP ceilings.
- (45) 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.⁴⁹ To the extent that Kosovo* 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.⁵⁰ 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.⁵¹ In addition, a situation of *force majeure* may be pleaded only for the period necessary in order to resolve those difficulties.⁵² It suffices to recall in this respect that the breach of the ceilings established by the NERP of Kosovo* 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 by Kosovo* of Article 4(3) of Directive 2001/80/EC thus cannot be considered the result of these events (or attributed to them).⁵³
- (46) Based on the above, the Secretariat respectfully submits that the arguments offered by Kosovo* in the reply to the Reasoned Opinion cannot justify the established breaches of Articles 4(3) and 4(6) of Directive 2001/80/EC and thus must be rejected.

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

- (47) 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.
- (48) 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

⁴⁵ See, inter alia, Case C-503/04 *Commission v Germany*, paragraph 38; Case C-568/07 *Commission v Greece*, paragraph 50.

⁴⁶ See, inter alia, Case C-147/94 *Commission v Spain*, paragraph 5 and C-259/94 *Commission v Greece*, paragraph 5.

⁴⁷ See, inter alia, Case C-166/97 *Commission v France*, paragraphs 12-13.

⁴⁸ Page 3 of the Opening Letter; Paragraph 10 of the Reasoned Opinion.

⁴⁹ See, to that effect, Case 518/06 *Commission v Italy*, paragraph 84 and Case C-333/14 *Scotch Whisky Association*, paragraph 55.

⁵⁰ Case C-540/21 *Commission v Slovakia*, paragraphs 80-89.

⁵¹ Case C-330/14 *Szemerey*, paragraph 58; Case C-297/08 *Commission v Italy*, paragraph 85; Case 296/86 *McNicholl and Others*, paragraph 11.

⁵² Case C-540/21 *Commission v Slovakia*, paragraph 81.

⁵³ *Ibid.*

fulfilment of the obligations arising out of this Treaty". 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,⁵⁴ 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.⁵⁵

- (49) The Secretariat concluded already in the Reasoned Opinion that Kosovo* 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. At the time of issuing the Reasoned Opinion, the previous Law on Air Protection from Pollution of Kosovo*⁵⁶ did not stipulate any penalties for the breach of the NERP ceilings.
- (50) In their reply to the Reasoned Opinion, the Ministry of Economy and the Ministry of Environment, Spatial Planning and Infrastructure of Kosovo* informed the Secretariat that a new draft of the Law on Air Protection from Pollution is in the adoption procedure that will address non-compliance with Article 16 of Directive 2001/80/EC.⁵⁷ This Law was indeed adopted on 23 June 2022 and entered into force on 28 July 2022.
- (51) To that end, the Secretariat recalls that in relation to failure to adopt compliant national measures transposing the Energy Community *acquis communautaire*, it is settled case-law of the Court of Justice of the European Union, the question whether a Contracting Party has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion.⁵⁸ In the present case, that period ended on 21 April 2022. Under these circumstances, Kosovo* breaches Article 16 of Directive 2001/80/EC without any further assessment needed. For the sake of completeness, the Secretariat will nevertheless assess the relevant provisions of the new Law on Air Protection from Pollution, which were adopted and entered into force after that date, against the criteria stipulated by Article 16 of Directive 2001/80/EC.
- (52) With the establishment of a penalty scheme linked to the non-compliance with the NERP ceilings via Articles 32 and 56 of the Law on Air Protection from Pollution, Kosovo* has created a legal framework based on which penalties for breaches of Article 4(3) *litera* (b) of Directive 2001/80/EC, *i.e.* non-compliance with the NERP ceilings, can be imposed. According to Article 56(1) of that Law, a misdemeanor fine between twenty thousand and forty thousand euros can be imposed by the Environmental Inspectorate on the operator of large combustion plants in case the requirements of the NERP are not complied with. According to Article 56(2) of the same Law, the responsible person of the is subject to a fine of two hundred euros up to four thousand euros for the same non-compliance.

⁵⁴ Ex Article 5 of the Treaty establishing the European Community.

⁵⁵ Case 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.

⁵⁶ Law No. 03/L-160.

⁵⁷ Point 4 of the Reply.

⁵⁸ Case C-631/18 *Commission v Slovenia*, paragraph 24 and the case-law cited.

- (53) The penalty scheme under the Law and its application in Kosovo* 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.
- (54) 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 ruled that efficiency is to be assessed in relation to whether the aim of a directive is actually achieved.⁵⁹
- (55) 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 Kosovo* did for the four plants covered by the NERP's scope), the obligation is implemented via compliance with the NERP ceilings and their effective enforcement.
- (56) Furthermore, even after more than five years into the implementation of the NERP of Kosovo*, 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 regime established by Kosovo* 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.
- (57) Therefore, the Secretariat does not consider the penalties applied in Kosovo* as sufficiently efficient for achieving the aim of Directive 2001/80/EC and thus compliant with the notion of effectiveness as required by Article 16 of Directive 2001/80/EC.
- (58) 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.⁶⁰ The Court of Justice of the European Union further held that the economic benefit derived from the infringement shall be considered when assessing the dissuasiveness of penalties established under national legislation.⁶¹
- (59) Following the amendments to the Law on Air Protection from Pollution in effect since July 2022, penalties exist that can be imposed on the operators of large combustion plants for non-compliance with the NERP ceilings. At the same time, as it is also evident from the requirement of the case-law quoted in paragraph 58 above, 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.
- (60) Where financial penalties are imposed in a European law context,⁶² 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. Being the only operator in Kosovo* of large combustion plants, dissuasiveness can only be assessed in the light of the turnover of *KEK*. According to its last publicly available Financial Statement for the year 2021, the sales of the company amounted to 216,607,000 euros in 2021 and to 185,844,000 euros in 2020, while its

⁵⁹ Case C-180/95 *Draehmpaehl*, paragraph 24 and Case C-14/83 *Van Colson and Kamann*, paragraph 18.

⁶⁰ See, *inter alia*, Case C-544/19 *Ecotex Bulgaria*, paragraph 100; Case C-255/14 *Chmielewski* and the case-law cited.

⁶¹ 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.

⁶² Guidelines of the European Commission (2006/C 210/02), point 13.

net profits were at 39,177,000 and 23,784,000 euros, respectively.⁶³ Financial sanctions between twenty thousand euros and forty thousand euros, as established by Article 56(1) of the new Law on Air Protection from Pollution therefore cannot, by any means, be considered as ensuring a genuinely dissuasive effect for the breach of the NERP ceilings. These amounts represent approximately 0.01-0.02% of *KEK*'s average annual turnover and are even negligible (approximately 0.1-0.2%) compared to the company's net profits. These numbers clearly show that the penalties established in Kosovo* law for breaches of the NERP ceilings are neither commensurate with the seriousness of the infringements for which they could 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*.

- (61) 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 European law will not effectively deprive those responsible of the economic benefit derived from their infringement and thus such a sanction would be neither effective nor dissuasive.⁶⁴ This is precisely the case in Kosovo*.
- (62) Based on the above, the Secretariat does not consider the penalties applied in Kosovo* as commensurate with the seriousness of the infringements for which they are imposed, 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.
- (63) 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 Kosovo* since to date, neither the Ministry of Environment, Spatial Planning and Infrastructure of Kosovo* nor the Kosovo* Environment Protection Agency has issued any penalties on *KEK* for the breach of compliance with the NERP ceilings.
- (64) On 14 June 2023, the Ministry of Environment, Spatial Planning and Infrastructure of Kosovo* informed the Secretariat that in the course of 2022, the Kosovo* Environmental Inspectorate found legal violations related to the monitoring and reporting of the emissions into the air of TPP Kosovo A. On 7 July 2023, the Ministry of Environment, Spatial Planning and Infrastructure submitted the copy of an inspection protocol carried out by the Kosovo* Environmental Inspectorate on 28 April 2022 as evidence.⁶⁵ The protocol, while conceding the breach of TPP Kosovo A of the emission limit values established by the Administrative Instruction, does not impose any sanction on *KEK*, the operator of the plant. The protocol also does not make any reference to the NERP or the breach of the ceilings established therein. Consequently, this document cannot be considered as an implementing measure to achieve compliance with the provisions of Article 16 of Directive 2001/80/EC.

⁶³ ANNEX 14, p. 8.

⁶⁴ Case C-77/20 *K.M.*, paragraph 48.

⁶⁵ Ref. no. 22-INS-P-3-ID-17, ANNEX 15

V. Conclusion

- (65) 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 applying effective and dissuasive penalties for the established breaches of the large combustion plants falling under the scope of its NERP, Kosovo* 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:

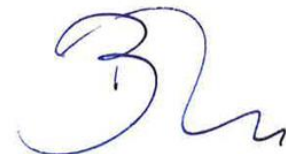
by failing to achieve significant emission reductions with regard to the four large combustion plants falling under the scope of its National Emission Reduction Plan, Kosovo* fails to comply with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 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.

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 Administrative Instruction 06/2007 on the rules and standards of discharges on air by stationary sources of pollution
- ANNEX 3 National Emission Reduction Plan of Kosovo*
- ANNEX 3a Decision 12/49 (29.05.2018) of the Government of Kosovo* (the Secretariat can provide translation upon request)
- ANNEX 4 Emission ceilings established by the NERP of Kosovo*
- ANNEX 5 Law No. 08/L-025 on Air Protection from Pollution
- ANNEX 6 Opening Letter in Case ECS-8/21, dated 16 March 2021
- ANNEX 7 Reasoned Opinion in Case ECS-8/21, dated 21 February 2022
- ANNEX 8 Reply to the Reasoned Opinion by the Ministry of Economy and the Ministry of Environment, Spatial Planning and Infrastructure, dated 21 April 2022
- ANNEX 9 Conclusions of the 20th meeting of the Environmental Task Force, 11 May 2020
- ANNEX 10 Conclusions of the 22nd meeting of the Environmental Task Force, 6 December 2021
- ANNEX 11 Conclusions of the 23rd meeting of the Environmental Task Force, 13 June 2022
- ANNEX 12 Emission totals of large combustion plants under the NERP of Kosovo* and their comparison to the ceilings established for the 2018 and 2019 reporting years
- ANNEX 13 Emission totals of large combustion plants under the NERP of Kosovo* and their comparison to the ceilings established for the 2020-2022 reporting years
- ANNEX 14 Financial Statement and Auditor's Report of KEK for the year ended on 31 December 2021
- ANNEX 15 Inspection Report nr. 22-INS-P-3-ID-17 (the Secretariat can provide translation upon request)