

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-1/22

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"),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

BOSNIA AND HERZEGOVINA

is seeking a Decision from the Ministerial Council that

by maintaining the operation of TPPs Tuzla 4 and Kakanj 5 after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V 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), Bosnia and Herzegovina fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) 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.

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

I. Relevant Facts

1. Introduction

- (1) The present case concerns non-compliance of Bosnia and Herzegovina with the provisions of Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants² (hereinafter: "Directive 2001/80/EC") by not respecting its provisions on limited lifetime derogation (also known as "opt-out") stipulated in Article 4(4) thereof. According to that provision, as adapted for the Energy Community, large combustion plants subject to it can only be operated for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023. Following the expiry of this period or, in any event, from 1 January 2024 onwards, plants subject to Article 4(4) of Directive

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

² OJ L 309, 27.11.2001, p. 1.

2001/80/EC can only remain in operation if their emissions are in line with the limit values stipulated by Part 2 of Annex V 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) (hereinafter: "Directive 2010/75/EU").³

2. Background

- (2) 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. These pollutants 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 must have implemented 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 (hereinafter: "Decision 2013/05/MC-EnC"), whereby Directive 2001/80/EC was adapted for the specific needs of the Energy Community. Namely, Decision 2013/05/MC-EnC introduced amendments for the implementation of Article 4(4) of Directive 2001/80/EC in the Energy Community and specified the timeframes of its applicability for large combustion plants in the Contracting Parties.
- (5) On 14 October 2016, the Ministerial Council adopted Decision 2016/19/MC-EnC on authorising exemptions of plants from compliance with the emission limit values set by Directive 2001/80/EC. As stipulated in its Article 1(1), this decision lists the plants that may be exempted from compliance with the emission limit values referred to in Article 4(3) of Directive 2001/80/EC, thereby complementing the opt-out rules stipulated in Article 4(4) of Directive 2001/80/EC for the purposes of the Energy Community. TPPs Tuzla 4 and Kakanj 5 in Bosnia and Herzegovina, operated by the public utility *Elektroprivreda Bosna i Hercegovine* (hereinafter: "EPBiH") are included in the list established by Decision 2016/19/MC-EnC.⁴
- (6) Following the expiry of the implementation deadline of Directive 2001/80/EC in the Energy Community, the Secretariat requested the Contracting Parties concerned by Decision 2016/19/MC-EnC to confirm whether the plants in question have started to operate under the opt-out regime. In response to a letter sent by the Secretariat on 15 February 2018,⁵ the Ministry of Foreign Trade and Economic Relations (hereinafter: "the Ministry") forwarded the statement of EPBiH to the Secretariat, confirming the start of the opt-out of TPPs Tuzla 4 and Kakanj 5 by a letter sent on 7 March 2018.⁶ In the same communication, EPBiH called upon flexibility in implementing the opt-out provisions.
- (7) Bosnia and Herzegovina submitted its emissions and plant operation data, as required by Annex VIII.B of Directive 2001/80/EC, for the reporting years 2018-2025 on an annual basis. According to the reports, the situation with regard to the operational hours used by TPPs Tuzla 4 and Kakanj 5 between 2018 and 2025 present themselves as follows:

³ OJ L 334, 17.12.2010, p. 17.

⁴ Decision 2016/19/MC-EnC (ANNEX 1), p. 4, rows no. 2-3.

⁵ Ref. BiH/MIN/O/jko/04/15-02-2018 (ANNEX 2).

⁶ Ref. No 01-02-6039/18 (ANNEX 3).

	2018	2019	2020	2021	2022	2023	2024	2025	Total
Tuzla 4	5,922	2,934	5,383	4,610	5,043	4,946	4,358	3,914	37,110
Kakanj 5	6,337	4,250	3,293	5,284	2,894	2,426	2,569	4,247	31,300

- (8) Upon the imminent approach of the expiry of the opt-out regime, the Ministry requested the Secretariat to revisit the compliance regime under Directive 2001/80/EC and change it for TPPs Tuzla 4 and Kakanj 5 by a letter sent on 4 February 2022.⁷ The Secretariat explained in its reply⁸ that it has no legal mandate to amend a Decision of the Ministerial Council, namely Decision 2016/19/MC-EnC, and warned the authorities of Bosnia and Herzegovina about the scarcity of remaining operational hours under the opt-out regime.
- (9) Following further exchanges between the authorities of Bosnia and Herzegovina⁹ and the Secretariat,¹⁰ the European Commission also confirmed¹¹ that changing the applicable operational regime of Tuzla 4 and Kakanj 5 would mean extending the operation period by additional unlimited time and well beyond the 20,000 hours limit, which cannot be accepted.
- (10) TPPs Tuzla 4 and Kakanj 5 have both reached the end of the 20,000-hours long opt-out period already in the 2022 reporting year. The plants have nevertheless continued their operation in the 2023-2025 reporting years. Thereby, the excess of 3,892 (Tuzla 4) and 2,058 (Kakanj 5) operational hours by 31 December 2022 were exacerbated by further 13,218 (Tuzla 4) and 9,242 (Kakanj 5) operational hours, respectively, raising the total amount of operational hours spent in breach of the provisions of Directive 2001/80/EC to 17,110 (Tuzla 4) and 11,300 (Kakanj 5) by 31 December 2025. These equal to 186% (Tuzla 4) and 157% (Kakanj 5) of the total amount of operational hours available for opt-out under Article 4(4) of Directive 2001/80/EC. Both plants remain in operation up to the present day.

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

- (11) In Bosnia and Herzegovina, the legal framework governing emissions into the air from large combustion plants is provided at entity level. As both plants concerned by the present case are located in the Federation of Bosnia and Herzegovina, only the legislation applicable in that entity of the Contracting Party bears relevance to the present case.
- (12) In the Federation of Bosnia and Herzegovina, Article 10 (Exemption based on remaining operating hours) of the Rulebook on emission limit values for combustion plants¹² describes the applicable provisions for plants the operators of which would like to benefit from the implementation alternative provided by Article 4(4) of Directive 2001/80/EC:

⁷ Ref. No. 09-1-28-2315-15/20 (ANNEX 4).

⁸ Ref. No. BH-MC/O/alo/24-02-2022 (ANNEX 5).

⁹ Ref. No. 09-1-28-2315-20/20 (ANNEX 6).

¹⁰ Ref. No. BH-MIN/O/alo/08/22-03-2022 (ANNEX 7).

¹¹ Ref. No. Ares(2022)3919247 (ANNEX 8).

¹² Official Gazette of FBiH 3/13 (ANNEX 9a).

"Existing large combustion plants may be exempted from the obligation to comply with the emission limit values set out in Annexes I-III of this Regulation and excluded from the Emission Reduction Plan under the following conditions:

a) the operator of the existing plant submits a written statement to the Federal Ministry of Environment and Tourism by 31.12.2015 that the plant will not operate for more than 20,000 operating hours in the period from 01.01. 2018 until 31.12.2025;

b) the operator is obliged to submit each year by 31.01. a report to the competent authority on the number of operating hours achieved in the previous year."

- (13) The amendments of 16 November 2017 to the Rulebook corrected, in accordance with the *acquis communautaire* on environment, the timeframe available for opt-out by setting the end-date of the application period of this regime as 31 December 2023 and by stipulating that

*"If in the period from 01.01.2018 to 31.12.2023, the combustion plant consumes 20,000 operating hours, and continues to operate after 01.01.2024, the emissions in that case must be in accordance with the prescribed emission limit values in points C of Annex I-III."*¹³

- (14) At the time of the entry into force of the obligations stemming from Article 4(4) of Directive 2001/80/EC in the Energy Community, the domestic legal framework in the relevant entity of Bosnia and Herzegovina for the present case was therefore compliant with the obligations stemming from the Treaty.
- (15) However, on 9 March 2022, the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina adopted a conclusion¹⁴ with the intention to *"prolong the work of TPPs Tuzla 4 and Kakanj 5 until 1 January 2028"*. At its 10th extraordinary session held on 24 March 2022, the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina endorsed this conclusion. This conclusion imposes an obligation on the Government of the Federation of Bosnia and Herzegovina to implement it. The Secretariat presented its objection in an official letter addressed to the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina.¹⁵

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"*.¹⁶
- (17) Point (d) of Article 2(1) of the Treaty reads:

The task of the Energy Community shall be to organise the relations between the Parties and create a legal and economic framework in relation to Network Energy, as defined in paragraph 2, in order to: (...)

¹³ Article 7 of the amending Rulebook, Official Gazette of FBiH 92/17 (ANNEX 9b).

¹⁴ <https://www.federalna.ba/predstavnicki-dom-pfbih-odobrio-nastavak-rada-termoblokova-4-i-5-u-tuzli-i-kaknju-twgqhc>

¹⁵ Ref. No. BH-MIN_O_alo_06_10-03-2022 (ANNEX 10).

¹⁶ Article 3(1) of the Dispute Settlement Procedures.

(d) improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space

(18) 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.

(19) 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.*

(20) Article 16 of the Treaty reads:

*The “*acquis communautaire* on environment”, for the purpose of this Treaty, shall mean (...)*

(iii) Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants,¹⁷ (...)

(21) Article 67 of the Treaty reads:

The Secretariat shall:

(a) provide administrative support to the Ministerial Council, the Permanent High Level Group, the Regulatory Board and the Fora;

(b) review the proper implementation by the Parties of their obligations under this Treaty, and submit yearly progress reports to the Ministerial Council;

(c) review and assist in the coordination by the European Commission of the donors' activity in the territories of the Adhering Parties and the territory under the jurisdiction of the United Nations Interim Administration Mission in Kosovo, and provide administrative support to the donors;

(d) carry out other tasks conferred on it under this Treaty or by a Procedural Act of the Ministerial Council, excluding the power to take Measures; and

(e) adopt Procedural Acts.

(22) Article 79 of the Treaty reads:

The Ministerial Council, the Permanent High Level Group or the Regulatory Board shall take Measures under Title II on a proposal from the European Commission. The European Commission may alter or withdraw its proposal at any time during the procedure leading to adoption of the Measures.

¹⁷ As amended by Decision 2013/05/MC-EnC and by Decision 2015/07/MC-EnC on amending Decision 2013/05/MC-EnC.

(23) 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.

(24) Point 3 of Annex II to the Treaty reads:

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.

(25) Point 5 of Annex II to the Treaty reads:

Each Contracting Party shall implement 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) from 1 January 2018 for new plants. For existing plants, Contracting Parties shall implement those provisions by 1 January 2028 at the latest. Prior to that date, they shall endeavour to implement the provisions of Chapter III and Annex V within the shortest possible timeframe, in particular in the cases of retrofitting existing plants. (...)

(26) Article 2(9) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community¹⁸ reads:

"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.

(27) Article 4(4) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community¹⁹ reads:

With the exception of plants for which a date of closure prior to 1 January 2018 has been agreed by the authorities via bilateral agreements with the European Union or other international organisations, existing plants may be exempted from compliance with the emission limit values referred to in paragraph 3 and from their inclusion in the national emission reduction plan on the following conditions:

(a) the operator of an existing plant undertakes, in a written declaration submitted by 31 December 2015 at the latest to the competent authority, not to operate the plant for more than 20 000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023;

(b) the Ministerial Council, in the form of a decision and following a verification by the Secretariat that the above conditions are met, authorizes this exemption in the form of a decision approved by the majority of its members including a vote in favour by the European Union.

¹⁸ Ministerial Council Decision 2013/05/MC-EnC.

¹⁹ Ministerial Council Decision 2013/05/MC-EnC.

The operator is required to submit each year to the competent authority a record of the used and unused time allowed for the plants' remaining operational life. Contracting Parties are required to submit each year a summary of these reports to the Secretariat.

From the point in time when the plant has been operating for 20 000 hours since 1 January 2018 and in any case from 1 January 2024 onwards, the plant shall not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.

(28) Part 2 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community²⁰ reads:

1. All emission limit values shall be calculated at a temperature of 273,15 K, a pressure of 101,3 kPa and after correction for the water vapour content of the waste gases and at a standardised O₂ content of 6 % for solid fuels, 3 % for combustion plants other than gas turbines and gas engines using liquid and gaseous fuels and 15 % for gas turbines and gas engines.

In case of combined cycle gas turbines with supplementary firing, the standardised O₂ content may be defined by the competent authority, taking into account the specific characteristics of the installation concerned.

2. Emission limit values (mg/Nm³) for SO₂ for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

Total rated thermal input (MW)	Coal and lignite and other solid fuels	Biomass	Peat	Liquid fuels
50-100	400	200	300	350
100-300	200	200	300 250 in case of fluidised bed combustion	200
> 300	150 200 in case of circulating or pressurised fluidised bed combustion	150	150 200 in case of fluidised bed combustion	150

(...)

4. Emission limit values (mg/Nm³) for NO_x for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

²⁰ Ministerial Council Decision 2013/06/MC-EnC.

Total rated thermal input (MW)	Coal and lignite and other solid fuels	Biomass and peat	Liquid fuels
50-100	300 400 in case of pulverised lignite combustion	250	300
100-300	200	200	150
> 300	150 200 in case of pulverised lignite combustion	150	100

(...)

7. Emission limit values (mg/Nm³) for dust for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

Total rated thermal input (MW)	
50-300	20
> 300	10 20 for biomass and peat

(29) Point 2 of Part 5 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community²¹ reads:

2. Minimum rate of desulphurisation for combustion plants referred to in Article 30(3)

Total rated thermal input (MW)	Minimum rate of desulphurisation
50-100	93 %
100-300	93 %
> 300	97 %

²¹ Ministerial Council Decision 2013/06/MC-EnC.

III. Preliminary procedure

- (30) According to Article 90 of the Treaty, 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 Article 12 of the Dispute Settlement Procedures, the Secretariat initiates 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. 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 by the Reasoned Request, the Secretariat may bring the matter to the attention of the Ministerial Council by way of a Reasoned Request in accordance with Article 29 of the Dispute Settlement Procedures.
- (31) After the Secretariat has repeatedly recalled the significant non-compliance with the provisions of Directive 2001/80/EC,²² the present case was initiated on 27 October 2022. In the Opening Letter,²³ the Secretariat preliminarily concluded that Bosnia and Herzegovina, by maintaining the operation of TPPs Tuzla 4 and Kakanj 5 after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Directive 2010/75/EU, fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC. The Secretariat requested the Government of Bosnia and Herzegovina to submit its reply on the points of fact and of law raised in the Opening Letter by 27 December 2022.
- (32) On 26 December 2022, the Ministry sent a Reply to the Opening Letter to the Secretariat.²⁴
- (33) As the information and the legal arguments provided by the Reply to the Opening Letter did not dispel the concerns raised in the Opening Letter, the Secretariat issued a Reasoned Opinion on 30 March 2026 and requested the Government of Bosnia and Herzegovina to submit its reply on the points of fact and of law raised therein by 30 May 2026.²⁵
- (34) On 9 June 2026, the Ministry sent a Reply to the Reasoned Opinion to the Secretariat.²⁶ Albeit dated 21 May 2026, the Reply to the Reasoned Opinion has arrived after the expiry of the deadline stipulated in the Reasoned Opinion. Regardless of this fact, the Secretariat will, where relevant, address the arguments brought forward by Bosnia and Herzegovina in the legal assessment of the present Reasoned Request.
- (35) As will be argued below, the Secretariat considers that Bosnia and Herzegovina did not provide sufficient evidence of developments or arguments that would dispel the concerns raised in the Opening Letter and concluded in the Reasoned Opinion. Therefore, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council.

IV. Legal Assessment

- (36) The present Reasoned Request addresses the non-compliance of Bosnia and Herzegovina with the obligation to operate large combustion plants subject to Article 4(4) of Directive 2001/80/EC

²² Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 47; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, pp. 54-55; Annual Implementation Report of the Energy Community Secretariat, 1 November 2021, pp. 48-49.

²³ ANNEX 11.

²⁴ ANNEX 12.

²⁵ ANNEX 13.

²⁶ ANNEX 14.

for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023, or to comply with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.²⁷

- (37) As a Contracting Party to the Treaty, Bosnia and Herzegovina is under an obligation to implement, i.e. to transpose and to apply the *acquis communautaire* on environment, including Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, and Directive 2010/75/EU, as adapted for and adopted by the Energy Community by Decision 2013/06/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 and point 5 of Annex II to the Treaty establishes the general implementation deadline for Directive 2010/75/EU as 1 January 2018 and a specific implementation deadline for existing plants under that Directive as 1 January 2028.

1. The implementation regime applicable to TPPs Tuzla 4 and Kakanj 5 under Directive 2001/80/EC

- (38) 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. There are two alternative avenues for Contracting Parties to implement Directive 2001/80/EC for existing plants, namely a) by complying with the emission limit values stipulated in Parts A of Annexes III to VII at individual plant level (compliance with Article 4(1) and point a) of Article 4(3)), or b) by defining and implementing a National Emission Reduction Plan (hereinafter: "NERP"; compliance with litera (a) of Article 4(3)). 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.
- (39) Article 4(4) of Directive 2001/80/EC, however, provides a possibility for an exemption from the above compliance avenues established by Article 4(3) by allowing, for a limited period, non-compliance with the Directive's individual emission limit values. The preconditions of this exemption clause are specified in Article 4(4) of Directive 2001/80/EC,²⁸ namely the submission of a written declaration by the operator of an existing large combustion plant as defined by Article 2(9) of Directive 2001/80/EC²⁹, not to operate the plant for more than 20,000 operational hours starting from 1 January 2018 and ending not later than 31 December 2023³⁰ and the authorization of the Ministerial Council in the form of a decision³¹.
- (40) Article 4(4) of Directive 2001/80/EC is an expression of flexibility within the compliance regime established by the Directive. The option to "opt out" individual power plants provides for a significant extension of operational lifetime for large combustion plants. This extension was introduced for the benefit of operators which find it economically or technically impossible to

²⁷ Fifth subparagraph of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

²⁸ As amended by Decision 2013/05/MC-EnC.

²⁹ As amended by Decision 2013/05/MC-EnC.

³⁰ Point (a) of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

³¹ Point (b) of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

implement emissions abatement measures. It is the very purpose of the additional 20,000 operational hours to allow Contracting Parties to prepare for this transition.³²

- (41) In this context, Bosnia and Herzegovina claims in the Reply to the Reasoned Opinion that *"[p]ersistent insistence by the Energy Community Secretariat on shutting down the aforementioned units could have significant implications for the security of supply and the stability of the power system of Bosnia and Herzegovina, as well as jeopardize the competitiveness of the economy and the living standards of citizens, which are already at a low level"*³³.
- (42) This accusation must be refused as unfounded. As described in detail below, one of the core functions of the Secretariat is to review the proper implementation by the Parties of their obligations under the Treaty. The very nature of the preliminary procedure described in this Reasoned Request is to fulfil that function. As it is clear from the Opening Letter, the Reasoned Opinion and the below legal assessment, the Secretariat has never insisted on the closure of TPPs Tuzla 4 and Kakanj 5 *as the sole option* for compliance with the provisions of Directive 2001/80/EC. It is rather the wording of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC, that requires opted-out large combustion plants not to be operated further unless they meet the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU. Also, the transposing entity legislation in Bosnia and Herzegovina establishes the same obligation, in line with the Energy Community *acquis communautaire* on environment.
- (43) In the case of TPPs Tuzla 4 and Kakanj 5, both conditions of Article 4(4) of Directive 2001/80/EC were met, the first one with the submission of the written declaration by EPBiH and the second one with the adoption of Decision 2016/19/MC-EnC. With the confirmation of the authorities of Bosnia and Herzegovina on the start of the opt-out in 2018,³⁴ it is therefore to be concluded that both TPPs Tuzla 4 and Kakanj 5 are subject to Article 4(4) of Directive 2001/80/EC.
- (44) The outcome of the exchanges referred to in paragraphs 8-9 above confirm this understanding. There was no measure tabled for consideration of the Ministerial Council that would have changed the application regime of Directive 2001/80/EC for individual combustion plants.
- (45) However, the Reply to the Reasoned Opinion reiterates the claim to do so: The Ministry quotes EPBiH claiming that *"it is necessary for the Energy Community Secretariat to assist JP Elektroprivreda BiH d.d. Sarajevo and the competent ministries before the Council of Ministers and the European Commission in overcoming the current situation by confirming the status of Unit 4 at the Tuzla Thermal Power Plant branch and Unit 5 at the Kakanj Thermal Power Plant branch within the framework of the NERP for BiH"*³⁵. In essence, this constitutes a request to change the status of TPPs Tuzla 4 and Kakanj 5.
- (46) In reply to that argument, the Secretariat respectfully submits that the role and the functions of the Secretariat are defined by Article 67 of the Treaty. Point (b) of that article mandates the Secretariat *"to review the proper implementation by the Parties of their obligations under this Treaty, and submit yearly progress reports to the Ministerial Council"*. As outlined above, the

³² Common Position (EC) No 52/2000 of 9 November 2000, as adopted by the Council.

³³ P. 3 of the Reply to the Reasoned Opinion (emphasis added).

³⁴ See ANNEX 3.

³⁵ P. 3 of the Reply to the Reasoned Opinion.

Secretariat has been doing precisely that prior to launching the present case by repeatedly recalling the approaching non-compliance with the provisions of Directive 2001/80/EC.³⁶

- (47) Furthermore, according to point (d) of Article 67 of the Treaty, the Secretariat shall “*carry out other tasks conferred on it under this Treaty or by a Procedural Act of the Ministerial Council, excluding the power to take Measures*”. As already explained by the Secretariat in the course of the communication in early 2022³⁷ on the same matter and as it is clear from the text of the Treaty itself, the Secretariat has no mandate to take Measures, either when it comes to the adoption of new ones or the amendment of existing ones, this being a prerogative of the Ministerial Council under primary Energy Community law. The opt-out list was established by a Decision of the Ministerial Council and it is therefore not only the Secretariat’s role, but also its obligation under point (b) of Article 67 of the Treaty to oversee the implementation of the Energy Community *acquis communautaire* in the Contracting Parties, including the Measures adopted by the Ministerial Council. The Secretariat referred the request of Bosnia and Herzegovina to the attention of the European Commission precisely because it is the institution that has the power, under Article 79 of the Treaty, to propose Measures under Title II. This understanding was also confirmed by the European Commission in the course of 2022.³⁸
- (48) Yet, the authorities of Bosnia and Herzegovina contested the breach of Article 4(4) of Directive 2001/80/EC in their Replies to the Opening Letter and to the Reasoned Opinion and claim that TPPs Tuzla 4 and Kakanj 5 should be considered as being included in the NERP of Bosnia and Herzegovina rather than on the opt-out list.
- (49) At the outset, the Secretariat notes that the Ministerial Council already concluded in 2023 that Bosnia and Herzegovina failed to meet its NERP ceilings for all pollutants.³⁹ The change of the status TPPs Tuzla 4 and Kakanj 5 in line with the request presented in the Reply to the Reasoned Opinion would therefore only mean that the individual non-compliance of these plants with Article 4(4) of Directive 2001/80/EC would be covered under the general non-compliance of Bosnia and Herzegovina to meet its NERP ceilings under Article 4(3) of Directive 2001/80/EC.
- (50) Furthermore, reference is made once more to the exchanges referred to in paragraphs 8-9 above as well as the reasoning in paragraphs 46-47, with the resulting conclusion that the measures proposed by Bosnia and Herzegovina are of a legislative nature and that the applicable implementation alternative to individual combustion plants cannot be changed after the start of the opt-out.
- (51) In addition, the Secretariat respectfully submits that up until the 2024 reporting year – including after the expiry of the operational hours available for opt-out in 2022 – both plants were consistently reported by the operator and the authorities of Bosnia and Herzegovina to the Secretariat as being opted out under Article 4(4) of Directive 2001/80/EC in the annual emission reports. They were only reported in the 2025 reporting year under a “special status” by neither indicating NERP nor opt-out in the derogation column of the report.⁴⁰

³⁶ See, to that effect, the references provided in paragraph 31 above.

³⁷ See, to that effect, ANNEX 5 and ANNEX 7.

³⁸ See, to that effect, ANNEX 8.

³⁹ Decision 2023/06/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-9/21 (ANNEX 15).

⁴⁰ See ANNEX 16.

- (52) Finally, switching the application of a derogation scheme for plants subject to the opt-out regime or the NERP during the implementation timeframe is not an option offered by Directive 2001/80/EC. It is therefore to be maintained that both TPPs Tuzla 4 and Kakanj 5 fall under the scope of Directive 2001/80/EC, were operated under the opt-out regime of Article 4(4) thereof and have reached their limit of 20,000 operating hours by the end of the 2022 reporting year.

2. Expiry of the maximum of allowed operational hours under the opt-out regime

- (53) Article 4(4) of Directive 2001/80/EC allows for a period of non-compliance with the Directive's individual emission limit values in case the operator of an existing large combustion plant undertakes, in the form of a written declaration, not to operate the plant for more than 20,000 operational hours starting from 1 January 2018 and ending not later than 31 December 2023. As explained above, this implementation alternative was chosen by the operator of TPPs Tuzla 4 and Kakanj 5, two existing plants in Bosnia and Herzegovina. The start of the plants' opt-out was explicitly confirmed by the Ministry on 7 March 2018 to the Secretariat.⁴¹
- (54) Therefore, it is clear that from 1 January 2018 onwards, TPPs Tuzla 4 and Kakanj 5 had 20,000 operational hours at their disposal to comply with the provisions of Article 4(4) of Directive 2001/80/EC. By the end of the 2022 reporting year, both plants have exceeded the maximum amount of operational hours available under Article 4(4) of Directive 2001/80/EC. This finding is based on the number of operational hours of TPPs Tuzla 4 and Kakanj 5 provided to the Secretariat and the European Environment Agency in the framework of the reporting obligation under Annex VIII.B of Directive 2001/80/EC. Following the exceeding of that limit and in accordance with the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,⁴² the plants could thereafter have remained in operation only if they meet the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.
- (55) It is thus undisputable that since the end of 2022, TPPs Tuzla 4 and Kakanj 5 have been in breach of Article 4(4) of Directive 2001/80/EC.
- (56) The state of non-compliance was further exacerbated in the course of 2023–2025, raising the total amount of operational hours spent in breach of the provisions of Article 4(4) of Directive 2001/80/EC to 17,110 (Tuzla 4) and 11,300 (Kakanj 5) by 31 December 2025. The plants remain in operation and thus the total number of operational hours in breach of Directive 2001/80/EC will increase further in the course of 2026 and possibly beyond.
- (57) It is therefore an objective fact, that TPPs Tuzla 4 and Kakanj 5 as plants falling under the scope of Directive 2001/80/EC and operating under the opt-out regime of Article 4(4) thereof, have reached the limit of 20,000 operating hours by the end of 2022 and have been operating since that point of time in breach of the provisions of Article 4(4) of Directive 2001/80/EC.

3. Compliance with emission limit values of Directive 2010/75/EU

- (58) According to the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,⁴³ from the point in time when a plant has been operating for 20,000 hours since 1 January 2018, it shall not be

⁴¹ See ANNEX 3.

⁴² As amended by Decision 2013/05/MC-EnC.

⁴³ As amended by Decision 2013/05/MC-EnC.

operated further, unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.

- (59) In the case of TPPs Tuzla 4 and Kakanj 5, this provision became applicable at the end of 2022, following the expiry of the 20,000 hours used under the opt-out regime. Consequently, TPPs Tuzla 4 and Kakanj 5 may only have remained in operation beyond the 20,000 hours under the condition that they meet the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.
- (60) In order to assess compliance with the emission limit values of Directive 2010/75/EU, the average emission concentrations expressed in mg/Nm³ are to be estimated. This assessment was carried out by the Secretariat in the Opening Letter,⁴⁴ with the following results:

Pollutant	Emission concentrations of TPP Tuzla 4 estimated by the Secretariat	Emission concentrations of TPP Kakanj 5 estimated by the Secretariat
SO ₂	9,183.1	7,269.3
NO _x	1,051.2	746.2
Dust	254.9	6.0

- (61) From these results, it follows that – except for the dust emissions of TPP Kakanj 5 – the applicable emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU⁴⁵ are not met. It is thus to be concluded that the operation of TPPs Tuzla 4 and Kakanj 5 after the 20,000 operational hours applicable under Article 4(4) of Directive 2001/80/EC is non-compliant.
- (62) To that end, the Reply to the Reasoned Opinion refers to the “*newly emerged global energy circumstances caused by armed conflicts and disruptions to the security of supply*”.⁴⁶ However, Article 4(4) of Directive 2001/80/EC establishes a clear and unequivocal *obligation de résultat*, by requiring that from the point in time when the plant has been operating for 20,000 hours since 1 January 2018, it shall not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU. Neither Directive 2001/80/EC itself, nor Decision 2013/05/MC-EnC of the Ministerial Council provides any exemption to this rule.
- (63) Finally, Bosnia and Herzegovina in its Reply to the Reasoned Opinion presents the operator’s efforts to achieve compliance with the emission limit values of Directive 2010/75/EU.⁴⁷ While it is to be commended that compliance remains an ambition for the operator, this can neither satisfy the *obligation de résultat* required by Part 2 of Annex V of Directive 2010/75/EU, nor offer remedy for the long-standing non-compliance after the expiry of the time-limit available under Article 4(4) of Directive 2001/80/EC. In that context, it is to be recalled that the Court of Justice of the European Union has held that “*the fact that an implementing measure will be adopted shortly is*

⁴⁴ The calculation details were presented in Annexes 1 to 6 to the Opening Letter, to which the Secretariat refers.

⁴⁵ 150 mg/Nm³ for sulphur dioxide (or a minimum rate of desulphurisation of 97%), 150 mg/Nm³ for nitrogen oxides (200 mg/Nm³ in case of pulverised lignite combustion) and 10 mg/Nm³ for dust.

⁴⁶ P. 3 of the Reply to the Reasoned Opinion.

⁴⁷ Pp. 3-4 of the Reply to the Reasoned Opinion.

irrelevant and cannot deprive the Commission of all legal interest in bringing an action for failure to fulfil obligations since, in accordance with settled case-law."⁴⁸

- (64) The consequence of the above is that the operation of TPPs Tuzla 4 and Kakanj 5 is in breach of Article 4(4) of Directive 2001/80/EC. This provision establishes a clear and unequivocal *obligation de résultat*. The fact that Bosnia and Herzegovina, by legislative amendments of 9 March 2022, attempted to legalize the non-compliant operation of the plants concerned even beyond the ultimate end-date for all opt-out mechanisms in the Energy Community, namely 31 December 2023, does not remedy the breach of Energy Community law.

V. Conclusion

- (65) Based on the above, the Secretariat respectfully submits that following the expiry of the opt-out period in the course of the 2022 reporting year, TPPs Tuzla 4 and Kakanj 5 have neither been put out of operation or continued their operation at emission limits applicable to a new plant under Directive 2010/75/EU. This constitutes a breach of Article 4(4) of Directive 2001/80/EC, which cannot be justified by the arguments put forward by the Ministry.

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 maintaining the operation of TPPs Tuzla 4 and Kakanj 5 after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V 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), Bosnia and Herzegovina fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) 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.

On behalf of the Secretariat of the Energy Community,

Vienna, 19 June 2026

A handwritten signature in black ink, reading "Artur Lorkowski".

Artur Lorkowski
Director

A handwritten signature in blue ink, reading "Marie-Therese Richter-Kuhnert".

Marie-Therese Richter-Kuhnert
Head of Legal Unit

⁴⁸ Case C-74/02 *Commission v Germany*, paragraph 17 and the case-law cited.

List of Annexes

ANNEX 1	Decision 2016/19/MC-EnC on authorising exemption of plants from compliance with the emission limit values set by Directive 2001/80/EC of the European Parliament and of the Council
ANNEX 2	Letter of the Secretariat to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, 15 February 2018
ANNEX 3	Statement of EPBiH confirming the start of the opt-out of TPPs Tuzla 4 and Kakanj 5, forwarded by the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina to the Secretariat, received 7 March 2018 (the Secretariat may provide translation upon request)
ANNEX 4	Letter of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina to the Secretariat, dated 4 February 2022
ANNEX 5	Letter of the Secretariat to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, dated 24 February 2022
ANNEX 6	Letter of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina to the Secretariat, dated 4 March 2022
ANNEX 7	Letter of the Secretariat to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina and to the European Commission, 22 March 2022
ANNEX 8	Letter of the European Commission to the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina, dated 24 May 2022
ANNEX 9a	Rulebook on emission limit values for combustion plants, Official Gazette of FBiH 3/13 (the Secretariat may provide translation upon request)
ANNEX 9b	Amendments to the Rulebook on emission limit values for combustion plants, Official Gazette of FBiH 92/17 (the Secretariat may provide translation upon request)
ANNEX 10	Letter of the Secretariat to the Speaker of the House of Peoples of the Federation of Bosnia and Herzegovina, 10 March 2022
ANNEX 11	Opening Letter in Case ECS-1/22, 27 October 2022
ANNEX 12	Reply to the Opening Letter by the Ministry of Foreign Trade and Economic Relations, 23 December 2022 (received 26 December 2022)
ANNEX 13	Reasoned Opinion in Case ECS-1/22, 30 March 2026
ANNEX 14	Reply to the Reasoned Opinion in Case ECS-1/22, 21 May 2026 (received 9 June 2026)

- ANNEX 15 Decision 2023/06/MC-EnC on the failure of Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-9/21
- ANNEX 16 Comparison between the reports for the years 2022-2025 in terms of the status of TPPs Tuzla 4 and Kakanj 5
- ANNEX 17 Opinion of the Advisory Committee in Case ECS-15/21 *Secretariat v Montenegro*