

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-7/18

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,¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

REPUBLIC OF MOLDOVA

is seeking a Decision from the Ministerial Council that

by not transposing into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU, the Republic of Moldova has failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

The Secretariat of the Energy Community has the honour of submitting the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

1. Introduction

- (1) 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. As stipulated in the Dispute Settlement Procedures, the Secretariat may initiate a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these Rules, such a procedure is initiated by way of an Opening Letter and according to Article 14 of the same Rules, in the light of the reply or absence of a reply from the Party concerned, the Secretariat may address a Reasoned Opinion to that Party. In the light of the reply or absence of a reply from the Party concerned, the Secretariat may bring the matter to the

¹ Procedural Act No. 2015/04/MC-EnC of 16 October 2015, hereinafter: "Dispute Settlement Procedures".

attention of the Ministerial Council by way of a Reasoned Request in accordance with Article 29 of the Dispute Settlement Procedures.

2. Background

- (2) Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants² (hereinafter: "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) According to point 3 of Annex II of the Treaty, each Contracting Party shall implement Directive 2001/80/EC by 31 December 2017.
- (4) 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.
- (5) In the European Union, Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control)³ (hereinafter: "Directive 2010/75/EU") repealed Directive 2001/80/EC with effect of 7 January 2013 (for new plants) and 1 January 2016 (for existing plants). In the Energy Community, Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU were incorporated into the *acquis communautaire* on environment by Decision 2013/06/MC-EnC of 24 October 2013 on the implementation of Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) and amending Article 16 and Annex II of the Energy Community Treaty (hereinafter: "Decision 2013/06/MC-EnC").
- (6) Article 1(2) of Decision 2013/06/MC-EnC amended Annex II of the Treaty by introducing a point 5 stipulating that Contracting Parties shall implement the provisions of Directive 2010/75/EU from 1 January 2018 onwards for new large combustion plants.

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

- (7) Currently, there is no legal framework governing the emissions into the air from large combustion plants in the Republic of Moldova. Only draft legislation exists, which was developed with the Secretariat's assistance in the framework of an EU4Energy Project, finalised in December 2017.⁴

² OJ L 309, 27.11.2001, p. 1.

³ OJ L 334, 17.12.2010, p. 17.

⁴ EU4Energy Governance – Development of Regulation on the Limitation of Emissions of Certain Pollutants into the Air from Large Combustion Plants in Moldova, ANNEX 1.

II. Relevant Energy Community Law

(8) 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”.⁵

(9) 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.

(10) 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.*

(11) 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,⁶ (...)

(v) Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control),⁷ (...)

(12) Article 94 of the Treaty reads:

*The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.*

(13) Point 3 of Annex II of the Treaty reads:

⁵ Article 3(1) Dispute Settlement Procedures.

⁶ As amended by Decision 2013/05/MC-EnC and by Decision 2015/07/MC-EnC on amending Decision 2013/05/MC-EnC.

⁷ As amended by Decision 2013/06/MC-EnC.

Each Contracting Party shall implement 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 by 31 December 2017.⁸

(14) Article 2 of Decision 2013/06/MC-EnC reads:

1. Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU by 1 January 2018. They shall forthwith inform the Energy Community Secretariat thereof.

2. Contracting Parties shall communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by the present Decision.

(15) Article 15 of the Dispute Settlement Procedures reads:

In the light of the reply or absence of a reply from the Party concerned, the Secretariat may bring the matter to the attention of the Ministerial Council by way of a reasoned request in accordance with Article 29 below.

(16) Article 29(1) of the Dispute Settlement Procedures reads:

A reasoned request for a decision of the Ministerial Council pursuant to Article 90 of the Treaty may be submitted by the Secretariat either upon complaint, upon notification by a Party or the Regulatory Board, or on its own initiative. In these cases, the reasoned request shall be preceded by a preliminary procedure in accordance with the provisions laid down in Title III, save as otherwise provided for in these Rules of Procedure.

III. Preliminary procedure

(17) 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. The present case was initiated on 5 September 2018.

(18) In the Opening Letter,⁹ the Secretariat preliminarily concluded that the Republic of Moldova failed to comply with Articles 12 and 16 of the Treaty read in conjunction with Directive 2001/80/EC and Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU by not transposing the latter provisions into national law and by not implementing those provisions. The Secretariat requested the Government of the Republic of Moldova to submit its reply on the points of fact and of law raised in the Opening Letter by 5 November 2018.

(19) In parallel to the issuance of the Opening Letter, the Secretariat recalled in its Annual Implementation Report¹⁰ that the Republic of Moldova has not yet transposed the requirements of the two directives regulating the emissions of large combustion plants into national law and called upon the national authorities to rectify the situation without

⁸ In its Article 2, the Protocol concerning the Accession of the Republic of Moldova to the Treaty establishing the Energy Community sets the same deadline for the implementation of Directive 2001/80/EC.

⁹ ANNEX 2.

¹⁰ Annual Implementation Report of the Energy Community Secretariat, 1 September 2018, p. 132.

further delay. The same call was addressed to the representatives of the Republic of Moldova at the 17th meeting of the Environmental Task Force of 21 November 2018.¹¹

- (20) The Republic of Moldova did not provide a reply to the Opening Letter. Consequently, the Secretariat issued a Reasoned Opinion on 19 February 2019, concluding that the Republic of Moldova failed to comply with Articles 12 and 16 of the Treaty read in conjunction with Directive 2001/80/EC and Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU by not transposing the latter provisions into national law and by not implementing those provisions. The Secretariat requested the Government of the Republic of Moldova to submit its reply on the conclusions raised in the Reasoned Opinion by 19 April 2019.¹²
- (21) The Ministry of Economy and Infrastructure of the Republic of Moldova, supported by the Ministry of Agriculture, Regional Development and Environment, responded to the Reasoned Opinion by a letter dated 19 April 2019.¹³
- (22) The Secretariat reiterated its call to address non-compliance with Directives 2001/80/EC and 2010/75/EU to the authorities of the Republic of Moldova in its 2019 Implementation Report¹⁴ and to the representatives of the Contracting Party at the 20th meeting of the Environmental Task Force of 11 May 2020¹⁵.
- (23) As will be argued below, the Secretariat considers that the authorities of the Republic of Moldova 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

- (24) The present Reasoned Request addresses the failure of the Republic of Moldova to comply with its obligations related to the transposition of the provisions of Directive 2001/80/EC (for existing plants) and Directive 2010/75/EU (for new plants) into national law.¹⁶
- (25) Article 12 of the Treaty requires Contracting Parties to implement the *acquis communautaire* on environment in compliance with the timetable for the implementation of those measures set out in Annex II. Point 3 of Annex II to the Treaty as well as Article 2 of the Accession Protocol sets the deadline for the implementation of Directive 2001/80/EC as 31 December 2017 for existing plants.
- (26) Point 5 of Annex II to the Treaty, as introduced by Decision 2013/06/MC-EnC, sets the deadline for the implementation of Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU as 1 January 2018 for new plants.
- (27) Article 6 of the Treaty imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Treaty. Hence Contracting Parties, to whom a directive is

¹¹ <https://www.energy-community.org/events/2018/11/ENVTF.html>.

¹² ANNEX 3.

¹³ Ref. no. 07-2706, ANNEX 4.

¹⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 104.

¹⁵ <https://www.energy-community.org/events/2020/04/ENVTF.html>

¹⁶ "New" and "existing" plants as defined in Policy Guidelines PG/02/2014.

addressed, must bring their legislation into conformity therewith within the prescribed period.

- (28) Article 2(1) of Decision 2013/06/MC-EnC reiterates this general obligation by stipulating that “[e]ach Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU by 1 January 2018” and that “[t]hey shall forthwith inform the Energy Community Secretariat thereof”.
- (29) Article 2(2) of Decision 2013/06/MC-EnC further requires Contracting Parties to communicate to the Energy Community Secretariat the text of the main provisions of national law which they adopt in the field covered by the Decision.
- (30) To date, despite the numerous requests described above, the Secretariat has not received such information from the Republic of Moldova.
- (31) In this situation, the Secretariat considers that the lack of legislation in the Republic of Moldova addressing air pollution from large combustion plants provides for a clear case of non-compliance with the Energy Community *acquis communautaire* on environment.
- (32) In the reply to the Reasoned Opinion, the authorities of the Republic of Moldova mention that the two large combustion plants in the Contracting Party are operating under permits issued according to Article 12 of the Law on Air Protection.¹⁷
- (33) The Secretariat, however, submits that the Law on Air Protection cannot be accepted as transposing legislation for either Directive 2001/80/EC or Directive 2010/75/EU. This law provides only general principles in the field of air pollution. Its Article 12, to which the authorities of the Republic of Moldova refer, stipulate that “[e]missions of pollutants into the atmosphere from stationary pollution sources are to be based in on the authorization issued by the State Ecological Inspectorate in each case”. There is no mention of emission limit values or provisions on the monitoring of emissions, as required by the two directives under the Energy Community *acquis communautaire* on environment. To that end, the Secretariat recalls that according to settled case-law of the Court of justice of the European Union, the provisions of a Directive need to be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty.¹⁸ Consequently, this argument presented by the authorities of the Republic of Moldova is not relevant for the present case.
- (34) Furthermore, in the Reply to the Reasoned Opinion, the authorities of the Republic of Moldova refer to the ongoing efforts to transpose Directive 2010/75/EU, in its entirety, into national law and claim that compliance with the Energy Community *acquis communautaire* on environment will be ensured upon transposition.
- (35) This argument cannot be accepted as justification for the non-compliance addressed by the present case. In the absence of any legal effect, having draft legislation prepared but not adopted and entered into force cannot be considered as measures necessary to comply with an obligation under the Treaty.¹⁹

¹⁷ Law 1422/1997, ANNEX 5.

¹⁸ See, to that effect, Case C-197/96 *Commission v France*, paragraph 15; Case C-207/96 *Commission v Italy*, paragraph 26; Case C-32/05 *Commission v Luxembourg*, paragraph 34 and Case C-427/07 *Commission v Ireland*, paragraphs 54-55.

¹⁹ See, to that effect, Case C-430/98 *Commission v Luxembourg*, paragraphs 8-13, Case C-648/13 *Commission v Poland*, paragraphs 129-132.

- (36) Finally, in the Reply to the Reasoned Opinion, the authorities of the Republic of Moldova claim that the delay in transposing and implementing Directive 2001/80/EC and Directive 2010/75/EU in the Contracting Party is attributable to difficulties in their internal administrative procedures, the lack of institutional capacities as well as fluctuation in staff.
- (37) In relation to this argument, the Secretariat notes that in accordance with the established case-law of the Court of Justice of the European Union, provisions, practices or situations prevailing in the domestic legal order cannot be used to justify failure to observe obligations arising under Community law.²⁰ Therefore, the argument by the authorities of the Republic of Moldova referring to non-specified difficulties in the national system as justification for the delay in transposition cannot be accepted.
- (38) In light of the above, the Secretariat maintains its findings elaborated above both in relation to Directive 2001/80/EC and 2010/75/EU and submits the present Reasoned Request to the Ministerial Council.

V. Conclusion

- (39) Based on the above, the Secretariat submits that by not transposing into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU, the Republic of Moldova has failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

²⁰ See, inter alia, Case C-503/04 *Commission v Germany*, paragraph 40; Case C-568/07 *Commission v Greece*, paragraph 50.

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 not transposing into national law the provisions of Directive 2001/80/EC and Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU, the Republic of Moldova has failed to fulfil its obligations under the Energy Community Treaty and in particular Articles 12 and 16 thereof.

On behalf of the Secretariat of the Energy Community,

Vienna, 9 September 2020

A handwritten signature in blue ink, appearing to read "Janez Kopač".

Janez Kopač
Director

A handwritten signature in blue ink, appearing to read "Dirk Buschle".

Dirk Buschle
Legal Counsel/Deputy Director

List of Annexes

- ANNEX 1 Final Report: "Development of Regulation on the Limitation of Emissions of Certain Pollutants into the Air from Large Combustion Plants in Moldova"
- ANNEX 2 Opening Letter in Case ECS-7/18, dated 5 September 2018
- ANNEX 3 Reasoned Opinion in Case ECS-7/18, dated 19 February 2019
- ANNEX 4 Reply to the Reasoned Opinion by the Ministry of Economy and Infrastructure of the Republic of Moldova, dated 19 April 2019
- ANNEX 5 Law 1422/1997 of the Republic of Moldova on Air Protection*

*in Romanian (the Secretariat can provide translation upon request)