

ESTABLISHMENT OF THE ENVIRONMENTAL TASK FORCE

I. INTRODUCTION

The *acquis* on environment stipulated in Chapter III in Title II of the Treaty establishing the Energy Community consists of six legislative acts altogether, namely (1) the Environmental Impact Directive, (2) the Sulphur in Fuels Directive 1999/32/EC, (3) the Large Combustion Plants Directive 2001/80/EC, (4) Article 4(2) of the Wild Birds Directive, (5) the Integrated Pollution Prevention and Control (IPPC) Directive 2008/1/EC and (6) the Kyoto Protocol. Whereas the Contracting Parties are under a binding obligation to implement the *acquis* (1) to (4), the implementation of the legal acts referred to under (5) and (6) is not mandatory. The implementation deadlines expired on 1 July 2006 for the directives (1) and (4), and will expire on 31 December 2011 for directives (2) (Sulphur in Fuels Directive) and 31 December 2017 for directive (3) (Large Combustion Plants Directive).

Implementation of the environmental *acquis* is instrumental in achieving one of the key objectives of the Treaty, namely to „*improve the environmental situation in relation to Network Energy*“ (Article 2(1)(d) of the Treaty). At the same time, the obligation to implement the directives listed above, and in particular those related to the reduction of emissions, (2) and (3), will have a significant impact on the electricity and the oil sectors. In terms of electricity generation, compliance with the *acquis* will necessitate decisions on decommissioning or rehabilitation of existing coal-fired power plants, with far-reaching consequences on the energy supply and the future of indigenous fuels within each Contracting Party, and eventually the security of energy supply. For reasons going beyond the environmental dimension alone, it is therefore of utmost importance that the implementation of the Sulphur in Fuels and, even more so, the Large Combustion Plants Directive, is properly and timely prepared.

Considering the scope and complexity of the task of preparing the implementation of the environmental directives whose implementation deadline has not yet expired - (2) and (3) - and given the experience made with the approach to implementing the Sulphur in Fuels Directive (see below), the Secretariat reckoned that the only appropriate approach would be one based on open and comprehensive deliberation involving all stakeholders. For this reason, the Secretariat proposed to the Ministerial Council to establish a Task Force on Environment. At its meeting on 24 September 2010, the Ministerial Council approved that proposal and authorized the Permanent High Level Group to adopt a concrete mandate of the Task Force and to elect its Chair.

The current report contains background information and proposals of the Secretariat in this aspect.

II. ACTIVITIES UNDERTAKEN IN THE AREA OF ENVIRONMENT

1. The Environmental Impact Assessment and the Wild Birds Directive

a) Content

Implementation of the two directives whose implementation deadline expired already in 2006 is subject to constant monitoring by the Secretariat. The Environmental Impact Directive aims at identifying and assessing environmental consequences of projects before a building or operation permit is granted. Projects falling within the scope of the Directive are specified in the annexes to the Directive. In terms of network energy, Annexes I and II to the Directive include projects both in energy generation and

transmission/distribution as well as gas storage. The key document within the environmental impact assessment procedure is the environmental impact statement to be compiled and submitted by the developer to the competent authorities for review. The procedure itself can be divided into four main parts, namely (i) screening, i.e. the determination of whether an environmental impact assessment is required for a specific project covered by Annex I (mandatory) or Annex II (non-mandatory); (ii) scoping, i.e. the identification of the issues to be covered by the environmental impact study; (iii) the elaboration and submission of an Environmental Impact Study by the developer; (iv) a review of the study by the competent authorities and the adoption of an authorization decision, before which (domestic) authorities likely to be concerned by the project, the public concerned and other Parties likely to be significantly affected by projects with a trans-boundary impact are to be consulted.

The main aim of the Wild Birds Directive is the long-term conservation of all species of naturally occurring wild birds in the territory of the European Union. The Directive focuses on two major issues: the protection of birds' habitat and the establishment of rules for their management, control and exploitation (hunting, capture, killing and sale). Article 4 of the Directive is a central element in that respect, as it foresees the establishment of a network of Special Protection Areas (SPAs) scientifically identified as critical for the survival of particularly vulnerable species of birds listed in Annex I of the Directive. Furthermore, similar measures are envisioned for migratory birds. Article 4(2) in particular requires the establishment of a legal protection regime for regularly occurring migratory species, taking into account their areas of breeding, moulting, wintering and their staging posts along the migratory routes.

b) Work undertaken

The Secretariat regularly monitors the state of implementation of both directives and publishes its findings in the Implementation Report. Monitoring focuses mostly on the transposition of the *acquis*, as the Secretariat is normally neither involved nor receives information on the application of the *acquis* (as implemented) to individual projects.

The Secretariat, in 2008, provided training on the implementation of the Environmental Impact Assessment Directive by way of a workshop. Further training may be provided in 2011.

c) Findings

In terms of transposition, the latest Implementation Report by the Secretariat reveals with regard to environmental impact assessment, that legislation in the Contracting Parties basically follows the Directive's model. However, only Croatia and Serbia are close to full transposition, whereas all other Contracting Parties still need to improve the legislative framework both in terms of primary and secondary law.

However, as regards the implementation of Article 4(2) of the Wilds Birds Directive in particular, a coherent and comprehensive monitoring of the implementation of all activities required to protect (migratory) birds is barely possible with respect to the energy sectors alone. Furthermore, obtaining the necessary data and information by the Contracting Parties proves to be rather difficult due to the lack of cooperation in some of them. That said, the Secretariat's assessment indicates that none of the Contracting Parties has achieved the full level of protection of wild birds required by the Directive.

2. The Sulphur in Fuels Directive

a) Content

As mentioned above, implementation of the Sulphur in Fuels Directive is due by the end of 2011. The main objective of the Sulphur in Fuels Directive is to ensure effective protection from the risks from SO₂ emissions, as well as protection of the environment, by imposing thresholds meant to prevent sulphur deposition exceeding critical loads and levels. In doing so, the directive covers two kinds of fuel oil, i.e.

refined oil used for combustion with the purpose of generating heat or power. The key element of the directive consists in setting the maximum sulphur content for heavy fuel oil and gas oil. The sulphur content of heavy fuel oil may not exceed 1% by mass.¹ The sulphur content of gas oil may not exceed 0,10% by mass.² The Directive envisages a number of derogations, most importantly in its Articles 3(2) and 4(3), which allow for more lenient thresholds in case the Large Combustion Plant Directive is implemented. Furthermore, the Sulphur in Fuels Directive also requires enforcement, namely by sampling and analysis³ and determining penalties.⁴ Article 7(1) of the Sulphur in Fuels Directive also obliges the Contracting Parties to report to the Commission each year on the sulphur content of the fuel oils covered by the Directive and used within their territory during the preceding year.

b) Work undertaken

In March 2010, the Secretariat submitted to the Permanent High Level Group a paper entitled “Guideline for the implementation of Directive 1999/32/EC”. The Guideline explains the implementation obligations stemming from the Sulphur in Fuels Directive in detail. It also proposed a “Roadmap to Implementation of the Directive”, which the PHLG accepted as structure and basis for the further implementation work. The Roadmap proposes an indicative, non-exhaustive schedule for how to structure the pre-implementation process as a tool of assistance for the Contracting Parties to start that process in a timely and coordinated manner.

c) Preliminary findings

The feedback to the Secretariat's Guideline is summarized in a separate document (Annex 11 to the PHLG agenda for 23 March 2011). In sum, the challenge and the importance of starting the implementation of the Sulphur in Fuels Directive in order to comply with the Treaty's obligations by the end of 2011 was highlighted at the institutional meetings as well as at the Environmental Workshop 2010 in Sarajevo and the 2010 Oil Forum. Several reminders have been sent to the relevant persons in the Contracting Parties. Nevertheless, the response has been disappointing. So far, only the former Yugoslav Republic of Macedonia has been in touch with the Secretariat. Serbia announced that they cannot implement the Directive on time. In the absence of any adaptation, there seems to be plenty of confusion on whether and how the derogation options under the Directive are applicable to the Contracting Parties of the Energy Community.

3. The Large Combustion Plants Directive

a) Content

The Large Combustion Plants Directive regulates emissions to air from large combustion plants („LCP“). The pollutants covered by the Directive are sulphur dioxide (SO₂), nitrogen oxides (NO_x) and dust. Large combustion plants are those whose rated thermal input is equal to or greater than 50 MW, irrespective of the type of fuel.⁵ In practical terms, and given the Treaty's limitation to network energy, the notion of combustion plants covers thermal power plants and combustion plants within petroleum refineries.⁶

The LCP Directive stipulates limit values applicable to the emissions from individual LCP. In that respect, the Directive draws a distinction between existing LCP (licensed before 1 July 1987)⁷ and new LCP.⁸ The category of new LCP falls into two subcategories, „old-new“ LCP (subject of a full request for a licence before 27 November 2002⁹, provided that the plant is put into operation no later than 27

¹ Article 3 of the SiF Directive.

² Article 4 of the SiF Directive.

³ Article 6 of the SiF Directive.

⁴ Article 11 of the SiF Directive.

⁵ Article 1 LCP Directive, with the exception of waste, cf. Article 2(6) LCP Directive.

⁶ Definition in Article 2(7) LCP Directive.

⁷ Article 1(10) LCP Directive

⁸ Including LCP extended by at least 50 MW, Article 10 LCP Directive.

⁹ The implementation deadline for EU Member States.

November 2003),¹⁰ and „new-new“ LCP (other LCP licensed on or after 1 July 1987).¹¹ They are to comply with emission limit values („ELVs“) as set out in parts A and B of annexes III to VII to the Directive, respectively.¹²

For existing LCP, emissions reduction may be achieved either by meeting the ELVs applicable to old-new plants,¹³ by participation in a national emission reduction plan („NERP“) in line with Article 4(6) and achieving the same overall results as would be the case when applying the ELVs to LCP which were operational in 2000,¹⁴ or by opting out of both ELVs and NERP by accepting a limited life-time (20,000 hours) derogation.¹⁵ Furthermore, emissions from LCP shall be monitored and reported on¹⁶, with plants over 100 MW having an obligation to monitor emissions continuously (unless where exempted)¹⁷.

New-new plants and plants extended by 50 MW and more need to provide an assessment of whether combined heat and power generation is technically and economically feasible, in which case installations may have to be developed accordingly.¹⁸ Permits shall furthermore make provisions for cases of and procedures for malfunction or breakdown of the abatement equipment.¹⁹

In the context of large combustion plants, the IPPC Directive contains requirements additional to the LCP Directive, most notably the requirements for ELVs to be set on the basis of the application of Best Available Techniques (BAT), while taking into account some local considerations.

b) Work undertaken

The state of implementation of the LCP and IPPC Directives has been subject of two Workshops organized by the Secretariat, one in March 2009 in Vienna, and one in October 2010 in Sarajevo. Both Workshops contained elements of monitoring, training, experience sharing and discussions. The presentations given at these workshops can be found at the Secretariat's website.

In 2009, the Secretariat commissioned a “Study on the potential for climate change combating in power generation in the Energy Community”. According to the Secretariat's work programme, the study was to focus on CO₂ emissions. Expected to be submitted by the end of 2010, the study will include (i) an inventory of the greenhouse gas emissions 1990 – 2008, and projections until 2020, (ii) the impact of Copenhagen on the Energy Community and (iii) recommendations. In the negotiations with the consultant chosen, SEEC from Belgrade, the Secretariat insisted on also receiving data on fluegas emissions on a plant-by-plant basis. The draft final study has been consulted with stakeholders in the Energy Community.

c) Preliminary findings

The implementation of the Large Combustion Plants Directive will be a huge challenge in almost all Contracting Parties, and gained an entirely new dimension after Ukraine's accession to the Energy Community. The focus on the implementation efforts will have to be on existing coal-fired power plants, many of which have reached or will soon reach the end of their lifespan. The quality of transposition cannot yet be assessed; it is clear, however, that no Contracting Party has yet implemented the directive or even taken major steps in that direction. Most Contracting Parties seem to plan to tackle implementation by ELV rather than NERPs, with the possible exception of Ukraine.

¹⁰ Article 4(1) LCP Directive

¹¹ Article 1(9) LCP Directive

¹² Specific ELVs apply to plants with multi-firing units involving the use of more than one fuel, Article 8 LCP Directive

¹³ Article 4(3) LCP Directive, which applies since 1 January 2008 for the EU Member States

¹⁴ Article 4(6) LCP Directive

¹⁵ Article 4(4) LCP Directive. Whereas the latter option is open to the plant operator, the choice between ELV and NERP is up to the Contracting Party.

¹⁶ Article 12 and 13 LCP Directive.

¹⁷ Annex VIII(B) LCP Directive

¹⁸ Article 6 LCP Directive.

¹⁹ Article 7 LCP Directive.

III. PROPOSALS TO THE PERMANENT HIGH LEVEL GROUP

Based on the foregoing, the Secretariat makes the following proposals to the Permanent High Level Group when adopting the mandate of the Task Force:

Proposal 1: At a first stage, the Environmental Task Force should focus on the implementation of the *acquis* related to emission reduction (Sulphur in Fuels and Large Combustion Plants Directive)

The focus on *acquis* dealing with emission reduction would ensure a certain homogeneity of the Task Force's mandate and composition. At the same time, the focus on *acquis* which is yet to be implemented allows for limitation of the Task Force's mandate on preparing implementation, rather than reviewing the implementation of already (partly) implemented *acquis*.

For these reasons, the Task Force should not deal with the implementation of the Environmental Impact Assessment and the Wild Birds Directive, in general, but on a case-by-case basis, in the context of the implementation of specific infrastructure projects.

Furthermore, the Task Force should not deal in general with the reduction of CO₂ emissions as required by the Kyoto Protocol. In some cases, discussions might be required on reducing CO₂ emissions or the use of flexible mechanisms (JI and CDM) under the Kyoto Protocol.

The Sulphur in Fuels and Large Combustion Plants Directive are homogeneous enough, both in terms of substance and of the Task Force's composition, to justify common coverage. To the extent necessary, the Task Force may convene in different composition. Once the Sulphur in Fuels Directive has been implemented to a satisfactory level, the focus would entirely shift to the implementation of the Large Combustion Plants Directive. The implementation of the IPPC Directive should be an inherent part of the Task Force's mandate due to its close relation with the Large Combustion Plants Directive.

Proposal 2: The Task Force's mandate should be comprehensive enough to achieve both transposition and implementation of the two Directives within the respective deadlines

The implementation obligation following from the Treaty includes transposition in domestic legislation as well as full implementation by law and practice to each individual plant covered.

In terms of *transposition*, compliance with the *acquis* is and can be monitored and enforced by the Secretariat. However, pure ex post control is not considered sufficient in case of the *acquis* on emission reduction, due to its huge complexity and overall impact on the energy sectors and the whole economy. Transposition of the *acquis* in each Contracting Party should be accompanied and coordinated by the Task Force.

As regards full *implementation*, the directives in question need to be properly applied in each case and project which requires its application. Without or with only partly compliance with the relevant directive, the domestic administrations may not grant (environmental) permits. The project-related implementation of the *acquis* is both of crucial importance for the overall compliance and rather difficult to coordinate/monitor by the Secretariat. This is where the Task Force has an important role to play.

Hence, the Task Force should structure and coordinate the transposition as well as the implementation of the directives. Even though both steps are logically sequential, they should be dealt with by the Task Force in parallel. In doing so, the Task Force shall follow a holistic approach, taken into account all possible interdependencies with other policy areas.

The ultimate goal of the Task Force should be to enable and achieve the full implementation of the directives in the above-mentioned sense. In order to achieve this goal, agreements reached within the Task Force need to be implemented within the Contracting Parties. This requires full commitment by all domestic authorities to implement the agreements of the Task Force within the given timeframe.

Furthermore, full implementation of the directives might require a level of flexibility (options, derogations, exemptions), which was inherent in both directives when they were adopted within the EU. The applicability of many of those flexibility provisions to and by the Contracting Parties is, however,

excluded by the fact that no adaptation (in terms of time and scope) took place when they were incorporated in the Energy Community Treaty. The Task Force is best placed to propose appropriate adaptation to the responsible bodies. In a similar vein, and in the light of homogeneity between the Contracting Parties and the EU Member States, the Task Force should also discuss a possible replacement of the Large Combustion Plants Directive by the new Industrial Emissions Directive repealing the former within the European Union. Finally, the Task Force may also propose measures on how implementation of the directives can be achieved on a regional, rather than on an isolated national level alone.

The tasks, tools and approaches should be set out in detail in the work programme to be adopted by the Task Force in its first session.

Proposal 3: Composition of the Task Force

The Task Force should consist of representatives from the European Union, from the Contracting Parties as well as the Observers which are candidates for membership. The composition of the Task Force should ensure each Contracting Party/Observer is represented by one member in charge – within the governmental institutions – of implementation of the Large Combustion Plants Directive and by one member in charge of the implementation of the Sulphur in Fuels Directive. For Bosnia and Herzegovina, more members may have to be necessary in order to accommodate the specific constitutional situation of that country.

To ensure a broad basis of knowledge, experience and acceptance, the Task Force should be open to other stakeholders. That should include public authorities, donors, business, investors and representatives of the civil society.

The European Union, Contracting Parties and Observers should nominate their representatives at the first PHLG meeting in 2011. The PHLG should elect the Chair.

The work of the Task Force will be organizationally and administratively supported by the Secretariat. The Secretariat will also attend the meetings of the Task Force.

Proposal 4: Duration of the mandate and number of meetings

The Task Force does not only need a comprehensive mandate, but also the timeframe necessary to ensure continuous and sustainable work. It is proposed that the Task Force be given until the end of 2015 to achieve the goals assigned in the mandate and spelt out by its work programme. The mandate may be renewed by the PHLG, if considered useful.

The Task Force should meet two times per year for ordinary meetings. It needs to be made sure that the members as well as other stakeholders are given sufficient time in between meetings to prepare and perform the necessary work on substance. As a rule, meetings should take place on one day, and be divided in two parts, one related to the implementation of the Large Combustion Plants Directive and one to the Sulphur in Fuels Directive.

As the implementation deadline for the Sulphur in Fuels Directive expires by the end of 2011, the members of the Task Force with expertise in that area should meet less often after that.

The chairman of the Task Force should regularly report on the progress to the PHLG and the Ministerial Council.

IV. WORK PROGRAMME

The first step of the Task Force, once established, should be the adoption of a detailed work programme. In this respect, the Secretariat proposes the Permanent High Level Group to request the following basic

and non-exhaustive elements. The work programme should include and determine for each task a deadline and a task leader responsible. The work programme should be kept under constant review to ensure adaptation and development.

1. Clarification of the Legal Framework

As a first step, the implementation requirements arising from the two directives in question should be clearly defined and explained to the members of the Task Force. This could be done by the Secretariat in cooperation with the European Commission.

The discussion of the legal framework should include common reflection on the options given by some provisions in the directives. In certain cases, such as the concept of „new-new“ plants, the „opt-out“ option for existing plants, the 2000 base year, the Commission’s evaluation of NERP, or Contracting Parties’ reporting duties²⁰ under the LCP Directive, but also several derogation options under the Sulphur in Fuels Directive, a reference to the Ministerial Council for adaptation²¹ or guidance²² might be requested.

Another related issue, to be discussed with the European Commission, is the possible replacement of the Large Combustion and IPPC Directives by the new Industrial Emissions Directive which will repeal the two former pieces of legislation within the European Union.

2. Stock-Taking

The Task Force should take stock of the SO₂, NO_x and particulate emissions from the energy sectors in each Contracting Party. The study commissioned by the Secretariat – as well as any other available studies to be identified by the Task Force – would serve as a point of departure, to which the individual Task Force members should add data. The stock-taking should be made for each Contracting Party and for each plant and each pollutant in question, with the goal of having a precise and commonly agreed inventory established.

Furthermore, the stock-taking should also include the legislation applicable to emission reduction in each Contracting Party, the institutional and procedural framework (competences, responsibilities etc.) as well as the abatement measures and strategies in place. The relevant information should be compiled by the individual Task Force members. To the extent necessary, the stock-taking can be complemented by expert missions of the Secretariat.

3. Development of action plans

Based on the stock-taking, the Task Force should develop action plans and roadmaps helping to structure the implementation process. The plans should concentrate on the challenges and task in the order of their importance and urgency. The main focus and objective of the action plans/road maps should be a structured approach to the existing installations existing in the Energy Community. For the Sulphur in Fuels Directive, the Guideline issued by the Secretariat shall serve as a point of departure.

The action plans should have national as well as a regional dimension. They should be designed in a way so as to allow for full implementation by the end of the respective implementation deadline. They should address all necessary steps to ensure timely and proper implementation, including political, legal, technical and financial.

The action plans should be consistent with national and regional strategies in energy and other policy areas. In these, the implementation of the *acquis* on environment must be given priority. The Task Force

²⁰ Article 15 LCP Directive.

²¹ Article 25 EnC.

²² Article 94 EnC.

would have to investigate on and point out inconsistencies between that task and other political or legal priorities.

The action plans/road maps should be endorsed/adopted by the political institutions of the Energy Community with a view to make them binding. The experience made with the Sulphur in Fuels Directive shows that a „mere“ political commitment on the level of the PHLG does not yield the desired results. If needed, the Ministerial Council could take general or framework decisions and leave the details to the Task Force.

4. Technical, economical and financial impact

The Task Force should clarify, in general terms as well as for each plant individually (to the extent NERPs are not used) which abatement solutions are available, technically suitable and economically most efficient in order to implement the *acquis* in question.

The Task Force should investigate and use possible financial resources to assist in the implementation of the relevant *acquis*, including private and public investments, Kyoto flexible mechanisms, green climate funds etc. To this end, it should be supported by the Secretariat and the Donors.

Budgetary availability or donor support provided, the Task Force could be supported by consultancy and/or training services commissioned by the Secretariat.

5. Implementation of action plans

Given the dimension and importance of the implementation challenge, the Task Force should continue to support the work of the Contracting Parties and all stakeholders involved beyond the establishment of action plans/road maps.

The Task Force should also review, and where necessary, give an opinion, on all new (planned) installations covered by the two directives and Article 15 of the Treaty. It would thus act as an „early warning system“ for new power plants in particular.

V. CONCLUSION

It is proposed to the Permanent High Level Group to adopt the mandate and scope of work of the Task Force based on the foregoing considerations.