



Council of the
European Union

Brussels, 7 July 2023
(OR. en, ro)

10689/23

SCHENGEN 31
COMIX 304
SCH-EVAL 139
ENV 743

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Request received from Asociația pentru Energie Curată și Combaterea Schimbărilor Climatice for an internal review according to Article 10 of regulation 1367/2006 on the application of the provisions of the Aarhus Convention, on the review of the decision taken at the JHA Council meeting of 8 and 9 December 2022 not to adopt the draft Council Decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania.

Delegations will find attached the note on the above-mentioned subject, as received from Asociația pentru Energie Curată și Combaterea Schimbărilor Climatice [Association for Clean Energy and Combating Climate Change].

REQUEST FOR INTERNAL REVIEW

made under Article 10 of Regulation (EC) No 1367/2006

by

Asociația pentru Energie Curată și Combaterea Schimbărilor Climatice [Association for Clean Energy and Combating Climate Change], a non-governmental organisation established under Romanian law, based at str. General Ștefan Burileanu nr. 5-7, bloc A20, parter, apartamentul 1, Sector 1, Bucharest, Romania, represented for legal purposes by **Răzvan-Eugen Nicolescu** (ernicolescu@gmail.com)

and **by its ordinary representative STOICA & Asociații, a civil law firm**, member of the Bucharest bar¹, through the lawyers Valeriu Stoica, Dragoș Bogdan, Constantin Pintilie, Yolanda Beșleagă and Maria Bodea, in accordance with power of attorney B 7320811/2023², the address for communication being sca@stoica-asociatii.ro (*'the Association'*),

addressed to

the Council of the European Union – Justice and Home Affairs Council (JHA)

requesting

the review of the decision taken at the JHA Council meeting of 8 and 9 December 2022 not to adopt the draft Council Decision on the full application of the provisions of the Schengen *acquis* in the Republic of Bulgaria and Romania.

17 May 2023

¹ Annex 1.1.

² Annex 1.2.

FIDELITAS, INTEGRITAS, FORTITUDO

CONTENTS

I. INTRODUCTION	3
II. LEGAL FRAMEWORK	4
III. FULFILMENT OF THE ADMISSIBILITY CONDITIONS.....	6
III.1..... The Association meets all the admissibility subcriteria laid down in Article 11(1) of the Aarhus Regulation:	6
III.2. The Council's decision is an 'administrative act' within the meaning of the Aarhus Regulation:	8
IV. GROUNDS FOR THE REQUEST FOR REVIEW	10
IV.1. Concept of 'environmental law' under the Aarhus Regulation:.....	10
IV.2. The Council's decision of 8 and 9 December 2022 infringes environmental law:	10
V. FINAL CONCLUSION.....	20
VI. LIST OF ANNEXES	20

I. INTRODUCTION

1. The European Council set out four priority areas for the period from 2019 to 2024, one of them being to create a European Union that is climate-neutral, green, fair and social. The *European Green Deal* is the first of the European Commission's six priorities, the Commission arguing that '*climate change and environmental degradation are an **existential** threat to Europe and the world*'³. The transition to a green economy was a priority of the Czech Presidency of the Council⁴ and is a priority of the current Swedish Presidency of the Council⁵.
2. The Charter of Fundamental Rights of the European Union ('*the Charter*'), the Treaty on European Union ('*TEU*') and the Treaty on the Functioning of the European Union ('*TFEU*') – i.e., the primary law of the European Union – require the EU institutions to include environmental protection in their policies and activities.
3. A draft Decision on the full application of the Schengen *acquis* in Romania was put to a vote at the JHA Council meeting on 8 and 9 December 2022 and was not adopted (due to a lack of unanimity in the Council). That decision by the Council, set out in the minutes of the meeting which were sent to the Association on 22 March 2023, is blatantly contrary to *environmental law* as defined in Article 2(1), point (f), of 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 ('*the Aarhus Regulation*').

³ See https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en.

⁴ See <https://czech-presidency.consilium.europa.eu/en/programme/priorities/>.

⁵ See <https://swedish-presidency.consilium.europa.eu/en/programme/priorities/>.

4. **Although EU policies and law require the Council to consider environmental issues, it does not appear that the Council analysed the impact on the environment of the Schengen *acquis* not being applied fully in Romania.** Such an analysis would undoubtedly have led to the conclusion that EU law required a decision to be taken to immediately apply the entire Schengen *acquis* in Romania.
5. **Consequently, we request that the Council review the decision taken at the JHA Council meeting on 8 and 9 December 2022, with the vote in the Council being repeated and the environmental impact taken into account.**

II. LEGAL FRAMEWORK

6. The following provisions of European Union law are particularly relevant in this context:

- 6.1. Article 37 (‘*Environmental protection*’) of the Charter:

‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’

- 6.2. Article 3(3), first subparagraph, TEU:

‘The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.’

- 6.3. Article 11 TFEU:

‘Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.’

- 6.4. Article 191 TFEU:

‘(1) Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,*
- protecting human health,*
- prudent and rational utilisation of natural resources,*
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.*

(2) Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.

(3) In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,*
- environmental conditions in the various regions of the Union,*
- the potential benefits and costs of action or lack of action,*
- the economic and social development of the Union as a whole and the balanced development of its regions.*

(4) Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.'

- 6.5. Article 2 of Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 ('European Climate Law'):

'(1) Union-wide greenhouse gas emissions and removals regulated in Union law shall be balanced within the Union at the latest by 2050, thus reducing emissions to net zero by that date, and the Union shall aim to achieve negative emissions thereafter.

(2) The relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective.'

- 6.6. Article 4(3) TEU:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

- 6.7. Article 4(2) of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded:

‘Those provisions of the Schengen acquis as integrated into the framework of the European Union and the acts building upon it or otherwise related to it not referred to in paragraph 1, while binding on Bulgaria and Romania from the date of accession, shall only apply in each of those States pursuant to a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that State.

The Council shall take its decision, after consulting the European Parliament, acting with the unanimity of its members representing the Governments of the Member States in respect of which the provisions referred to in this paragraph have already been put into effect and of the representative of the Government of the Member State in respect of which those provisions are to be put into effect. The members of the Council representing the Governments of Ireland and of the United Kingdom of Great Britain and Northern Ireland shall take part in such a decision insofar as it relates to the provisions of the Schengen acquis and the acts building upon it or otherwise related to it in which these Member States participate.’

III. FULFILMENT OF THE ADMISSIBILITY CONDITIONS

7. Article 10(1) of the Aarhus Regulation recognises the entitlement of any non-governmental organisation that meets the criteria set out in Article 11 of that Regulation to make a request for internal review to the EU institution or body that adopted an administrative act or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that the act or omission contravenes environmental law within the meaning of Article 2(1), point (f).
8. The legal text thus requires two general admissibility conditions to be met, namely **(III.1.)** that the subcriteria set out in Article 11(1) of the Aarhus Regulation be met (if the request for internal review is made by a non-governmental organisation) and **(III.2.)** that the request for internal review be made in respect of an administrative act [as defined in Article 2(1), point (g), of the Aarhus Regulation] or an administrative omission [as defined in Article 2(1), point (h), of the Aarhus Regulation].

III.1. The Association meets all the admissibility subcriteria laid down in Article 11(1) of the Aarhus Regulation:

9. The admissibility criteria laid down in Article 11(1) of the Aarhus Regulation are also set out in Article 2 of Commission Decision (EU) 748/2023 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council as regards requests for the internal review of administrative acts or omissions (*‘Decision 748/2023’*), which became applicable on 29 April 2023.

10. The Association fulfils all the conditions laid down in Article 11 of the Aarhus Regulation, in conjunction with Article 2 of Decision 748/2023, as follows:
- **The Association is an independent non-profit-making legal person, being a non-governmental organisation established and registered under Romanian law, in accordance with the provisions of Government Order No 26 of 2000 on associations and foundations:**
11. As proof that this criterion is met, we enclose the following:
- *The Association's statute, signed on 1 January 2021⁶ – see Article 1;*
- *The conclusion of 26 February 2021 delivered by the Court of First Instance, Sector 1, Bucharest in case No 1846/299/2021, which granted the request made by the Association, granting it legal personality and ordering the registration of the Association in the Register of Legal Persons at the Registry of the Court of First Instance, Sector 1, Bucharest – final because no appeal was brought⁷;*
- ***The Association has the primary stated objective of promoting environmental protection in the context of environmental law:***
12. As proof that this criterion is met we enclose the following:
- *The Association's statute⁸ – see Articles 4 and 5;*
13. Article 4 of the Association's statute states that the primary mission of the Association is 'supporting, developing and promoting innovative technological solutions and activities in the field of the environment, energy and infrastructure in Romania/Europe, promoting innovation and cooperation, and providing expertise on clean energy, the environment and combating climate change'. For example, the Association's objectives as set out in Article 5 of its statute include 'conducting and promoting activities to protect the environment' [Article 5, point (j), of the statute], and other objectives which fall under environmental protection.
- ***On the date of the present request for review, the Association has existed for more than two years:***
14. This is clear from the conclusion of 26 February 2021⁹. The Association acquired legal personality on 26 February 2021.

⁶ Annex 2.

⁷ Annex 3.

⁸ Annex 2.

⁹ Annex 3.

➤ **Through its activities, the Association has actively pursued the objective of environmental protection:**

15. As proof that this criterion is met we enclose the *Association's annual activity reports for 2021 and 2022*¹⁰, as well as extracts showing, by way of example, the work done by the Association during those two years of activity in the field of environmental protection¹¹.

➤ ***The subject matter in respect of which the request for internal review is made is covered by the Association's objectives and activities.***

16. The subject matter of this request for review is in line with the objectives and activities of the Association. Protecting the environment and promoting cooperation in this area are among the Association's objectives [see also Article 5, points (j), (n) and (u), of the statute]¹².

III.2. The Council's decision is an 'administrative act' within the meaning of the Aarhus Regulation:

17. In its letter dated 22 February 2023¹³, the General Secretariat of the Council informed the Association that *the draft Council Decision on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania* (hereinafter '*the draft Decision*') was on the agenda for the Council meeting on 8 and 9 December 2022. Enclosed with the letter dated 22 February 2023, the General Secretariat of the Council sent the Association the draft Decision.
18. On 22 March 2023¹⁴ the General Secretariat of the Council sent the Association document 15877/22 ADD 1 REV 1. That document contains the minutes of the Council meeting of 8 and 9 December 2022 (in the original, '*Draft minutes – Council of the European Union (Justice and Home Affairs) – 8 and 9 December 2022*') (hereinafter '*the minutes*').
19. According to the minutes, *the draft decision* was put to a vote at the Council meeting ('*The draft Council Decision on the full application of the Schengen acquis in Bulgaria and Romania, to be adopted by unanimity of the Member States as set out in Article 4 (2) of the 2005 Act of Accession, was put to a vote. The required unanimity has not been attained, therefore the Decision was not adopted*').
20. Thus, on **22 March 2023**, the Association became aware of the Council's *decision* not to adopt the draft Decision. In accordance with Article 10(1), second subparagraph, of the Aarhus Regulation, the act in respect of which we request a review was *notified* (sent) to the undersigned on 22 March 2023.
21. In accordance with Article 2(1), point (g), of the Aarhus Regulation, the *administrative act* in respect of which a review may be requested can be '*any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1)*'.

¹⁰ Annex 4.1.

¹¹ Annex 4.2.

¹² Annex 2.

¹³ Annex 5. The document bears reference number 23/0111-rh/ns. The reference to 2022 at the top of the letter is a clerical error.

¹⁴ Annexes 6.1. and 6.2. The document bears reference number 23/0111-rh/el.

22. *First*, Article 289 TFEU provides that legal acts adopted by legislative procedure are to constitute *legislative acts*. The decision on full application of the Schengen *acquis* for Romania thus does not fall within the scope of Article 289 TFEU.
23. *Second*, it is clear from the minutes¹⁵ that the Council considered the decision on full application of the Schengen *acquis* for Romania to be a *non-legislative act*.
24. *Third*, the Council's decision to reject the adoption of the draft Decision through a vote produces legal effects. As emphasised by Advocate General Juliane Kokott, '[t]he subject matter of the request for review relates, in accordance with Article 10 of the Aarhus Regulation, to the reassessment of the act in respect of which the review is requested. The request is thus – in the words of the Court of Justice – intended to establish that, as alleged, the act in question is unlawful or that it is not well founded'¹⁶.
25. At the JHA Council meeting of 8 and 9 December 2022, the representatives of the Member States put to a vote the adoption of a decision in accordance with Article 4(2) of the Act of Accession. Those provisions recognise that Romania has a genuine right to be fully part of the Schengen area. **The Council's refusal to take note of the fulfilment of the conditions laid down in the Act of Accession, in the form of the Council's decision in respect of which we request a review, produces legal effects, being a form of non-recognition by the Council of the fulfilment of the requirements of the Act of Accession and blocking the full extension of the Schengen *acquis* to Romania.**
26. *In the alternative*, the decision in respect of which we request a review can be classified as ***an administrative omission*** within the meaning of Article 2(1), point (h), of the Aarhus Regulation. *Administrative omission* is defined in the Aarhus Regulation as '*any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene environmental law within the meaning of point (f) of Article 2(1)*'. Article 10(1), second subparagraph, of the Aarhus Regulation mentions that the time limit for making a request for review runs from '*the date when the administrative act was required*', yet in the particular situation described in the present request that time limit can run only from 23 March 2023, the date when the Association became aware of the content of the minutes stating that the draft Decision was put to a vote at the JHA Council meeting of 8 and 9 December 2022. Moreover, the letter sent by the Council to the Association on 22 February 2023 mentions that '*[h]owever, for non-legislative acts, the minutes are not public. The minutes of the JHA Council meeting of 8-9 December 2022 have been drafted by the General Secretariat and will be submitted to Coreper or to the Council for approval, following which we will be able to examine your request for public access to them*'¹⁷.

¹⁵ Annex 6.2. The document bears reference number 23/0111-rh/el.

¹⁶ Opinion of Advocate General Kokott delivered on 15 December 2022, joined cases C-212/21 P and C- 223/21 P, ECLI:EU:C:2022:1003, paragraph 60.

¹⁷ Annex 5.

IV. GROUNDS FOR THE REQUEST FOR REVIEW

IV.1. Concept of ‘environmental law’ under the Aarhus Regulation:

27. Article 2(1), point (f), of the Aarhus Regulation defines *environmental law* as ‘Union legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Union policy on the environment as set out in TFEU: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems’.
28. Article 37 of the Charter, Article 3(3) TEU, Article 11 TFEU, Article 191 TFEU and the European Climate Law form an integral part of the concept of *environmental law* as defined in Article 2(1), point (f), of the Aarhus Regulation and require that all the EU’s actions ensure a high level of environmental protection.
29. In her opinion in joined cases C-212/21 P and C-223/21 P (ECLI:EU:C:2022:1003), Advocate General J. Kokott emphasised that the concept of *environmental law* referred to in the Aarhus Regulation, ‘in the light of the environmental policy objectives of EU law and of Article 9(3) of the Aarhus Convention, [...] must be interpreted as covering any measure which could be contrary to environmental law’ (paragraph 104).
30. We would emphasise that the argument that the Council’s decision of 8 and 9 December 2022 did not expressly relate to an environmental issue is irrelevant. In this regard, recital 10 of Regulation (EU) 2021/1767 supplementing and amending the Aarhus Regulation explicitly set out the intention of the EU legislator: ‘When assessing whether an administrative act contains provisions which could, because of their effects, contravene environmental law, it is necessary to consider whether such provisions could have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU. Where that is the case, the internal review procedure should also cover acts that have been adopted in the implementation of policies other than Union policy on the environment.’

IV.2. The Council’s decision of 8 and 9 December 2022 infringes environmental law:

31. **First, the Council had an obligation to take into account the EU’s environmental protection objectives when deciding on the draft Decision. There is absolutely no indication that those objectives were taken into account.** On the contrary, the Council’s decision seriously undermines the EU’s environmental protection objectives. By proceeding as it did, the Council failed to comply with its obligation to act in line with the EU’s objectives, with serious consequences for the environment.
32. The Court of Justice of the European Union (‘CJEU’) ruled in case C-128/17 (judgment of 13 March 2019, ECLI:EU:C:2019:194, paragraph 133) that ‘Article 191 TFEU lays down a series of objectives, principles and criteria which the EU legislature must respect in implementing environmental policy’. One of those objectives is precisely ‘preserving, protecting and improving the quality of the environment’.

33. The EU's objectives in the field of environmental protection must be pursued through all the actions of the EU institutions, in accordance with Article 11 TFEU. The rationale of that provision is natural, since any other interpretation would lead to the absurd conclusion that what is protected by specific environmental rules could be destroyed by the adoption of legislative measures in other regulatory areas, or that the objective of environmental protection must be pursued only when legislative measures are adopted in that domain. Obviously, such a conclusion cannot be accepted.
34. Furthermore, Article 13(1) TEU provides that the EU's institutional framework '*shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions*'. Furthermore, Article 13(2) TEU provides that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and **objectives laid down in the Treaties, and practice mutual sincere cooperation**.
35. Article 4(2) of the Act of Accession confers on the Council the power to adopt a decision on the full application of the Schengen *acquis*, with the unanimity of the Schengen Member States and also the candidate country (Romania). However, in the light of Article 11 TFEU, the Council cannot disregard the objectives of the EU and the need for sincere cooperation with the Parliament and the Commission. Although Article 13 TEU does not establish a substantive rule on protection of the environment, it requires that the Council advance the European Union's environmental policy objectives through its actions and that all decisions taken be examined *inter alia* in terms of environmental protection.
36. The Council thus had an obligation also to analyse the impact of the decision taken at the meeting of 8 and 9 December 2022 on the objective of protecting the environment and to act in accordance with that objective. The JHA Council's decision of 8 and 9 December 2022 thus **infringed Article 13 TEU** because **the Council acted contrary to the objectives of the European Union in the field of environmental protection**.
37. *Second*, in close connection with the arguments set out above, we submit that **the Council's decision of 8 and 9 December 2022 runs counter to the EU's obligation to ensure a high standard of environmental protection**.
38. Romania fulfils all the specific criteria for the full application of the Schengen *acquis*, as confirmed in the Commission communication of 16 November 2022¹⁸ and reiterated in the Commission communication on the State of the Schengen Area (COM(2023) 274 final), published on 16 May 2023¹⁹.

¹⁸ Communication from the Commission to the European Parliament and the Council 'Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls' - COM(2022) 636 final.

¹⁹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, State of Schengen report 2023, pages 6 and 7, available at: https://home-affairs.ec.europa.eu/system/files/2023-05/State%20of%20Schengen%20Report%202023_en.pdf.

39. The Council's refusal to adopt the necessary act (*the decision*) pursuant to Article 4(2) of the Act of Accession is not only unlawful in the light of the provisions of that article of primary law, but also leads to an infringement of environmental law through disregard for **the serious effects on the environment resulting from the Council's decision to reject the adoption of the act necessary for the full application of the Schengen *acquis*.**
40. These harmful effects have been brought to the Council's attention, including by the European Parliament in its *resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area (2022/2852(RSP))* (*'the European Parliament resolution'*)²⁰. In that resolution the European Parliament recalled that all the necessary conditions for the full application of the Schengen *acquis* to Romania and Bulgaria were already met in 2011, and urged the Council to take all the necessary steps in that regard. Point J of the European Parliament resolution states that *'the maintenance of internal border controls [...] entails direct operational and investment costs for cross-border and mobile workers, tourists, road freight transporters and public administrations, with negative effects on the economies of the Member States and the functioning of the internal market of the EU, including a negative impact on the environment due to the large number of slow-moving trucks waiting at border crossing points'*.
41. In March 2023, KPMG conducted an independent study on the carbon dioxide (CO₂) emissions associated with the postponement of the full application of the Schengen *acquis* in Romania and Bulgaria and generated by vehicles waiting to pass through border control²¹. KPMG's study concluded that the Council's decision not to adopt the act necessary for the full application of the Schengen *acquis* places an additional and unnecessary burden on the EU's efforts to ensure carbon neutrality in the transport sector, where urgent action to reduce emissions is needed.
42. The data analysed by KPMG lead, in a very conservative estimate, to the conclusion that in each month in which Romania and Bulgaria are not part of the Schengen area at least 3 800 additional tonnes of carbon dioxide are emitted into the atmosphere, causing air pollution and **directly affecting communities living close to the border crossing points. The total annual impact of the JHA Council's decision of 8 and 9 December 2022 is the emission of more than 46 000 tonnes of carbon dioxide.**
43. *Third*, the JHA Council's decision of 8 and 9 December 2022 **blatantly runs counter to the objectives set out in Regulation (EU) 2021/1119 ('European Climate Law')**.
44. At this juncture we would point out that, in addition to the provisions of the primary legislation, the European Climate Law set the binding target of climate neutrality by 2050 and the target of reducing greenhouse gases by 55 % by 2030. With the adoption of the European Climate Law, **the EU's climate-neutrality objective became legally binding**. At the same time, the EU established the **obligation to reduce greenhouse gas emissions by at least 55 % by 2030**.

²⁰ Annex 7.

²¹ Annex 8.

45. The European Climate Law set a long-term goal closely linked to the Paris Agreement (to which the EU is a party), thus responding to the threats posed by climate change. Prior to the European Climate Law, the EU established a regulatory framework for meeting the greenhouse gas emission reduction targets: for example, Regulation (EU) 2018/842 on national greenhouse gas emission reduction targets and Regulation (EU) 2018/841, which requires Member States to balance greenhouse gas emissions from land use.
46. As noted in recital 40 of Regulation (EU) 2021/1119:

‘Climate change is by definition a trans-boundary challenge and coordinated action at Union level is needed to effectively supplement and reinforce national policies. Since the objective of this Regulation, namely to achieve climate neutrality in the Union by 2050, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale and effects, be better achieved at Union level [...]’.
47. As set out in Article 1 thereof, Regulation (EU) 2021/1119 establishes ‘a framework for the irreversible and gradual reduction of anthropogenic greenhouse gas emissions’ and ‘a **binding objective of climate neutrality in the Union by 2050**’. Regulation (EU) 2021/1119 also set ‘a binding Union target of a net domestic reduction in greenhouse gas emissions’.
48. Article 2(2) of Regulation (EU) 2021/1119 provides that ‘[t]he relevant Union institutions and the Member States shall take the necessary measures at Union and national level, respectively, to enable the collective achievement of the climate-neutrality objective set out in paragraph 1, taking into account the importance of promoting both fairness and solidarity among Member States and cost-effectiveness in achieving this objective’. Furthermore, Article 4 of Regulation (EU) 2021/1119 established a series of binding intermediate EU targets. With a view to meeting the target for 2030, the Regulation requires ‘the relevant Union institutions and the Member States’ to ‘**prioritise swift and predictable emission reductions**’.
49. Moreover, Article 5 of Regulation (EU) 2021/1119 requires the EU institutions to ensure continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change.
50. In this context, the JHA Council’s decision of 8 and 9 December 2022 blatantly runs counter to the **binding** targets imposed on the EU institutions. The EU institutions have an obligation to work towards meeting the EU’s targets, and not to the contrary by hindering the achievement of the end pursued via those targets.
51. *Fourth*, the JHA Council’s decision of 8 and 9 December 2022 **also contravenes the fundamental right to a healthy environment**. Article 6(3) TEU provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights, constitute general principles of EU law. In settled case-law, the European Court of Human Rights has ruled that the right to a healthy environment may fall within the scope of protection of the right to a private life.

As we have already shown, the Council's inability to adopt the decision on the full application of the Schengen *acquis* in Romania and Bulgaria leads to an increase in the level of pollution, in contradiction not only with the EU's objectives but also with the recognised fundamental rights of EU citizens.

52. *Fifth, the EU's environmental protection objectives must also be linked with the effects of climate change on other priority objectives* (such as combating irregular migration). For example, an article published by the European Parliament at the end of 2020 (in line with the UN conclusions) pointed out that **climate change is a driver of migration**: '*climate change is expected to exacerbate extreme weather events, meaning more people could be on the move*'²². Thus, the EU's policy on the environment and its migration policy are closely related.
53. The first step in combating any negative phenomenon is to eliminate the cause. The Council's decision drives migration *inter alia* because additional pollution leads to loss of territory or to areas becoming uninhabitable, which will have a boomerang effect. In this context, the JHA Council's decision of 8 and 9 December 2022 blatantly runs counter to the **binding** targets imposed on the EU institutions. As we have emphasised, the EU institutions have an obligation to work towards meeting the EU's targets, and not to the contrary by hindering or blocking the achievement of the end pursued via those targets.
54. *Sixth, the devastating effects of climate change and the underlying cause thereof* (namely massive and continuing pollution since the beginning of the industrial age – with 1990 as reference year) have been explained in countless scientific studies (including, for example, the IPCC reports²³). In this context, countries worldwide have come to the conclusion that urgent measures must be implemented to combat this phenomenon, which may lead, as a result of multiple interrelated negative effects (such as the destruction of territories, the melting of glaciers, famine caused by drought, etc.), to the extinction of forms of life known to us so far.
55. The global (and implicitly European) approach to the magnitude and complexity of climate change became clear with the conclusion of the **Paris Agreement**, an international act ratified by the European Union on 5 October 2016, through which signatory states aimed to strengthen a global response to climate change.

²² See <https://www.europarl.europa.eu/news/en/headlines/world/20200624STO81906/exploring-migration-causes-why-people-migrate>.

²³ Intergovernmental Panel on Climate Change (IPCC) special report on the impacts of global warming of 1.5 °C – <https://www.ipcc.ch/sr15/> and <https://eit.europa.eu/news-events/news/ipcc-report-we-can-turn-things-around-if-we-act-fast-and-collectively>.

56. With a view to achieving the objectives set out in the Paris Agreement (to keep global warming well below 2 °C above pre-industrial levels), on 11 December 2019 the European Commission published the **European Green Deal**²⁴, a communication setting out a roadmap towards a sustainable economy, based essentially on the principle of protecting the environment and human health, for which purpose it established as the European Union's priority objective achieving climate neutrality by 2050.
57. As the Council itself has communicated to the public²⁵, the deal underlines the need for a **holistic and cross-sectoral approach in which all relevant policy areas contribute to the ultimate climate-related goal**. It includes initiatives covering climate, the environment, energy, transport, industry, agriculture and sustainable finance – *'all of which are strongly interlinked'*.
58. Given the need to reform legislation across all sectors contributing to environmental pollution, on 14 July 2021 the European Commission proposed a set of legislative initiatives known as the **Fit for 55** package. That legislative package aims to put in place the measures that need to be implemented as a matter of urgency in order to achieve firstly the intermediate target set for 2030, and subsequently the objective of climate neutrality (2050).
59. Fit for 55 thus reconfigures all legislation as regards climate, the environment, energy, transport, industry, agriculture and sustainable finance. Some of those legislative initiatives have already been adopted and are to be published in the Official Journal of the European Union²⁶.
60. In addition, on 18 May 2022 the European Commission presented the **REPowerEU plan**²⁷ in response to the hardships and global energy market disruption caused by Russia's invasion of Ukraine. The REPowerEU plan seeks to both end the EU's dependence on Russian fossil fuels and **make further progress towards the EU's climate goals**.
61. As part of the REPowerEU plan, the Commission has proposed a number of specific amendments to existing energy legislation, namely the Renewable Energy Directive, the Energy Performance of Buildings Directive and the Energy Efficiency Directive, all three of which are already under review as part of the Fit for 55 package adopted by the Commission in 2021.
62. *Seventh, the Council infringed the precautionary principle, the principle of preventive action and the principle of cost-effectiveness in achieving environmental objectives.*
63. Under Article 191 TFEU, EU policy on the environment is to contribute to pursuit of objectives regarding the quality of the environment, human health, the prudent and rational utilisation of natural resources and combating climate change. Paragraph 2 of that article also stipulates that **EU policy on the environment is to aim at a high level of protection and be based on the precautionary principle and on the principles that preventive action should be taken**, that environmental damage should as a priority be rectified at source and that the polluter should pay.

²⁴ See https://eur-lex.europa.eu/resource.html?uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF.

²⁵ See <https://www.consilium.europa.eu/en/policies/green-deal/>.

²⁶ See <https://www.consilium.europa.eu/en/press/press-releases/2023/04/25/fit-for-55-council-adopts-key-pieces-of-legislation-delivering-on-2030-climate-targets/>.

²⁷ See https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en.

64. As regards the collective achievement of the climate-neutrality objective (i.e. through existing anti-pollution measures), Article 2(2) of Regulation (EU) 2021/1119 provides that the relevant EU institutions must respect solidarity between Member States **and ‘cost-effectiveness in achieving this objective’**.
65. It follows from a literal interpretation of the above provisions that the European legislator is to give precedence to preventive action rather than rectification, and that when rectifying measures are required, they must be implemented in accordance with the principle of cost-effectiveness.
66. In addition, even before the adoption of the European Climate Law the European Union adopted Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013²⁸. The Regulation already sets out in the preamble that:

‘(1) The European Council in its conclusions of 23-24 October 2014 on the 2030 climate and energy policy framework endorsed a binding target of at least a 40 % domestic reduction in economy-wide greenhouse gas emissions by 2030 compared to 1990 and that target was reaffirmed in the European Council conclusions of 17-18 March 2016.

(2) The European Council conclusions of 23-24 October 2014 stated that the emissions reduction target of at least 40 % should be delivered **collectively by the Union in the most cost-effective manner possible**.

[...] (12) The transport sector represents almost a quarter of the Union’s greenhouse gas emissions. It is therefore important to reduce greenhouse gas emissions and risks related to fossil fuel dependency in the transport sector through a comprehensive approach for the promotion of greenhouse gas emission reductions and energy efficiency in transport, for electric transportation, for a shift of transport modes, where more sustainable, and for sustainable renewable energy sources in transport also after 2020. The shift towards low-emission mobility as part of the broader shift to a safe and sustainable low-carbon economy can be facilitated through the introduction of enabling conditions and strong incentives, as well as long-term strategies that can enhance investments.’

²⁸ See also Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU.

67. Furthermore, Article 1 of Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030 specifies that **the 8th EAP is to be based on the precautionary principle, the principles of preventive action and of rectification of pollution at source and the polluter pays principle**. Similarly, the first part of Article 2(2) of Decision (EU) 2022/591 provides as follows:

‘The 8th EAP shall have the following six interlinked thematic priority objectives for the period up to 31 December 2030:

(a) swift and predictable reduction of greenhouse gas emissions [...]’.

68. The principle of cost-effectiveness in the context of the Energy Union and climate action is also found in **Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action**, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council.
69. The above Regulation sets out **the necessary legislative foundation for cost-efficient and predictable governance of the Energy Union and Climate Action** (governance mechanism), which ensures the achievement of the 2030 and long-term objectives and targets of the Energy Union in line with the 2015 Paris Agreement on climate change.
70. In its conclusions of 26 November 2015 on the governance system of the Energy Union, the Council recognised that that system will be an essential tool for the **efficient and effective construction of the Energy Union and the achievement of its objectives**.
71. The Regulation establishes that the main objective of the governance mechanism is to enable the achievement of the objectives of the Energy Union and in particular the targets of the 2030 Framework for Climate and Energy, in the field of greenhouse gas emission reduction, energy from renewable sources and energy efficiency, and provides that *‘[n]one of those objectives, which are indissociably linked, can be regarded as secondary to the other’*.
72. The preamble also specifies that, as greenhouse gases and air pollutants largely derive from common sources, policy designed to reduce greenhouse gases can have co-benefits for public health and air quality. For that reason, as set out in the Regulation, *‘[r]egional cooperation is key to ensuring the effective achievement of the objectives of the Energy Union in a cost-optimal manner’*.

73. In future, **the new EU ETS (part of the Fit for 55 legislative package), already adopted within the Council²⁹, will also include the transport sector**, which means that, in the coming years, a price on emissions in the road transport sector will be established.
74. **That proposal for a Directive states that the EU's overall objective of reducing emissions by at least 55 % by 2030 compared to 1990 levels cannot be achieved without significant emission reductions in road transport** and sets out obligations for fuel suppliers with the aim of incentivising them to decarbonise their products, as this will reduce the cost of complying with the emissions trading scheme.
75. **However, the cheapest, non-polluting energy is first and foremost the energy that is not consumed.** Full decarbonisation of the transport sector in the short term is impossible to achieve (especially as the legislative reforms will take time to transpose into national law).
76. At the same time, the greater quantity of fuel needed to cope with queues of 25 km that sometimes go on for days at Romania's borders will continue to make the transition to a green economy much more difficult (given the much greater requirement for biofuels) and will continue to increase the level of pollution in Romania (which has already reached alarming levels for the health of Romanian citizens).
77. Moreover, it follows from the principle of cost-effectiveness in achieving the decarbonisation objective that it is more effective to avoid pollution by eliminating queues between borders within the European Union than to implement costly decarbonisation measures which will be implemented in due course anyway.
78. *Eighth, the Council infringed the 'energy efficiency first' principle.* One of the EU measures proposed in the legislative plan to reduce pollution aims to reduce energy consumption in each Member State. Directive (EU) 2018/2002 of 11 December 2018 amending Directive 2012/27/EU on energy efficiency **emphasised the importance of the 'energy efficiency first' principle** for meeting the commitments made under the Paris Agreement. It is inefficient and inconsistent for the Council to require EU citizens to reduce their own carbon footprint by reducing their heating consumption or using air conditioning efficiently while it fails to take environmental aspects into account in its decisions (generating CO₂ emissions).
79. On 10 March 2023, the co-legislators reached a provisional agreement on the recast and reinforcement of the EU Energy Efficiency Directive, with the Member States being **required to take energy efficiency into account in their policy**, planning and major investment **decisions** in the energy sector **and beyond**.
80. The agreement sets an **EU energy efficiency target of 11.7 % for 2030**, going beyond the Commission's initial proposal in the Fit for 55 package. The agreement requires EU Member States to **collectively** ensure a further reduction in final energy consumption and primary energy consumption compared to the 2020 energy consumption projections.

²⁹ See <https://www.consilium.europa.eu/en/press/press-releases/2023/04/25/fit-for-55-council-adopts-key-pieces-of-legislation-delivering-on-2030-climate-targets/>.

81. Although the recast of the Energy Efficiency Directive is not yet in force, the European Union's objective of applying the 'energy efficiency first' principle to reduce excessive energy consumption in order to combat unjustified pollution stems from both Directive (EU) 2018/2002 and the legislative process in respect of that act.
82. Furthermore, it is equally relevant that, in the Commission's recommendations as set out in communications such as EU 'Save Energy'³⁰ or 'Save gas for a safe winter'³¹, and later in **Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas**, over the winter period the Member States made it mandatory to reduce heating³², for two reasons: first, the risk in terms of security of supply as a result of the war in Ukraine; second, to reduce what was considered excessive consumption with reference to the European Union's climate objectives.
83. **Finally**, it is worth noting that while the European Union has set a rigorous legislative objective from a climate perspective³³ (agreeing, among other things, that it is necessary to significantly reduce energy consumption), unjustified pollution occurs even at the borders between Member States, through the increased fuel consumption needed to cope with **queues that are sometimes 25 km long. In Romania, 25 km may equate to the area covered by 10 villages belonging to the same municipality**³⁴. This pollution ultimately affects all Member States, but the first country affected is the one where the pollution is generated, namely Romania.
84. Lastly, in support of all the arguments set out above, we refer once again to the **European Commission's State of Schengen report (COM(2023) 274 final), published on 16 May 2023**³⁵, which underlines, among other things, the negative environmental consequences of the Schengen *acquis* not being applied fully in Romania and Bulgaria:

'It is both a legal expectation and a European promise that Member States acceding to the Union participate fully in the Schengen area once all the agreed conditions are verified and met. Moreover, the failure to lift controls at the internal borders has important negative economic and environmental consequences not only for Bulgarian and Romanian citizens but for the entire EU. Increased waiting times at the borders result in long queues of vehicles and trucks, leading to increased costs, reduced competitiveness for businesses, disruption of supply chains, and decreased revenues for the tourism sector.'

³⁰ See

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A240%3AFIN&qid=1653033053936> and https://energy.ec.europa.eu/topics/markets-and-consumers/action-and-measures-energy-prices/playing-my-part_en.

³¹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0360&qid=1658479881117>.

³² See, for example: <https://www.rferl.org/a/dutch-reduce-russian-gas-campaign/31782700.html> and <https://www.thelocal.fr/20221006/cold-water-19c-heating-and-cash-bonuses-how-france-plans-to-cut-its-energy-use-by-10-this-winter> and <https://www.euronews.ro/articole/cum-trec-romanii-prin-iarna-caloriferele-la-minim-resouri-sau-incalzirea-partiala>.

³³ See <https://www.europarl.europa.eu/news/en/headlines/society/20221128STO58002/energy-saving-eu-action-to-reduce-energy-consumption>.

³⁴ See https://ro.wikipedia.org/wiki/Comuna_Roe%C8%99ti_V%C3%A2lcea.

³⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, State of Schengen report 2023, page 7, available at: https://home-affairs.ec.europa.eu/system/files/2023-05/State%20of%20Schengen%20Report%202023_en.pdf.

*The uncertainties related to border delays and administrative burdens can discourage foreign investment and undermine economic and social cohesion between Member States. **There is even an environmental cost, with estimates suggesting that 46,000 tonnes of CO2 are emitted per year due to the non-lifting of internal border controls.***

V. FINAL CONCLUSION

85. **IN CONCLUSION**, in the light of the above legal provisions and all the arguments set out above, we request that the Council review the decision taken at the meeting of the JHA configuration on 8 and 9 December 2022 with a view to ensuring that that decision complies with environmental law.

VI. LIST OF ANNEXES

For the sake of clarity, the pages of the documents constituting the annexes to this request for internal review have been numbered in continuation thereof. Thus, pages 1 to 20 constitute the request for internal review and pages 21-113 are the eight annexes.

Number of the annex	Content of the document	Pages
<i>Annex 1</i>	<i>Annex 1.1.</i> Documents proving that the Association's ordinary representative (i.e. the civil law firm Stoica & Asociații) is authorised to exercise its profession before the Romanian courts; <i>Annex 1.2.</i> Power of attorney B 7320811/2023;	21-23 24-25
<i>Annex 2</i>	The statute of the Association;	26-33
<i>Annex 3</i>	The conclusion of 26 February 2021 delivered by the Court of First Instance, Sector 1, in case No 1846/299/2021,	34-36
<i>Annex 4</i>	<i>Annex 4.1.</i> The Association's activity reports for 2021 and 2022;	37 and 38

	Annex 4.2. Extracts showing, by way of example, the work done by the Association during those two years of activity in the field of environmental protection;	39-79
Annex 5	The Council's letter of 22 February 2023*; <i>*The reference to 2022 at the top of the letter is a clerical error.</i>	80 and 81
Annex 6	Annex 6.1. The Council's letter of 22 March 2023; Annex 6.2. The minutes of the JHA Council meeting of 8 and 9 December 2022;	82 83-96
Annex 7	The European Parliament resolution of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area [2022/2852(RSP)];	97-100
Annex 8	Study by KPMG regarding the impact on the environment of the Schengen <i>acquis</i> not being applied fully in Romania and Bulgaria.	101-113

[Complimentary close]

Asociația pentru Energie Curată și Combaterea Schimbărilor Climatice [Association for Clean Energy and Combating Climate Change]