

**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–7/21

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 Procedures”),<sup>1</sup> the

### **SECRETARIAT OF THE ENERGY COMMUNITY**

against the

### **REPUBLIC OF NORTH MACEDONIA**

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, the Republic of North Macedonia 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 the Republic of North Macedonia with the provisions of Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants<sup>2</sup> (hereinafter: “Directive 2001/80/EC”) by not respecting the emission ceilings for sulphur dioxide 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.

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

<sup>2</sup> 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.
- (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 with 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 existing<sup>3</sup> 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 covered plants in operation in the year 2012.
- (6) By consequence, there are two alternative avenues available to 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,<sup>4</sup> or b) by defining and implementing a NERP.<sup>5</sup> 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").<sup>6</sup> 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 ceilings for the three pollutants covered by the Directive's scope are to be calculated. These

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<sup>3</sup> 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.

<sup>4</sup> Compliance with Article 4(1) and point a) of Article 4(3).

<sup>5</sup> Compliance with point b) of Article 4(3) and Article 4(6).

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

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")<sup>7</sup> (for the implementation years 2026-2027).

- (8) The Republic of North Macedonia 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, April 2021, March 2022 and March 2023, respectively.

### 3. Legal framework governing emissions into the air from large combustion plants in the Republic of North Macedonia

- (9) Article 23 of the Law on Ambient Air Quality<sup>8</sup> identifies the basic planning documents that need to be prepared by the Minister responsible for environment and to be adopted by the Government of the Republic of North Macedonia in order to achieve the national goals for ambient air quality. According to Article 23(4), one of those documents is the national programme for gradual reduction of emissions from certain pollutants. The national programme, as defined by Articles 27-b and 27-c of the same Law, includes data on the reference values for setting the ceilings, adopted and envisaged policies and basic measures as well as a quantified assessment of the effects of the policies and measures for the reduction of emissions of air pollutants (including sulphur dioxide, nitrogen oxides and dust).
- (10) The national programme for gradual reduction of emissions from certain pollutants was adopted by the Government in July 2012 for the period 2012-2020. Based on Article 23(4) of the Law on Ambient Air Quality and the national programme for gradual reduction of emissions from certain pollutants, the Government of the Republic of North Macedonia adopted the NERP on 11 April 2017<sup>9</sup> for the period 2018-2027.
- (11) The NERP covers the following eight large combustion plants:

Emission report code	Plant name
MK0001	REK Bitola (B1+B2)
MK0002	REK Bitola (B3)
MK0003	REK Oslomej
MK0004	TEC Negotino
MK0005	Balkan Energy, Toplana Istok
MK0006	Balkan Energy, Toplana Zapad
MK0007	OKTA Processing plant
MK0008	OKTA Energy production

Plants MK0001-MK0004 are operated by *JSC Power Plants of North Macedonia*, plants MK0005-MK0006 by *TE-TO a.d.* and plants MK0007-MK0008 by *OKTA a.d.*

<sup>7</sup> OJ L 334, 17.12.2010, p. 17.

<sup>8</sup> Official Journal No. 100/12; 163/13; 10/15; 146/15 and 151/2021, ANNEX 2.

<sup>9</sup> 104<sup>th</sup> session of the Government held on 11 April 2017, ANNEX 3.

- (12) 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.
- (13) Article 28 of the Law on Ambient Air Quality stipulates that operators of installations that are sources of ambient air pollution are to apply and finance the emission reduction measures stemming from the documents referred to in Article 23 of the Law. As confirmed in the reply to the Opening Letter, these measures include the ones required for the implementation of the NERP.
- (14) According to Article 66 of the Law on Ambient Air Quality, the Ministry of Environment and Physical Planning and the State Environmental Inspectorate are responsible for supervising the application and implementation of the Law. The sanctions and penalties are prescribed in Chapter XII of the Law.
- (15) Article 77(1) of the Law on Ambient Air Quality addresses non-compliance with the obligation of operators in case the emission limit values are exceeded. Following amendments in effect since July 2021, point 1 of Article 77(1) envisages fines of 180,000 to 200,000 euros (denar-equivalent)<sup>10</sup> to be imposed on the operator in case pollutants are released into the air above the prescribed emission limit values under Article 15(1) of the Law. That provision is the basis for secondary legislation establishing individual emission limit values (corresponding to those stipulated by Annexes III to VII of Directive 2001/80/EC).<sup>11</sup> Furthermore, point 4 of Article 77(1) imposes the same amount of fines in case the operator does not fulfill its obligations and the financing of measures to reduce the emissions specified in the planning documents referred to in Article 28, which includes the NERP. Article 77(2) of the Law on Ambient Air Quality envisages fines of 10,000 euros (denar-equivalent) to be imposed on natural persons responsible within the operator in the same cases. Under Article 67 of the Law on Ambient Air Quality, the installation can be forced by the State Environmental Inspectorate to suspend its operation for a period of sixty days in case the conditions of the integrated environmental permit referred to in Article 55 of the Law, or the adjustment permit referred to in Article 56 of the Law, are not met.

## II. Relevant Energy Community Law

- (16) 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*”.<sup>12</sup>
- (17) 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.*

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<sup>10</sup> Amounts applicable in case of “large commercial entities” which are defined by the Law on Commercial Entities of the Republic of North Macedonia as having more than 250 employees, more than 10 million euros (denar-equivalent) annual income and an average value of total assets above 11 million euros (denar-equivalent). The operators of the large combustion plants under the scope of the NERP of the Republic of North Macedonia fall into this category.

<sup>11</sup> Rulebook on the Limit Values for the Permissible Levels of Emissions and Types of Pollutants in the Exhaust Gases and Vapours Emitted into the Air from Stationary Sources, Official Gazette No.141/10, 223/19, ANNEX 5.

<sup>12</sup> Article 3(1) of the Dispute Settlement Procedures.

(18) 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.*

(19) 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,(...)*

(20) 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.*

(21) Article 4(3) of Directive 2001/80/EC<sup>13</sup> 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.*

(22) Article 4(6) of Directive 2001/80/EC<sup>14</sup> 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<sub>x</sub>), sulphur dioxide (SO<sub>2</sub>) 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.*

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<sup>13</sup> As amended by Article 3 of Decision 2013/05/MC-EnC.

<sup>14</sup> As amended by Article 5 of Decision 2013/05/MC-EnC.

*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.*

(23) Article 16 of Directive 2001/80/EC<sup>15</sup> 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.*

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<sup>15</sup> As amended by Article 7 of Decision 2013/05/MC-EnC.

(24) Annex VIII.B of Directive 2001/80/EC<sup>16</sup> reads:

*Contracting Parties shall establish, starting in 2018 and for each subsequent year, an inventory of SO<sub>2</sub>, NO<sub>x</sub> 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 SO<sub>2</sub>, NO<sub>x</sub> 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

- (25) 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,<sup>17</sup> the present case was initiated on 16 March 2021.
- (26) In the Opening Letter,<sup>18</sup> the Secretariat preliminarily concluded that by not meeting the ceilings for sulphur dioxide and dust in the 2018 and 2019 reporting years and by not establishing proportionate, effective and dissuasive penalties for such breaches, the Republic of North Macedonia 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 of the Republic of North Macedonia to submit its reply on the points of fact and of law raised in the Opening Letter by 16 May 2021.
- (27) The Ministry of Economy of North Macedonia provided a reply to the Opening Letter on 14 May 2021.<sup>19</sup> In the reply to the Opening Letter, the Ministry did not dispute the breach of the NERP ceilings but referred to the 2040 Energy Development Strategy of the Republic of North Macedonia. The Ministry announced that it will address, in the longer term, the non-compliance by the power plants concerned. The Ministry also argued that the penalties envisaged by the national legislation are capable of ensuring proper enforcement of the provisions of Directive

<sup>16</sup> As amended by Article 6 of Decision 2013/05/MC-EnC.

<sup>17</sup> Annual Implementation Report of the Energy Community Secretariat, 1 September 2018, pp. 112-113; Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, pp. 142-143; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, pp. 154-155.

<sup>18</sup> ANNEX 6.

<sup>19</sup> Ref. no. 12-2321/3, ANNEX 7.

2001/80/EC, including compliance with the NERP ceilings. As the information provided by the reply was not sufficient to dispel the preliminary conclusions outlined in the Opening Letter, the Secretariat issued a Reasoned Opinion<sup>20</sup> on 21 February 2022, concluding that the Republic of North Macedonia failed to comply with Articles 12 and 16 of the Treaty read in conjunction with Articles 4(3) and 16 of Directive 2001/80/EC by not implementing those provisions with regard to the eight large combustion plants falling under the scope of the NERP.

- (28) The Secretariat requested the Government of the Republic of North Macedonia to submit its reply on the points of fact and of law raised in the Reasoned Opinion by 21 April 2022. To date, no reply was provided to the Reasoned Opinion.
- (29) The Secretariat reiterated its call to address non-compliance with Directive 2001/80/EC to the authorities of the Republic of North Macedonia in its 2021<sup>21</sup> and 2022<sup>22</sup> Implementation Reports and to the representatives of the Contracting Party at the 20<sup>th</sup><sup>23</sup>, 22<sup>nd</sup><sup>24</sup> and 23<sup>rd</sup><sup>25</sup> meetings of the Environmental Task Force of 11 May 2020, 6 December 2021 and 13 June 2022, respectively.
- (30) As will be argued below, the Secretariat considers that the authorities of the Republic of North Macedonia 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

- (31) The present Reasoned Request addresses the non-compliance of the Republic of North Macedonia with the obligation to comply with the emission ceilings for sulphur dioxide 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, and the failure to apply effective and dissuasive penalties for breaches of the NERP ceilings.
- (32) As a Contracting Party to the Treaty, the Republic of North Macedonia 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

- (33) 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*.<sup>26</sup> 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

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<sup>20</sup> ANNEX 8.

<sup>21</sup> Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 148-149.

<sup>22</sup> Annual Implementation Report of the Energy Community Secretariat, 1 November 2022, pp. 136-137.

<sup>23</sup> ANNEX 9.

<sup>24</sup> ANNEX 10.

<sup>25</sup> ANNEX 11.

<sup>26</sup> Emphasis added.



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.

- (34) Article 4(3) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, requires the Republic of North Macedonia 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,<sup>27</sup> or by subjecting them to a NERP.<sup>28</sup> 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 NERP<sup>29</sup> and compliance verification is to be done between the combined emission totals of all plants subjected to the NERP and the annual emission ceilings.<sup>30</sup>
- (35) 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 the Republic of North Macedonia 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.
- (36) The Secretariat further notes 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.
- (37) 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 to comply with the thresholds provided therein not only by virtue of national, but also of Energy Community law.
- (38) The Secretariat therefore considers that the national programme for gradual reduction of emissions from certain pollutants stipulated by Article 23(4) of the Law on Ambient Air Quality adopted by the Republic of North Macedonia and referred to by the reply to the Opening Letter may be considered as a transposition measure for Article 3 of Directive 2001/80/EC. The NERP, however, developed according to the provisions of Article 4(6) and intended to ensure

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<sup>27</sup> Compliance with litera (a) of Article 4(3) of Directive 2001/80/EC.

<sup>28</sup> Compliance with litera (b) of Article 4(3) of Directive 2001/80/EC.

<sup>29</sup> First subparagraph of Article 4(6) of Directive 2001/80/EC.

<sup>30</sup> Annex VIII.B of Directive 2001/80/EC.

compliance with litera (b) of Article 4(3) of Directive 2001/80/EC is meant to establish, as it must under Energy Community law, legally binding emission thresholds for the conglomerate of large combustion plants falling under its scope.

- (39) 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 the Republic of North Macedonia exceed the emission ceilings established by the NERP for sulphur dioxide and dust in the 2018 and 2019 reporting years and beyond. The emission totals reported by the Republic of North Macedonia and their comparison to the applicable NERP ceilings are presented in Annex 12 to the present Reasoned Request.
- (40) 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 to the Opening Letter. The Secretariat submits that these breaches amount to breaches of Directive 2001/80/EC and hence amount to a failure by the Republic of North Macedonia 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 sulphur dioxide and dust. In the 2020-2022 reporting years, the ceilings set by the NERP for those two pollutants were breached again with similar and in some cases even with higher levels of non-compliance than in 2018 and 2019.<sup>31</sup> In the 2020 reporting year, the ceiling for sulphur dioxide was breached 5.47 times, while in the 2021 and 2022 reporting years, 5.24 and 7.27 times, respectively. In the 2020 reporting year, the ceiling for dust was breached 2.12 times, while in the 2021 and 2022 reporting years, 1.72 and 2.46 times, respectively. Those data were communicated by the authorities of the Republic of North Macedonia themselves and are therefore not disputed.
- (41) 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”*.<sup>32</sup> Given that the Republic of North Macedonia’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.
- (42) Regarding the arguments by the Ministry of Economy of the Republic of North Macedonia in the reply to the Opening Letter referring to difficulties in the national administrative system related to the interlinkages between the Energy Development Strategy and the NERP as justification for the delay in implementing the provisions of Directive 2001/80/EC, the Secretariat refers to the assessment provided in paragraphs 35-39 of the Reasoned Opinion and recalls that Contracting Parties cannot use administrative delays as justification for a failure to comply with the Energy Community *acquis communautaire*<sup>33</sup> and respectfully submits that this argument must be rejected.
- (43) The Secretariat thus respectfully submits that the Republic of North Macedonia 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 and dust in the case of the eight large combustion plants by subject to the NERP by 1 January 2018 and until present date.

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<sup>31</sup> For a comparison between those ceilings and the reported emissions, see ANNEX 13 to the present Reasoned Request.

<sup>32</sup> Case C-220/22 *Commission v Portugal*, paragraph 46 and the case-law cited.

<sup>33</sup> See, inter alia, Case C-503/04 *Commission v Germany*, paragraph 38; Case C-568/07 *Commission v Greece*, paragraph 50.

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

- (44) 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.
- (45) 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”.
- (46) 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,<sup>34</sup> 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.<sup>35</sup>
- (47) The Secretariat concluded in the Reasoned Opinion that the Republic of North Macedonia breaches Article 16 of Directive 2001/80/EC by not adopting and applying effective, proportionate and dissuasive penalties for the failure to implement the NERP. 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.
- (48) With regard to the application of penalties, the Secretariat acknowledges that penalties for breaches of the NERP can be imposed by the competent authorities of the Republic of North Macedonia on the basis of Article 77 of the Law on Ambient Air Quality.
- (49) The penalty scheme and its application in the Republic of North Macedonia 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.
- (50) 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 they must be sufficiently efficient for achieving the aim of a directive.<sup>36</sup>
- (51) As it is clear from its recitals 5 and 6, 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 the Republic of North Macedonia did for

<sup>34</sup> Ex Article 5 of the Treaty establishing the European Community.

<sup>35</sup> 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.

<sup>36</sup> Case C-180/95 *Draehmpaehl*, paragraph 24 and Case C-14/83 *Van Colson and Kamann*, paragraph 18.

the eight plants covered by the NERP's scope), the obligation is implemented via compliance with the NERP ceilings.

- (52) Furthermore, even after more than five years into the implementation of the NERP of the Republic of North Macedonia, the ceilings established for sulphur dioxide and dust therein are not complied with and in the case of both pollutants, the breaches have even intensified. This mere fact confirms that the sanctions regime established by the Republic of North Macedonia 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, that is to significantly reduce emissions from large combustion plants by 1 January 2018 and beyond.
- (53) Therefore, the Secretariat does not consider the penalties applied in the Republic of North Macedonia as sufficiently efficient for achieving the aim of Directive 2001/80/EC, namely to achieve significant emission reductions of large combustion plants by 1 January 2018 and beyond and thus are in breach of the effectiveness principle stipulated by Article 16 of Directive 2001/80/EC.
- (54) 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.<sup>37</sup> 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.<sup>38</sup>
- (55) Following the amendments to the Law on Ambient Air Quality in effect since July 2021, the amounts established therein were increased. At the same time, as it is also evident from the requirement of the case-law quoted in paragraph 54 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.
- (56) Where financial penalties are imposed in a European law context,<sup>39</sup> 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. Since all the plants that are effectively contributing to the emission ceilings of the NERP is operated by *Power Plants of North Macedonia*, dissuasiveness can only be assessed in the light of the turnover of this company. According to its last publicly available Financial Statement for the year 2022, the sales of the company amounted to 554,358,000 euros in 2022 and to 15,957,107,000 denars (equivalent of 259,062,857 euros) in 2021, while its net profits were at 36,592,000 euros and -1,728,207,000 denars (equivalent of -28,056,122 euros), respectively.<sup>40</sup> Financial sanctions between one hundred eighty thousand euros and two hundred thousand euros for large commercial entities, as established by Article 77(1) of the amended Law on Air Protection therefore cannot be considered as ensuring a genuinely dissuasive effect in the Republic of North Macedonia for the breach of the NERP ceilings. These amounts represent approximately 0.05% of *Power Plants of North Macedonia's* average annual turnover and are even negligible (approximately 0.5%) compared to the company's net profits in 2022.<sup>41</sup> These numbers clearly show that the penalties established in Macedonian law for breaches of the NERP ceilings neither commensurate with the seriousness of the infringements for which they could be imposed, nor they ensure a

<sup>37</sup> See, *inter alia*, Case C-544/19 *Ecotex Bulgaria*, paragraph 100; Case C-255/14 *Chmielewski* and the case-law cited.

<sup>38</sup> 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.

<sup>39</sup> Guidelines of the European Commission (2006/C 210/02), point 13.

<sup>40</sup> ANNEX 14, p. 3.

<sup>41</sup> In 2021, the company reported negative financial results.

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*.

- (57) 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 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.<sup>42</sup> This is precisely the case in the Republic of North Macedonia.
- (58) Based on the above, the Secretariat does not consider the penalties applied in the Republic of North Macedonia 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.
- (59) 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 the Republic of North Macedonia since to date, no penalties were issued on operators for the breach of compliance with the NERP ceilings.
- (60) To that end, the Secretariat recalls that compliance with the NERP ceilings in the Republic of North Macedonia depends on the emissions, the abatement measures and related enforcement action taken at the largest combustion plant of the Contracting Party, TPP REK Bitola. The two units of this plant, which technically are to be considered two separate plants but are located on the same site, were responsible for well above 90% of the total emissions of large combustion plants in the country.<sup>43</sup> Even if the emissions of all other plants subject to the NERP would be reduced to zero, non-compliance with the ceilings for sulphur dioxide and dust would persist considering the emissions of TPP REK Bitola in any of the reporting years between 2018 and 2022. It is therefore clear that without carrying out the necessary emission reduction measures at the two units of this plant, no compliance with the NERP ceilings can be achieved.
- (61) The State Environmental Inspectorate, in its inspection report of 23 February 2021 concluded that *“dust and sulphur dioxide emissions measured on both chimneys exceed the limit values and the maximum total emissions set by the National Emission Reduction Plan resulting from the agreement with the Energy Community”* and stated that *“once TPP Bitola receives a permit for compliance with the operational plan (IPPC permit), the inspectors will ensure timely implementation of the defined measures to pollution reduction”* and that the *“failure to comply with the deadlines [in the permit] will be duly sanctioned”*.<sup>44</sup> The Secretariat notes that in December 2022, the integrated environmental permit including an adjustment plan for compliance with the permit requirements for the thermal power plant REK Bitola was issued.<sup>45</sup> At the same time and despite the existence of legal possibilities to issue penalties for non-compliance with the permit conditions, no such penalties were issued to the operator of the plant for not complying with the NERP ceilings.

<sup>42</sup> Case C-77/20 *K.M.*, paragraph 48.

<sup>43</sup> The two units of TPP REK Bitola accounted for 98% of the total emissions of sulphur dioxide in both the 2018 and 2019 reporting years. In the case of nitrogen oxides, it was accountable for 96% in 2018 and 93% in 2019, while in the case of dust, this ratio was 97% and 95%, respectively.

<sup>44</sup> [http://www.sei.gov.mk/news\\_detail\\_mk.asp?cID=61](http://www.sei.gov.mk/news_detail_mk.asp?cID=61), ANNEX 15

<sup>45</sup> [https://www.moep.gov.mk/wp-content/uploads/2022/03/Final\\_TPP\\_REK\\_A\\_IPPC\\_BT..pdf](https://www.moep.gov.mk/wp-content/uploads/2022/03/Final_TPP_REK_A_IPPC_BT..pdf), ANNEX 16

- (62) The Secretariat, in line with the assessment provided by paragraphs 41-47 of the Reasoned Opinion, submits that despite factual existence of penalties established by the Law on Ambient Air Quality, penalties for plants that are not respecting their emission limits established under the NERP are not applied in practice in the Republic of North Macedonia. While the existence of the breaches is recognized and concluded by the competent authority,<sup>46</sup> the lack of imposition of penalties amounts to a factual refusal to apply penalties for established breaches, and hence contravenes Article 16 of Directive 2001/80/EC.

## V. Conclusion

- (63) Under those circumstances, 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, the Republic of North Macedonia 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:

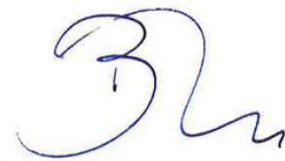
by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan, the Republic of North Macedonia fails to comply with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC of the European Parliament and 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

<sup>46</sup> Confirmed by the inspection report of the State Environmental Inspectorate of 23 February 2021: [http://www.sei.gov.mk/news\\_detail\\_mk.asp?cID=61](http://www.sei.gov.mk/news_detail_mk.asp?cID=61), ANNEX 15, with direct reference to the breach of the NERP ceilings.

## 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 on Ambient Air Quality
- ANNEX 3 National Emission Reduction Plan of the Republic of North Macedonia
- ANNEX 4 Emission ceilings established by the NERP of the Republic of North Macedonia
- ANNEX 5 Rulebook on the Limit Values for the Permissible Levels of Emissions and Types of Pollutants in the Exhaust Gases and Vapours Emitted into the Air from Stationary Sources
- ANNEX 5a Amendment to the Rulebook on the Limit Values for the Permissible Levels of Emissions and Types of Pollutants in the Exhaust Gases and Vapours Emitted into the Air from Stationary Sources
- ANNEX 6 Opening Letter in Case ECS-7/21, dated 16 March 2021
- ANNEX 7 Reply to the Opening Letter by the Ministry of Economy of the Republic of North Macedonia, dated 14 May 2021
- ANNEX 7a Cover letter to the reply to the Opening Letter by the Ministry of Economy of the Republic of North Macedonia, dated 14 May 2021
- ANNEX 8 Reasoned Opinion in Case ECS-7/21, dated 21 February 2022
- ANNEX 9 Conclusions of the 20<sup>th</sup> meeting of the Environmental Task Force, 11 May 2020
- ANNEX 10 Conclusions of the 22<sup>nd</sup> meeting of the Environmental Task Force, 6 December 2021
- ANNEX 11 Conclusions of the 23<sup>rd</sup> meeting of the Environmental Task Force, 13 June 2022
- ANNEX 12 Emission totals of large combustion plants under the NERP of the Republic of North Macedonia 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 the Republic of North Macedonia and their comparison to the ceilings established for the 2020-2022 reporting years
- ANNEX 14 Financial Statement of *Power Plants of North Macedonia* for the year 2022
- ANNEX 15 Inspection report of 23 February 2021 of the Environmental Inspectorate (original)
- ANNEX 15a Inspection report of 23 February 2021 of the Environmental Inspectorate (unofficial translation)

ANNEX 16 Integrated environmental permit of TPP REK Bitola (the Secretariat can provide translation upon request)