

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

**In case ECS-28/24, the Secretariat of the Energy Community
against**

Montenegro,

the

ADVISORY COMMITTEE,

composed of

Rajko Pirnat, Nikola Radovanovic, Helmut Schmitt von Sydow, Verica Trstenjak and
Wolfgang Urbantschitsch

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

acting unanimously,

gives the following

OPINION

I. Procedure

By e-mail dated 19 July 2024 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-28/24 against Montenegro. The members of the Advisory Committee received the Reasoned Request and its annexes.

In its Reasoned Request the Secretariat seeks a Decision from the Ministerial Council declaring that Montenegro **by failing to bring into force the laws, regulations and administrative provisions** necessary to comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of **Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources**¹, as adapted and adopted by Ministerial Council Decision 2021/14/MC-EnC and amended by Ministerial Council Decision 2022/02/MC-EnC, and **by failing to forthwith notify those measures to the Secretariat** by 31 December 2022, **fails to comply** with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Articles 2(1) and (2) of Ministerial Council Decision 2021/14/MC-EnC.

¹ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, 21.12.2018, p. 82–209.

Pursuant to Article 32 (4) Dispute Settlement Rules 2022 the Advisory Committee has to conduct a public hearing before giving its opinion. According to Article 8 (1) Rules of Procedure of the Energy Community Advisory Committee as amended (RoP) a public hearing shall take place unless both parties to the case agree that it can be dispensed with. On 22 July 2024 the Advisory Committee asked the parties whether they consider holding a public hearing necessary. In its e-mail from 23 July 2024 the Secretariat stated that there is no need for a hearing, the Contracting Party made no declaration concerning the hearing. Therefore, the Advisory Committee assumed that a hearing is not necessary and informed the parties that a hearing can be dispensed with in this case.

II. Provisions allegedly violated by the Contracting Party concerned

Article 6 of the Treaty reads:

The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Article 20 of the Treaty reads:

Each Contracting Party shall implement Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources.

Article 25 Directive (EU) 2018/2001 provides for the *Mainstreaming renewable energy in the transport sector.*

Article 26 Directive (EU) 2018/2001 provides for *Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops.*

Article 27 Directive (EU) 2018/2001 provides for *Calculation rules with regard to the minimum shares of renewable energy in the transport sector.*

Article 29 Directive (EU) 2018/2001 provides for the *Sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels.*

Article 30 Directive (EU) 2018/2001 provides for the *Verification of compliance with the sustainability and greenhouse gas emissions saving criteria.*

Article 31 Directive (EU) 2018/2001 provides for the *Calculation of the greenhouse gas impact of biofuels, bioliquids and biomass fuels.*

Article 2 of Ministerial Council Decision 2021/14/MC-EnC reads:

1) Each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2018/2001, Directive (EU) 2012/27/EU as amended by Directive (EU) 2018/2002, Regulation (EU) 2018/1999 [...] as adapted by this Decision, by 31 December 2022.

[...]

2) Upon transposition, Contracting Parties shall immediately inform the Energy Community Secretariat thereof and communicate to the Energy Community Secretariat the text of the provisions of national law, which they adopt in the field covered by this Decision.

Article 89 of the Treaty reads:

The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision.

Article 11(3) of the Dispute Settlement Rules reads:

Where the Secretariat initiates a dispute settlement procedure on the grounds that a Party has failed to fulfil its obligation to notify measures transposing a Decision addressed to it within the deadline specified in that Decision, the Secretariat shall submit a reasoned request to the Ministerial Council without preliminary procedure.

III. Legal Assessment

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

The Reasoned Request of the Secretariat alleges that by failing to bring into force the laws, regulations and administrative provisions necessary to comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of Directive (EU) 2018/2001 and to inform the Secretariat thereof within the deadline specified in the Ministerial Council Decision, i.e. by 31 December 2022 pursuant to Article 2(1) of Ministerial Council Decision 2021/14/MC-EnC Montenegro failed to comply with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Articles 2(1) and (2) of Ministerial Council Decision 2021/14/MC-EnC

In its letter of 5 July 2024 Montenegro informed the Secretariat about the process to implement Directive (EU) 2018/2001.

In its reply to the Reasoned Request of 28 August 2024 Montenegro states:

“In connection with the ECS 28/24 case, we can inform you that we transposed Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources into the Law on the Use of Energy from Renewable Sources (“Official Gazette of Montenegro”, No. 82/24).“

On 26 August 2024 the Energy Community Secretariat published the following information regarding the implementation of the EU Renewable Energy Directive in Montenegro on its website²:

“In a letter to Montenegro's Ministry of Energy, the Energy Community Secretariat confirmed that Montenegro's newly adopted Renewable Energy Law aligns with the EU's Renewable Energy Directive. The law, which was passed on 17 August, demonstrates Montenegro's strong commitment to achieving its climate and energy targets.”

Contrary to this statement, the Secretariat claims that the implementation of the Directive is incomplete. Therefore, the Advisory Committee invited the Secretariat to indicate whether it intends to maintain the Reasoned Request.

² www.energy-community.org/news/Energy-Community-News/2024/08/26.html

In its reply of 11 October 2024 the Secretariat informs the Advisory Committee that it maintains the Reasoned Request and states:

“While the Secretariat welcomes the adoption of the Renewable Energy Law and confirmed its alignment with the Renewables Directive, the Secretariat notes that the law constitutes a basis for transposition of further detailed provisions of the Directive but cannot be considered to have fully transposed the Directive.”

The Secretariat does not argue which provisions of the Directive have not been transposed into national law and does not respond to the arguments put forward by Montenegro in its reply to the Reasoned Request of 12 September 2024.

In this reply, Montenegro states that the Renewable Energy Law transposes all the provisions mentioned in the Reasoned Request by referring to the specific provisions of the Law.

The Advisory Committee has to provide its Opinion on the basis of the Reasoned Request. The Secretariat initiated the procedure by letter of 21 June 2024, the Reasoned Request dates from 12 July 2024. The Renewable Energy Law of Montenegro was adopted and published in August 2024, while the deadline for implementation of Directive (EU) 2018/2001 was 31 December 2022.

According to settled case law of the European Court of Justice *‘the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes’* (Case C-632/18 *Commission v Slovenia*, para 24). According to Article 94 of the Treaty, *‘[t]he institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities’*.

The Advisory Committee acts on request of the Ministerial Council and is bound by Energy Community law pursuant to Article 5 (3) of its Rules of Procedure. Hence, despite the Advisory Committee not being explicitly named in Article 94 of the Treaty, it is bound by the interpretation of EU terms and concepts if adopted by Energy Community law. This interpretation is also confirmed by Article 32 (2) of the Dispute Settlement Rules 2022 where Article 94 of the Treaty is named as being of particular importance for the work of the Advisory Committee. In the present case, the Secretariat – as stated above – initiated the procedure before the adoption of the Renewable Energy Law, therefore the Reasoned Request is well-founded

IV. Conclusions

The Advisory Committee considers that

Montenegro, by failing to bring into force **by 31 December 2022** the laws, regulations and administrative provisions necessary to **comply with Article 25(1), (2), Article 26, Article 27, Article 29, Article 30, and Article 31(1), (2) of Directive (EU) 2018/2001** on the promotion of the use of energy from renewable sources as adapted and adopted by the Ministerial Council Decision 2021/14/MC-EnC and amended by the Ministerial Council Decision 2022/02/MC-EnC, and by failing to forthwith notify those measures to the Secretariat, **had failed to comply** with Articles 6, 20 and 89 of the Energy Community Treaty as well as with Article 2(1) and (2) of the Ministerial Council Decision 2021/14/MC-EnC.

Done in Vienna on 28 November 2024

On behalf of the Advisory Committee



Wolfgang Urbantschitsch, President