

European Commission
Environment Directorate-General
B-1049 BRUSSELS

14 May 2014

Request for Internal Review

pursuant to Article 10 of the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies against the **Commission decision of 31.3.2014 on the notification by the Republic of Bulgaria of a transitional national plan referred to in Article 32 of Directive 2010/75/EU on industrial emissions**¹ (hereinafter „Bulgarian TNP approval“).

1. The Applicants

a) EEB

The contact details of the person empowered by EEB for the purpose of the request for internal review is as follows:

By email:
Tel:-
European Environmental Bureau
34, Bd de Waterloo
B-1000 Brussels

b) HEAL

The contact details of the person empowered by HEAL for the purpose of the request for internal review is as follows:

By email:
Tel:-
Health and Environment Alliance
28, Bd Charlemagne
B-1000 Brussels

¹ Commission Decision C(2014) 2002 of 31.3.2014. Announcement of the adoption was published in the Official Journal of the European Union OJ C 97/9 on 2.4.2014. The decision itself is available on the website: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

c) Frank Bold Society

The contact details of the person empowered by FBS for the purpose of the request for internal review is as follows:

By email:
Tel:
Údolní 33
602 00 Brno
Czech Republic

d) Ekologichno sdruzenie Za Zemiata (Environmental Association Za Zemiata)

The contact details of the person empowered by Environmental Association Za Zemiata for the purpose of the request for internal review is as follows:

By email:
Sofia 1000, 11B, Yanko Sakazov blv.,
Bulgaria
PO Box. 975, Sofia, Bulgaria

2. Criteria set by the Regulation (EC) No. 1367/2006 of the European Parliament and of the Council

a) EEB

We hereby confirm that the EEB satisfies the Article 11 criteria of entitlement foreseen by the Regulation (EC) No. 1367/2006 (hereafter "the Aarhus Regulation").

Evidence for entitlement can be found on the EEB website, e.g.:

- Primary stated objectives, subject matter in respect of which the request for internal review is made is covered by its objectives and activities (see EEB Annual Work programmes)
<http://www.eeb.org/index.cfm/about-eeb/>
- Independent non-profit-making legal personality existing for more than 2 years, see official statute (attached).

b) HEAL

We hereby confirm that HEAL satisfies the Article 11 criteria of entitlement foreseen by the Aarhus Regulation.

Evidence for entitlement can be found on the HEAL website, e.g.:

- Primary stated objectives, subject matter in respect of which the request for internal review is made is covered by its objectives and activities (see <http://env-health.org/about-us/>
<http://www.env-health.org/resources/publications/article/annual-review-2012>
<http://www.env-health.org/resources/publications/article/heal-annual-review-2011>
<http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=00723343929-96>)
- Independent non-profit-making legal personality existing for more than 2 years, see official statute (attached).

c) Frank Bold Society

We hereby confirm that the FBS (former Environmental Law Service, the organization was renamed in 2013) satisfies the Article 11 criteria foreseen by the Aarhus Regulation.

Evidence for entitlement can be found on the FBS website, e.g.:

- Primary stated objectives, subject matter in respect of which the request for internal review is made is covered by its objectives and activities <http://en.eps.cz/about-us/what-we-do>
- Independent non-profit-making legal personality existing for more than 2 years, see official statute (attached).

d) Environmental Association Za Zemiata

We hereby confirm that the Environmental Association Za Zemiata satisfies the Article 11 criteria of entitlement foreseen by the Aarhus Regulation

- Primary stated objectives, subject matter in respect of which the request for internal review is made is covered by its objectives and activities, see official statute or Certificate of Incorporation (attached)
- Independent non-profit-making legal personality existing for more than 2 years, see official statute or Certificate of Incorporation (attached)

3. Compliance with requirements for the request for internal review

Article 10 Paragraph 1 of the Regulation (EC) No. 1367/2006 sets the following requirements for the request for internal review:

A) *“to the Community institution or body that has adopted an administrative act”*

This request for internal review is addressed to the Commission of the European Union which has adopted the decision in question.

B) *“an administrative act”*

The Commission decision that is subject to this request meets the criteria of an administrative act according to Article 2 Paragraph 1 Point g) of the Regulation (EC) No. 1367/2006: *“any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects;”*

By Decision of 31 March 2014 the European Commission has approved an optional derogation facility for certain operators of 8 combustion plants in Bulgaria, allowing those operators to derogate from stricter Emission Limit Values (ELVs) concerning three key pollutants up to July 2020. The decision was published in the Official Journal of the European Union on 2 April 2014, i.e. less than six weeks preceding this request for internal review.

The European Commission’s decision regarding the Bulgarian TNP approval is to be regarded as a measure of individual scope under environmental law insofar as the decision in question applies to the benefit of a few individual operators of clearly identified 8 large combustion

plants in Bulgaria. Therefore, this measure could not be regarded as having impact on addressees defined in general and/or abstract manner.

The decision has *legally binding and external effect* as it constitutes an approval to derogate from stricter ELVs and to provide for a linear decrease of emissions for certain LCPs pursuant to the conditions and ceilings set in the Annex to the Bulgarian TNP approval. The Commission decision ultimately sets which installations will benefit from the transitional national plan.

Irrespective of considerations on the above, Article 9(3) of the Aarhus Convention² provides access to administrative or judicial procedures to be available “[...] to challenge acts or omissions by [...] public authorities [...]”. The General Court has annulled two decisions of the Commission that considered requests for internal review inadmissible on grounds that the concerned acts were not ‘administrative acts’ as defined in Art. 2(1)(g) of the Aarhus Regulation. According to the case T-338/08 *Stichting Natuur en Milieu and PAN Europe v. Commission*, judgment of 14 June 2012³ and Case T-396/09 *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission*, judgment of 14 June 2012, the Court has maintained that the definition in the Aarhus Regulation of an act which may be subject of an internal review request is too narrow and that an administrative act should not be limited to a measure of “individual scope”. The Court has therefore found that “*It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified.*” (see paragraph 76 of Judgment T-338/08).

“*It follows from the above that Article 9(3) of the Aarhus Convention cannot be construed as referring exclusively to measures of individual scope. Consequently, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of ‘acts’, as used in Article 9(3) of the Aarhus Convention, to ‘administrative act[s]’ defined in Article 2(1)(g) of Regulation No 1367/2006 as ‘measure[s] of individual scope’, it is not compatible with Article 9(3) of the Aarhus Convention.*” (See paragraph 83 of Judgment T-338/08).

We are aware that the General Court ruling has been appealed by the Commission and that the ruling of the Court of Justice of the European Union is pending. Nevertheless, we wish to make it clear that while we maintain, as stated above, that the Decision in question does in fact constitute a measure of individual scope, this should not in any way be construed as implying that we concur with the Commission’s view on the question of individual scope. On the contrary, we do not consider that constituting a measure of individual scope can legitimately be invoked as a pre-condition for the admissibility of this request for internal review.

C) “under environmental law”

According to Article 2 para.1 (f) of the Regulation (EC) No. 1367/2006, the Commission Decision falls under area of environmental law: “*Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilization of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;*”.

² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed at Aarhus on 25 June 1998 (‘the Aarhus Convention’)

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0338:EN:HTML>

The Commission decision was adopted pursuant to the EU Directive 2010/75/EU on industrial emissions (hereafter "IED Directive") that objective clearly refers to the Community environmental targets as they were introduced by the Sixth Community Environment Action Programme.

D) "request must be made in writing"

The present request is made in writing and addressed to the European Commission.

E) "within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest"

The Commission decision was adopted on 31 March 2014 and has been published on 2 April 2014. The six-week period from the adoption expires on 14 May 2012 by which the present request is written and submitted to the European Commission.

F) "The request shall state the grounds for the review."

See below.

Based on the above, the request for internal review should be declared admissible.

4. Grounds for the review

4.1 Failure to comply with the requirements of Directive 2001/42/EC, on the assessment of the effects of certain plans and programmes on the environment (hereinafter "SEA Directive")

Under the SEA Directive an environmental assessment should be carried out for the plans and programmes which are likely to have significant environmental effects and which are prepared, among others, for the energy sector. Pursuant to Article 2 of the SEA Directive "plans and programmes" shall mean plans and programmes, as well as any modifications to them that are: subject to preparation and/or adoption by an authority at national, regional or local level, or which are prepared by an authority for adoption, through a legislative procedure by parliament or government, and which are required by legislative, regulatory or administrative provisions. The Bulgarian transitional national plan fulfils the criteria as it was prepared by the Bulgarian authorities and formally adopted by the Council of Ministers pursuant to decision of 28 December 2012⁴.

Furthermore, the majority of measures foreseen and listed in the TNP are not abstract, but these are very concrete projects with clearly set parameters – such as localization, levels of emission limits applicable and techniques proposed to abate pollutants as well as monitoring requirements etc. Further, number of planned measures included in the TNP fulfils criteria set out in Annexes I and II to Directive 2011/92/EU and thus shall be subject to the environmental impact assessment procedure. It follows that the TNP sets out a framework for future development consent of these projects that will be realized by the operators concerned.

⁴ Available here http://pris.government.bg/prin/file_view.aspx?did=58504&pid=63412

Further, it is important to note, that the number of the installations are also located in the vicinity of the protected areas under the Habitats Directive 92/43/EEC. These are:

TNP Nr. 5 Svilozha TTP which is located:

- less than 3 km to Habitats Directive site Svishtovska gora BG 0000576
- less than 1 km to Birds Directive site Svishtovsko-Belenska nizina BG 0002083
- less than 2 km to Habitats Directive site Persina BG 0000396

TNP Nr. 7 Toplofikatsia Ruse

- less than 10km to Habitats Directive site Lomovete BG 0000608
- less than 10km to Birds directive site Lomovete BG 0002025
- less than 3 km to Habitats Directive site Gura Vedei -Saica - Slobozia ROSCI0088 (Romania)
- less than 5 km to Birds Directive site Vedeia Dunare ROSPA0108 (Romania)

TNP Nr. 6 Vidahim TPP

- less than 2 km to Habitats Directive site Ciuperceni – Desa ROSCI0039 (Romania)
- less than 2km to Birds Directive site Calafat – Ciuperceni - Dunare ROSPA0013 (Romania)

TNP Nr. 2 Toplofikatsia Sofia Itzok

- less than 5km to Birds Directive site Dolni Bogorov - Kazichene BG 0002004

TNP Nr. 8 Mondi Stamboliyski TPP

- less than 2km to Habitats Directive site Reka Maritsa BG 0000578
- less than 2km to Birds Ddirective site Maritsa-Plovdiv BG 0002087

Pursuant to Article 6, para.3 of the Habitats Directive 92/43/EEC *any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon*, either individually or in combination with other plans or projects, shall be subject to *appropriate assessment* of its implications for the site in view of the site's conservation objectives.

Although TNP presents a transition plan towards application of stricter standards from 2020, the period during which the less strict standards will be applied (2016-July 2020) may have a negative impact on the protected sites, since the TNP results in additional pollution load of SO₂ and NO_x emissions that would otherwise be prevented/reduced with effect as from 2016 if the TNP derogation is not granted. Nitrogen Oxides contributes to acidification and eutrophication of waters and soils (i.e. potentially of those habitats). Similarly to NO_x, sulphur dioxide contributes to acidification, with potentially significant impacts including adverse effects on aquatic ecosystems and damages to forests⁵. The potential impacts of granting the TNP should have been assessed against the conservation objectives pursuant to the Birds and Habitats Directive.. It follows that a thorough assessment of the possible effect of the TNP implementation on these sites should have been ensured, i.e. by providing for complete SEA procedure.

Nevertheless, Minister of environment and water issued a decision number 13/2012 dated 15.12.2012 that SEA is not necessary for the TNP. We are convinced, that the failure to carry out an

⁵ Source EEA.

environmental assessment has therefore resulted in a breach of the following provisions of the SEA Directive – Art.3, Art.4 para.1, Art.6 paras. 1 and 2, Art.8, Art.9.

Acknowledging the fact, that SEA Directive is binding on the Member State, if the Commission adopts a decision that consequently leads to the breach of obligations set by the directive by the Member State, this decision contradicts the European law as well.

According to Article 17 of the Treaty of the European Union, the Commission shall “ensure the application of the Treaties and of measures adopted by the institutions pursuant to them” as well as it shall “oversee the application of Union law under the control of the Court of Justice of the European Union”. When deciding on a particular issue the Commission cannot escape this general supervisory role by declaring that the responsibility is shifted to a Member State. When the TNP was being approved, the Commission’s duty was equally to deal with the environmental aspects and to ensure that the requirements of the SEA Directive were fulfilled. The Commission has nevertheless made a final approval of a TNP in breach of the EU law on these counts.

4.2. Failure to ensure effective public participation during the preparation of the Bulgarian TNP pursuant to the Aarhus Convention

The Aarhus Convention was signed by the European Community on 25 June and the Council ratified it on 17 February 2005⁶. We are convinced, that Bulgarian TNP falls within the scope of the plan and programmes under Article 7 of the Aarhus Convention. Hence the public should have been given the opportunity to participate during its preparation and the requirements for public participation set out in article 6, paragraphs 3, 4 and 8 of the Convention should have been applied.

Nevertheless, Bulgarian authorities have not ensured compliance with the requirements for the public participation in environmental decision making under the Aarhus Convention.

Pursuant to the Aarhus Convention, each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, para.3, 4 and 8 of the Convention, shall be applied.⁷ Although, it is a primary duty of Bulgaria to comply as a party to the Convention with its provision, we suppose that a certain obligation rests in this respect also on the European Union and European Commission as a body concerned in this regard⁸. The Commission carried out the assessment of the draft TNP and it had opportunity to check whether the account was given also to the obligations under the Aarhus Convention, namely whether Bulgaria properly implement Article 7

⁶ Pursuant to the Treaty on the functioning of the European Union, Article 216, para.2 „Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.“

⁷ Aarhus Convention, Article 7, Public participation concerning plans, programmes and policies relating to the environment.

⁸ For instance, Draft findings of the Aarhus Compliance Committee - Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union, Draft findings 12 April 2012, the Committee found that the European Union by not having properly monitored the implementation by Ireland of article 7 of the Convention in the adoption of Ireland’s renewable action plan has failed to comply with article 7 of the Convention.

of the Convention in preparing the draft TNP. Moreover, in time of the information exchange and the revision of the plan, it was also the Commission's duty as an active player in the preparation process to take into consideration the requirements of the public participation.

In this regard it is important to note findings of the Aarhus Compliance Committee in communication ACCC/C/2012/70 (Czech Republic), "*Further, the Committee, while noting the complexity of decision-making in a multi-level government structure, such as the one between the EU and its member States, encourages the EU in designing common framework for the member States to implement the Convention, to ensure compatibility of such framework with the Convention and to fulfil its responsibility to monitor that its member States, including the Czech Republic, in implementing EU law properly meet the obligations resting on them by virtue of the EU being a party to the Convention (cf. ACCC/C/2010/54, ECE/MP.PP/C.1/2012/12, para. 76).*"⁹

From the available information it can be concluded that the Commission did not provide evidence and information that it evaluated Bulgarian TNP in the light of the requirements of Article 7 of the Aarhus Convention. Furthermore, it was the role of the Commission as a party to the Convention to monitor and ensure that the public consultation and the public participation in the process of TNP preparation met the standards of article 7 of the Aarhus Convention. According to Article 17 of the Treaty of the European Union, the Commission shall "*ensure the application of the Treaties and of measures adopted by the institutions pursuant to them*" as well as it shall "*oversee the application of Union law under the control of the Court of Justice of the European Union*". When deciding on a particular issue the Commission cannot escape this general supervisory role by declaring that the responsibility is shifted to a Member State. When the TNP was being approved, the Commission's duty was equally to deal with the environmental aspects and to ensure that the requirements of the Aarhus Convention were fulfilled.

4.3 Non-disclosure of information and failure to ensure early and effective public participation by the Commission

Further, the Commission has acted against the provisions on public participation of the EU Aarhus Regulation, in particular Article 9 stating that the "*Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open.*" (own emphasis added).

At no stage in the process did the Commission provide actively an early and effective opportunity to participate during the preparation, modification or review of the Bulgarian TNP approval. On the contrary, the Commission has withheld all the essential elements of information about that plan, its preparation, modification or review from the public it had received by the Bulgarian authorities. For that reason, EEB did lodge an application to the Registrar of the General Court on 22 April 2014 against the European Commission¹⁰.

In this case, the European Commission cannot demonstrate that a public participation procedure has taken place at the EU level decision making process. Hence the public, including the NGOs submitting this request for internal review, did not have any early and effective opportunity to participate

⁹ Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-70/Findings/C70_CzechRep_Findings_advancededited.pdf.

¹⁰ Court Case T-250/14 pending.

during the preparation, modification or review by the Commission of the Bulgarian TNP when options i.e. to modify / reject were still open.

4.4 Disregard of ambient air quality objectives

It follows from the Bulgarian TNP approval that the Commission has not assessed whether the granting of the TNP derogation to any of the 8 combustion plants would negatively affect the attainment of the goals set forth in Directive 2008/50/EC on ambient air quality and cleaner air for Europe (herewith the AAQD). The AAQD, with regard to the Sixth Community Environment Action Programme follows the objective to reduce pollution to levels which minimise harmful effects on human health, and the environment.

The Bulgarian TNP approval merely states in recital 15 that "*The implementation of the TNP should be without prejudice to other applicable national and Union law. In particular, when setting individual permit conditions for the combustion plants covered by the TNP, the Republic of Bulgaria should ensure that compliance with the requirements set out in, inter alia, Directive 2010/75/EU, Directive 2008/50/EC of the European Parliament and of the Council and Directive 2001/81/EC of the European Parliament and of the Council is not jeopardised.*"

We think that this assessment should not be limited to the Bulgarian permitting authorities once the TNP is implemented, but should also be taken by the European Commission in light of the TNP approval decision. In fact it is of the responsibility of the European Commission to assess the TNP application and to ensure the EU environmental acquis is safeguarded.

According to own statements by the Commission¹¹, you are particularly concerned with cases where non compliance with EU ambient air quality rules has lasted for more than 5 years and is forecast to continue in the future. The Commission refers to a "fresh approach" to "*urge Member States with on-going air quality problems to take forward-looking, speedy and effective action to keep the period of non-compliance as short as possible*". In the decision of the European Commission on the notification by the Republic of Bulgaria of an exemption from the obligation to apply the limit values for PM10 in six air quality zones from the 11.12.2009 relating to the AAQD the Commission raised objections to the notification of Bulgaria, stating that "[...] the air quality plans do not include all required information laid down in Part A of Annex XV to Directive 2008/50/EC. In particular complete source apportionments and information about the impact of the measures are missing." The Commission concluded from your own analysis that "On the basis of the information provided, the Commission notes that for zones 1, 4, 5 and 6 it appears that industry is one of the main sources of emissions. As regards zones 2 and 3, it appears that traffic and domestic combustion are the dominant emission sources. In zone 2 also industry seems to be a major source."¹² Several of the concerned zones of this notification are the locations of TNP plants (zones 1, 2, 4). Bulgaria is listed as the top ranking Member States exceeding PM10 limit values of the AAQD in the 2013 report of the European Environment Agency¹³ and as the top ranking European country in terms of the average annual exposure of the urban population to PM10 by the World Health Organization (56 µg/m³).¹⁴

¹¹ http://europa.eu/rapid/press-release_IP-13-47_en.htm

¹² http://ec.europa.eu/environment/air/quality/legislation/pdf/bg_en.pdf

¹³ EEA (2013): Air quality in Europe – 2013 report. Page 28-29. <http://www.eea.europa.eu/publications/air-quality-in-europe-2013>

¹⁴ World Health Organization Regional Office for Europe, Environment and Health Information System (ENHIS), indicator Exposure to particulate matter in outdoor air (annual mean PM10).

<http://www.euro.who.int/en/data-and-evidence/environment-and-health-information-system-enhis>

The seriousness of the status quo was already recognised by the Commission by sending additional letter of formal notice to Bulgaria on 24 January 2013.

Taking into consideration the outstanding problem with the air quality limits in Bulgaria, the TNP approval would only further delay emission reductions and compliance with the AAQD. In the case of the TNP plants 1-4 and 8 the LCP is located in a zone with breaches of the NO₂ limit value for the protection of human health. In a decision from 05.12.2012 the Commission granted Bulgaria time extension for compliance with the NO₂ limit value for the respective zones (BG0001 and BG0002) until 31 December 2013. Whether the limits will be kept after this deadline is not yet clear as recent data still show a violation of this limit in 2012.

4.4.1 Interrelation of the AAQD objectives and TNP derogation

We doubt on whether it is permissible to include certain LCPs in a TNP which are located in areas which are already in breach of ambient air quality limits. The AAQD, in its Chapter III on ambient air quality management, imposes a number of obligations on Member States, inter alia:

- they are required to ensure that, throughout their zones and agglomerations, levels of SO₂, PM₁₀, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI, while, in respect of NO_x and benzene, the limit values specified in Annex XI to the AAQD are not to be exceeded from the dates specified therein (Article 13).
- they shall take all necessary measures to reduce exposure to PM 2.5 with a view to attaining the national exposure reduction target laid down in Section B of Annex XIV by the year specified therein (Article 15(1))
- they shall take all necessary measures not to ensure that concentrations of PM 2.5 in ambient air do not exceed the target value laid down in Section D of Annex XIV as from the date specified therein (Article 16(1))
- they are required to take all necessary measures to ensure that the target values and long-term objectives are attained (Article 17(1)).

According to Article 23 of the AAQD, where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case (20% for the annual mean value of PM₁₀ and 0% for the annual mean value for NO₂), Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV of the AAQD. In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children. (Article 23(1) and (2) of the AAQD).

In the light of the provisions of the AAQD, and in particular the provisions already specifically mentioned, it is clear that the Member States are legally obliged to ensure that, generally speaking, air quality limits are not exceeded, and that any breach of said limits require the undertaking of appropriate measures to ensure that in any case a breach kept to be as short as possible.

It is important to note that due to there being no catalogue or definition of "appropriate" measures, such measures may include both affirmative measures (i.e. the undertaking of measures whose aim it is to lower pollution) and passive measures (i.e. forbearance from undertaking measures which increase pollution or the abandonment of such measures already in use). The only determining factor

concerning said measures is whether, in case of a breach of air quality limits, said measures can effectively remove the breach in shortest time possible, and, additionally, whether the totality of the measures undertaken by a Member State permits it to attain the goals set forth in the entire AAQD (i.e. minimize negative effects on human health), not just in Article 23 of the AAQD. Given that the limit and target values for ambient air quality set in Annex XI and XIV, respectively, are not in line with the WHO air quality guideline values from 2005 and thus do not warrant sufficient protection of human health although the AAQD refers specifically to the WHO guidelines, any exceedance of those limit and target values should be kept to the minimum.

In the light of the above, one may say that if, in the event of an existing breach, a facultative measure of a derogational nature -i.e. the TNP derogation- is adopted or undertaken which leads to an avoidance or delay of a reduction in pollution which would have otherwise resulted from the coming into force of the IED with its ELVs set out in Annex V, such a measure constitutes a violation not just of Article 23 of the AAQD, but of the general goals set forth in the other provisions of the AAQD.

Such a measure violates a Member State's obligation to ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead, carbon monoxide, nitrogen dioxide, and benzene in ambient air do not exceed the limit values laid out in the AAQD, or the general provision laid down in Art. 1 that measures should be aimed at "*maintaining air quality where it is good and improving it in other cases*".

We provide further information in section 4.4.2 and 4.4.3 suggesting that the latter is the case.

It is in this context that one must analyze the relationship between the provisions of the AAQD and the relevant provisions of the IED Directive. Besides the general obligation to hold a permit which sets ELVs on the basis of BAT, it is clear from Article 18 that environmental quality standards (EQS) may not be breached.

According to Article 18 of the IED, compliance with relevant EQS need to be ensured at all times. In fact, "*additional measures shall be included in a permit without prejudice to other measures which may be taken to comply with environmental quality standards*".

The TNP only allows derogation to ELVs mentioned under Annex V of the IED, but not to the other Chapter II requirements, let alone other requirements set pursuant to other EU legislation such as the AAQD.

The adoption of the Bulgarian TNP should therefore not constitute a contradiction with required measures to be taken in order to safeguard relevant EQS i.e. not exempt a Member State from the requirement to take *all measures* necessary in order to ensure that, inter alia, throughout a Member State's zones and agglomerations, levels of sulphur dioxide, PM10, lead, carbon monoxide, nitrogen dioxide, and benzene in ambient air do not exceed the limit values laid out in the AAQD.

The air quality plans required in case of exceedance of limit values by Art. 23 of the AAQD have to be reported to the European Commission two years after the exceedance had been observed. In assessing the plans the European Commission weighs the efforts that Member States are undertaking to comply with the AAQD in the future against ongoing infringement of EU law.

The AAQD itself specifically states that "*Full account will [...] be taken of the ambient air quality objectives provided for in this Directive, where permits are granted for industrial activities pursuant to Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control*". As the IED has replaced Directive 2008/1/EC full account should be taken of the AAQD limit values for permits, and thus also for TNPs, under the IED.

The European Commission has to act as the guardian of the Treaties, and in particular ensure that the EU environment and health protection *acquis* is effectively enforced. Therefore it should not adopt a measure that would run counter to the objectives set under other relevant EU *acquis* it is supposed to enforce. However by approving the Bulgarian TNP without assessing the impacts of that decision for the attainment of the objectives set in the other relevant EU *acquis*, the Commission is providing an *ex ante* exemption for Bulgaria from the necessity to take all adequate source prevention measures, including measures in the energy industry sector, and eventually from taking full account of the AAQD objectives.

In fact the TNP should not allow Member States authorities to derogate from standard and stricter source control measures for largest point source emitters for specific pollutants which may negatively affect an area which is already in breach of air quality limits pertaining to those pollutants for which a weakening of emission limits is sought for. The BAT used to achieve the IED ELVs set in Annex V part 1 have already passed the “economic feasibility test” in 2006, and numerous assessment studies carried out by the Commission find that the benefits of pollution prevention by far exceeds the costs (compare also below section 4.4.4 on external costs to health from modeling of TNP related emissions).

We consider this a violation of certain provisions of the AAQD, most notably Article 13 as well as Article 23. The granting of that TNP derogation for the LCP concerned will not ensure that a Member State would remove a breach in the shortest time possible, nor does it enable a Member State to ensure compliance with the requirements of the AAQD. It should not be permitted for a Member State to adopt measures which make it impossible to fulfill its obligations arising under EU law, the European Commission should exercise an *ex ante* scrutiny on this regard.

4.4.2 Impact of Bulgarian TNP approval on AAQD objectives (monitoring results)

According to our findings¹⁵, there is a high probability that the implementation of the Bulgarian TNP approval would endanger the realization of objectives of the AAQD at least throughout the period 2016-2020.

Methodology:

The 8 combustion installations were attributed zone codes in accordance to the implementation of the AAQD as well as the closest monitoring stations in case of zone BG0004 with a large geographic area. For each installation, the status of air quality was assessed in regards to the relevant pollutants affected by the TNP i.e. SO₂, NO_x, PM 2.5 and PM10¹⁶ based on official data from the AirBase database of the European Environment Agency, for the next station available, as well as throughout the zone.

Results of air quality status of the relevant areas were differentiated according to 3 classes:

class A - concentrations of substance do not exceed the limit values, the target values, values of long-term objectives throughout the zone,

class B - concentrations of substance exceed the limit values but do not exceed limit values plus the margin of tolerance throughout the zone,

¹⁵ See more detailed assessment in separate attachment

¹⁶ “Dust” does indeed cover PM10 and PM2.5, a derogation on the dust ELVs according to the TNP is considered as having effects on PM10 and PM2.5 emissions

class C - concentrations of substance exceed the limit values plus the margin of tolerance throughout the zone; if the margin of tolerance is not defined - exceed the limit values.

In order to assess the degree of impediment to achieving the objectives of the AAQD, for each category of air quality class an impediment factor value of "n" was assigned for each of the 4 measured pollutants: SO₂, NO_x, PM 2.5 and PM₁₀: Class A = "0" class B = "1", class C = "1".

Further, for each pollutant derogated from, an impediment factor of "1" was applied to any of the pollutants concerned (for "dust", the impediment factor would apply to PM_{2.5} and PM₁₀).

Illustration 1:

a combustion plant which is seeking a TNP derogation for SO₂, and NO_x in an air quality zone where the monitoring results indicate class A for SO₂ / NO_x and class C for PM₁₀ and PM_{2.5} would have an impediment factor of "2".

Illustration 2:

a combustion plant which is seeking a TNP derogation for SO₂, NO_x and dust in an air quality zone where the monitoring results indicate class A for SO₂ / NO_x / PM₁₀ and PM_{2.5} would have an impediment factor of "0".

According to this simplified classification installations yielding n = 0 would be considered as not posing difficulties in achieving AAQ Directive objectives in the said zone, however it does not take account of long range and transfrontier pollution.

Results:

It appears that at least 4 out of the 8 combustion plants included in the Bulgarian TNP would hinder (impediment factor 2) the achievement of the objectives of the AAQ Directive. This equates to 50% of the installations covered. The other four combustion plants would be assigned the same impediment factor if the monitoring values from one station outside Sofia would be excluded from the analysis. The notorious problem of particulate matter pollution in the whole of Bulgaria demands highest scrutiny when evaluating measures that could result in a postponement of the compliance with EU ambient air quality standards.

The AAQD explicitly states that *"it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level¹⁷"*. This approach is in line with the polluter prevents and pays principle enshrined in the Treaties.

It is clear from the EEA Air pollution factsheet for Bulgaria of 2013¹⁸ that energy use and supply are:

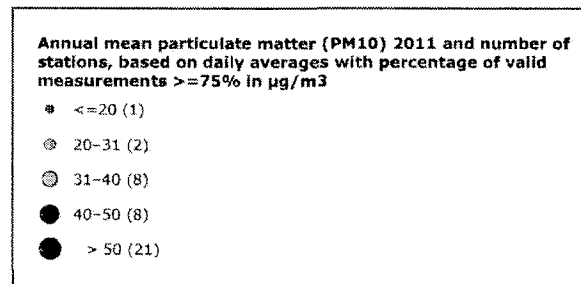
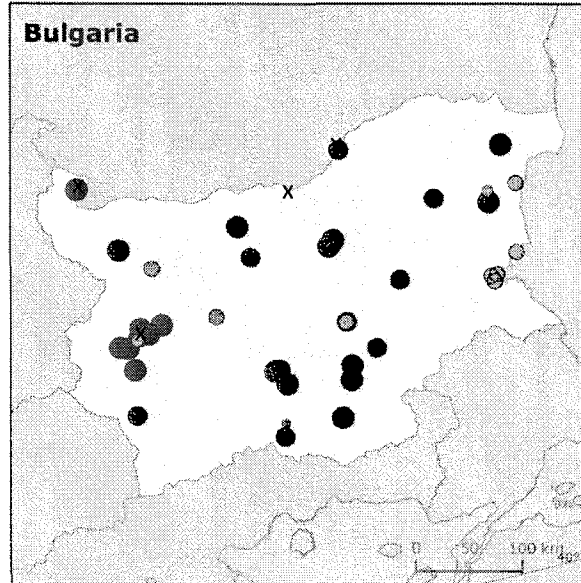
1. the largest source for NO_x pollution in Bulgaria, with 51% of the total emissions
2. the exclusive source of SO₂ pollution in Bulgaria (95%)
3. the largest source for PM 2.5 pollution in Bulgaria, with 91% of the total emissions
4. according to the same report, in Bulgaria there is a huge need to improve the situation of PM₁₀ concentrations.

The ambient air quality situation in Bulgaria regarding PM₁₀ is the following:

¹⁷ Recital 2

¹⁸ <http://www.eea.europa.eu/themes/air/air-pollution-country-fact-sheets/bulgaria-air-pollutant-emissions-country-factsheet/view>

- 100% of the urban population in Bulgaria is exposed to ambient levels of PM10 that exceed the EU daily reference value of $50\mu\text{g m}^{-3}$;
- Respectively, 49% of the joint rural and urban population are exposed to average levels of PM10 exceeding the annual limit value of $40\mu\text{g m}^{-3}$;
 - Four out of the ten most polluted cities in Europe, in terms of the number of days on which $50\mu\text{g m}^{-3}$ of PM_{10} are exceeded, are located in Bulgaria.
- Every year in Bulgaria air pollution with PM2.5 is responsible for 104,200 life years lost annually,¹⁹ which is equivalent to about 9,700 lives being shortened. Pollution with primary and secondary particulate matter is affecting the most lives in this regard.



Annual mean particulate matter (PM10) concentrations 2011, based on daily averages with percentage of valid measurements $\geq 75\%$; only dark green data points indicate compliance with the WHO air quality guideline value ($20\mu\text{g m}^{-3}$), figure taken from EEA Air Pollution Fact Sheet 2013 Bulgaria. Black crosses symbolize the approximate locations of the TNP plants.

The objective of the AAQD is to “maintain air quality where it is good and improving it in other cases”. In the below cases, improvements are needed.

Four TNP installations have a high air quality impediment factor “2” due to exceedance of the PM10 and PM2.5 limit value and target value, respectively.

Ref Plant number	zone	Name of the plant
5	BG0004	TPP Sviloza

¹⁹ European Topic Centre on Air and Climate Change, 2008: Assessment of the health impacts of exposure to PM2.5 at a European level, http://acm.eionet.europa.eu/docs/ETCACC_TP_2009_1_European_PM2.5_HIA.pdf

6	BG0004	TPP Vidahim
7	BG0004	DHC Rousse – TPP Rousse East
8	BG0002	TPP – Mondi Stamboliyski

The combustion plants 5, 6, and 7 should therefore not be granted derogation from the dust limit value. As for plant 8 the NO₂ limit value is exceeded at least at one monitoring station in the zone, withdrawal from the Bulgarian TNP approval should be checked based on modelling of the diffusion of the NO₂ emissions of this plant.

Four TNP installations have the air quality impediment factor “0” because one monitoring station in zone BG0001 recorded no exceedance of the PM₁₀ and PM_{2.5} limit value and target value, respectively.

Ref Plant number	zone	Name of the plant
1	BG0001	DHC Sofia – TPP Sofia
2	BG0001	DHC Sofia – TPP Sofia East
3	BG0001	DHC Sofia – Heating Station „Zemlyane“
4	BG0001	DHC Sofia – Heating Station „Lyulin“

As all other monitoring stations in this zone recorded exceedances both of the PM₁₀ limit value and the PM_{2.5} target value, and as the only station reporting lower values is located outside the city and does not give account of the exposure of the urban population, the withdrawal from the Bulgarian TNP should be checked on a case-by-case basis, informed through detailed modelling of the dispersion of the emissions of these plants and influence of secondary particles on the local load with PM. As for plants 1-4 the NO₂ limit value is exceeded at least at one monitoring station in the respective zone, also the contribution to NO₂ levels should be included in the modelling and inform the case-by-case decisions.

4.4.3 Assessment of those findings in the light of the new WHO guidelines

The AAQD explicitly states that *“it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore **the emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account relevant World Health Organization standards, guidelines and programmes**”*²⁰ (own highlights added).

In the context of the objectives of the Sixth and Seventh Environmental Action Plans, to approve through derogations at EU level less strict air quality requirements on key pollutants from the largest point sources goes in fact against attainment of the objectives of the relevant environmental acquis. According to the findings of the World Health Organization (WHO) such as REVIHAAP and HRAPIE²¹ there is a strong scientific evidence-based advice on the health aspects of air pollution with regards to prevention of chronic disease and improvements in productivity as well as reduction of health care costs.

²⁰ Recital 2

²¹ Co-financed by the European Commission, these two projects confirmed in review of the latest scientific evidence that current background levels of air quality in the EU are associated with substantial health risks; that there are no thresholds for particulate matter pollution below which no health harm occurs; and that the range of health effects associated with exposure to air pollution is much broader than previously thought.

According to the REVIHAAP report²² *“the adverse effects on health of particulate matter (PM) are especially well documented. **There is no evidence of a safe level of exposure or a threshold below which no adverse health effects occur.** Only a slightly decreasing trend in average concentrations has been observed in countries in the EU over the last decade. Further, pollution from PM **“creates a substantial burden of disease, reducing life expectancy by almost 9 months on average in Europe. Since even at relatively low concentrations the burden of air pollution on health is significant, effective management of air quality that aims to achieve WHO Air Quality Guidelines levels is necessary to reduce health risks to a minimum. Exposure to air pollutants is largely beyond the control of individuals and requires action by public authorities at the national, regional and international levels.”***

The conclusion on PM 2.5 exposure is the following: *“The scientific conclusions of the 2005 global update of the WHO air quality guidelines about the evidence for a causal link between PM2.5 and adverse health outcomes in human beings have been confirmed and strengthened and, thus, clearly remain valid. As the evidence base for the association between PM and short-term, as well as long-term, health effects has become much larger and broader, it is important to update the current WHO guidelines for PM. This is particularly important as recent long-term studies show associations between PM and mortality at levels well below the current annual WHO air quality guideline level for PM2.5, **which is 10 µg/m3.**”* These minimum thresholds should be considered.

Further, the WHO finds that *“In the absence of a threshold and in light of linear or supra-linear risk functions, public health benefits will result from any reduction in PM2.5 concentrations, whether or not the current levels are above or below the limit values.”*

The above finding reinforces the environmental principles of the EU Treaties that “prevention is better than cure”. Abatement techniques that would prevent harmful emissions should therefore be implemented without further delay, and especially in zones where limit values for the protection of human health are not being met.

4.4.4 Estimate of external health costs of granting the Bulgarian TNP derogation compared to regular IED Annex V ELV compliance by 2016

The emission caps for SO₂, NO_x and dust for the years 2016-2018 from the Bulgarian TNP approval are compared to an immediate application of IED emission limit values as they come into effect in 2019. External costs associated with the excess emissions of SO₂, NO_x and dust are monetarized through application of the marginal damage costs based on the methodology of the EEA 2011 report on industrial emissions. The Bulgarian TNP is thus associated with external costs of 137-366 million Euro (low and high range) over the course of three years.

Due to the above mentioned reasons, the European Commission’s decision shall be considered as unlawful.

²² Review of evidence on health aspects of air pollution, WHO/Europe 2013 <http://www.euro.who.int/en/health-topics/environment-and-health/air-quality/publications/2013/review-of-evidence-on-health-aspects-of-air-pollution-revihaap-project-final-technical-report>

5. Claim

For the above mentioned reasons, the applicants respectfully ask the Commission to:

- Review the Decision C(2014) 2002 of 31.3.2014 on the notification by the Republic of Bulgaria of a transnational national plan referred to in Article 32 of Directive 2010/75/EU on industrial emissions and assess its legality,
- Inform the applicants about its decision in the aforementioned matter.

Thank you in advance for your consideration.

Best regards,

Attachments:

- 1. Statute of EEB*
- 2. Statute of HEAL*
- 3. Statute of Frank Bold Society*
- 4. Statute of Ekologichno sdruzhenie Za Zemiata (Environmental Association Za Zemiata)*