

TO THE MINISTERIAL COUNCIL OF THE ENERGY COMMUNITY  
represented by the Presidency and the Vice-Presidency of the Energy Community

In case ECS-9/21, the Secretariat of the Energy Community  
against  
Bosnia and Herzegovina, the

ADVISORY COMMITTEE,

composed of  
Rajko Pirnat, Alan Riley, Helmut Schmitt von Sydow, Verica Trstenjak, and  
Wolfgang Urbantschitsch

pursuant to Article 90 of the Treaty establishing the Energy Community ('the Treaty') and Article 11(3) of Procedural Act No 2008/1/MC-EnC of the Ministerial Council of the Energy Community of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty as amended by Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 and by Procedural Act No 2022/03/MC-EnC of the Ministerial Council of the Energy Community of 15 December 2022 on amending Procedural Act 2008/01/MC-EnC ('Dispute Settlement Rules 2022'),

acting unanimously,

gives the following

OPINION

**I. Procedure**

By e-mail dated 18 July 2023 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-9/21 against Bosnia and Herzegovina. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Bosnia and Herzegovina by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan fails to comply with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

Bosnia and Herzegovina submitted a reply to the Opening Letter and the Reasoned Opinion, but did not reply to the Reasoned Request. Furthermore, they did not declare the necessity of a public hearing and communicated that there is no additional information on this topic. The Secretariat agreed that a public hearing could be dispensed with according to Article 8 (1) of the Rules of Procedure of the Energy Community Advisory Committee as amended. Bosnia and Herzegovina was informed about the Secretariat's position.

The Georgian National Energy and Water Supply Regulatory Commission (GNERC) submitted written observations according to Article 31 (2) Dispute Settlement Rules 2022 to the Secretariat on 16 November 2023, which were forwarded to the Advisory Committee on 17 November 2023. GNERC stresses the efforts of Bosnia and Herzegovina to transpose Directive 2001/80/EC into national law. GNERC did not dispute the legal assessment in the Reasoned Request.

## II. Provisions allegedly violated by the Contracting Party concerned

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.*

Article 16 of the Treaty reads:

*The “*acquis communautaire* on environment”, for the purpose of this Treaty, shall mean*  
*(i) – (ii) [...]*  
*(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,*  
*(iv) – (vii) [...]*

Article 4 of Directive 2001/80/EC reads:

*1. – 2. [...]*  
*3. Without prejudice to Directive 96/61/EC and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, Contracting Parties shall, by 1 January 2018 at the latest, achieve significant emission reductions by:*  
*(a) taking appropriate measures to ensure that all licences for the operation of existing plants contain conditions relating to compliance with the emission limit values established for new plants referred to in paragraph 1; or*  
*(b) ensuring that existing plants are subject to the national emission reduction plan referred to in paragraph 6; and, where appropriate, applying Articles 5, 7 and 8.*  
*4. – 5. [...]*  
*6. Contracting Parties may, without prejudice to this Directive and Directive 96/61/EC, and taking into consideration the costs and benefits as well as their obligations under Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants and Directive 96/62/EC, define and implement a national emission reduction plan for existing plants, taking into account, inter alia, compliance with the ceilings as set out in Annexes I and II.*  
*The national emission reduction plan shall reduce the total annual emissions of nitrogen oxides (NO<sub>x</sub>), sulphur dioxide (SO<sub>2</sub>) and dust from existing plants to the levels that would have been achieved by applying the emission limit values referred to in paragraph 3 to the existing plants in operation in the year 2012, (including those existing plants undergoing a rehabilitation plan in 2012, approved by the competent authority, to meet emission reductions required by national legislation) on the basis of each plant’s actual annual operating time, fuel used and thermal input, averaged over the last five years of operation up to and including 2012.*  
*The closure of a plant included in the national emission reduction plan shall not result in an increase in the total annual emissions from the remaining plants covered by the plan.*

*The national emission reduction plan may under no circumstances exempt a plant from the provisions laid down in relevant Community legislation, including inter alia Directive 96/61/EC.*

*The following conditions shall apply to national emission reduction plans:*

*(a) the plan shall comprise objectives and related targets, measures and timetables for reaching these objectives and targets, and a monitoring mechanism;*

*(b) Contracting Parties shall communicate their national emission reduction plan to the Secretariat no later than 31 December 2015;*

*(c) within nine months of the communication referred to in point (b) the Secretariat shall evaluate whether or not the plan meets the requirements of this paragraph. When the Secretariat considers that this is not the case, it shall inform the Contracting Party and within the subsequent three months the Contracting Party shall communicate any measures it has taken in order to ensure that the requirements of this paragraph are met;*

*(d) the Secretariat shall, no later than 27 November 2002, develop guidelines to assist Contracting Parties in the preparation of their plans.*

*National emission reduction plans shall be in use up to 31 December 2027 at the latest.*

*The ceilings for the year 2018 shall be calculated on the basis of the applicable emission limit values at the time of submission of the plan as set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used.*

*The ceilings for the year 2023 shall be calculated on the basis of the applicable emission limit values in that year set out in Part A to Annexes III to VII to Directive 2001/80/EC or, where applicable, on the basis of the rates of desulphurisation set out in Annex III to Directive 2001/80/EC. In the case of gas turbines, the emission limit values for nitrogen oxides set out for such plants in Part B of Annex VI to Directive 2001/80/EC shall be used. The ceilings for the years 2019 to 2022 shall be set providing a linear trend between the ceilings of 2018 and 2023.*

*The ceilings for the year 2026 and 2027 shall be calculated on the basis of the relevant emission limit values set out in Part 1 of Annex V to Directive 2010/75/EU or, where applicable, the relevant rates of desulphurisation set out in Part 5 of Annex V to Directive 2010/75/EU. The ceilings for the years 2024 and 2025 shall be set providing a linear decrease of the ceilings between 2023 and 2026.*

*7. – 8. [...]*

Article 16 of Directive 2001/80/EC reads:

*The Contracting Parties shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus provided for shall be effective, proportionate and dissuasive.*

### **III. Legal Assessment**

According to Article 32 (1) Dispute Settlement Rules 2022, the Advisory Committee gives its Opinion on the Reasoned Request, taking into account the reply by the party concerned. On the basis of this provision, the Advisory Committee assessed the Reasoned Request and the relevant documents, discussed the legal topics which were brought up and came to the following conclusions.

The Reasoned Request of the Secretariat alleges that by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan Bosnia and Herzegovina fails to comply with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC of the European Parliament and of the Council of 23

October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

In its reply to the Reasoned Opinion, Bosnia and Herzegovina did not dispute its failure to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of the National Emission Reduction Plan (NERP). The arguments brought forward by Bosnia and Herzegovina to justify the non-implementation of the NERP, were ongoing investments and the COVID-19 pandemic to be considered a *force majeure*.

In the extensive argumentation on the first point, it remains undisputed by Bosnia and Herzegovina that emission ceilings were exceeded at the time span in question.

The second argument could only justify Bosnia and Herzegovina's breach after the time span ranging from the outbreak of the COVID 19 pandemic in 2020 until now. By raising such a plea, Bosnia and Herzegovina contends in substance a *force majeure* releasing it temporary from the obligation to perform the Treaty. While it might be correct that COVID-19 presents certain elements of *force majeure*, it is also true that it is an epidemic that came to Europe in January and February 2020. Bosnia and Herzegovina on the other hand did not dispute that the breach of the ceilings established by the NERP started already in the 2018 reporting year. That deadline was not complied with at least two years before COVID-19 came to Europe. Thus, the plea of *force majeure* is inoperative. Bosnia and Herzegovina cannot rely on unforeseeable circumstances or *force majeure* in circumstances in this case where a diligent and prudent Contracting Party would have been able to avoid the expiry of the period for implementation. Thus, Bosnia and Herzegovina's breach of Article 4(3) and 4(6) Directive 2001/80/EC cannot be considered the result of events – and this applies similarly to the energy crisis starting in 2022 – originating after 2018.

As regards Article 16 Directive 2001/80/EC, the Secretariat elaborates on the non-implementation of effective, proportionate and dissuasive penalties. In the context of this case, efficiency should be read as the requirement to provide for penalties that actually sanction exceeding the relevant emission ceilings. What is more, if there was only a fine to be imposed, it is considered neither effective nor dissuasive, if it does not 'effectively deprive those responsible of the economic benefit derived from the infringement' (case C-77/20 K.M., para 48). In addition, it is obvious, that the amounts of the fines between 5,117 EUR and 10,225 EUR cannot be considered dissuasive as interpreted by the European Court of Justice. It has consistently held that 'the severity of the sanctions must be commensurate with the seriousness of the breaches for which they are imposed' (Case C-77/20 K.M., para 38). Finally, it has to be noted, that Bosnia and Herzegovina's alleged non-application of any kind of penalty for a violation of Article 4 (3) Directive 2001/80/EC does not fall within the scope of a violation of Article 16 Directive 2001/80/EC and does not support the argument of effectiveness.

#### **IV. Conclusions**

The Advisory Committee considers that

Bosnia and Herzegovina by failing to achieve significant emission reductions with regard to the eight large combustion plants falling under the scope of its National Emission Reduction Plan failed to comply with Articles 4(3), 4(6) and 16 of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants read in conjunction with Articles 12 and 16 of the Energy Community Treaty.

Done in Vienna on 10 December 2023

On behalf of the Advisory Committee

A handwritten signature in blue ink, appearing to read 'W. Urbantschitsch', with a stylized flourish at the end.

Wolfgang Urbantschitsch, President