

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

In case ECS-15/21, the Secretariat of the Energy Community  
against  
Montenegro, the

ADVISORY COMMITTEE,

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

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

acting unanimously,

gives the following

OPINION

**I. Procedure**

By e-mail dated 18 July 2023 the Energy Community Presidency asked the Advisory Committee to give an Opinion on the Reasoned Request submitted by the Secretariat in case ECS-15/21 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 maintaining the operation of TPP Pljevlja after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), Montenegro fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

In its reply about the necessity of a public hearing on 20 August 2023 the Ministry of Capital Investment of Montenegro considered holding a public hearing necessary and referred to its position as it has been communicated to the Secretariat in the 2nd Reply to the Reasoned Opinion (letter dated 11 April 2023). Montenegro did not reply to the Reasoned Request. On 16 November 2023 Montenegro's representative submitted a Report prepared by the Montenegro University of Economy on "The participation of TPP 'Pljevlja' in the production of EPCG with reference to the importance of base energy" stating that the deadline of 16 November 2023 "*had been interpreted as the deadline for the submission of new evidence in support of the previously submitted counterarguments.*"

The Georgian National Energy and Water Supply Regulatory Commission (GNERC) submitted written observations according to Article 31 (2) Dispute Settlement Rules 2022 to the Secretariat on 16 November 2023 which were forwarded to the Advisory Committee. GNERC stresses unforeseen challenges which rendered strict compliance within the timeframe difficult and acknowledged Montenegro's significant steps towards compliance. GNERC did not dispute the legal assessment in the Reasoned Request.

On 14 November 2023 the public hearing took place. The Secretariat was represented by deputy director Dirk Buschle and Peter Vajda, Montenegro by Andreas Gunst and Jolita Hoxholli, both DLA Piper, as representative of the Contracting Party.

The Secretariat outlined the Reasoned Request and stated that the breach is an undisputable fact. According to the Secretariat the decision to keep TPP Pljevlja running in non-compliance is not a result of circumstances but a lack of time-management and a lack of planning and therefore not a case of force majeure. A diligent operator would have carefully managed the remaining operating hours. Furthermore, Montenegro has more than one source of energy supply and is well interconnected and therefore there is no need to maintain the operation of the power plant.

The representatives of Montenegro did not dispute that TPP Pljevlja is running after the expiry of 20,000 operational hours. Technically this is a breach of the obligations of Montenegro but there was no other choice than to keep the plant running at that point of time. Montenegro cannot be held responsible in this case because of force majeure and fundamental change in circumstances. Unforeseeable events were the COVID-19 pandemic from February 2020 to January 2022 and from February 2022 to present date the energy crisis following the Russian invasion in Ukraine. There was no alternative for Montenegro than to keep the plant running in order to maintain the security of supply. Importing energy was financially not possible. The costs would have been passed to consumers. As to the financial consequences the representatives of Montenegro referred to a Report prepared by the Montenegro University of Economy.

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

Article 12 of the Treaty reads:

*Each Contracting Party shall implement the *acquis communautaire* on environment in compliance with the timetable for the implementation of those measures set out in Annex II.*

Article 16 of the Treaty reads:

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

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

Article 2(10) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community (Decision 2013/05/MC-EnC) reads:

*“existing plant” means any combustion plant for which the original construction licence or, in the absence of such a procedure, the original operating licence was granted before 1 July 1992;*

Article 4(4) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community (Decision MC 2013/05/MC-EnC) reads:

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

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

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

*The operator is required to submit each year to the competent authority a record of the used and unused time allowed for the plants’ remaining operational life. Contracting Parties are required to submit each year a summary of these reports to the Secretariat. From the point in time when the plant has been operating for 20 000 hours since 1 January 2018 and in any case from 1 January 2024 onwards, the plant shall not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.*

Part 2 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community (Decision MC 2013/06/MC-EnC) reads:

## PART 2

### Emission limit values for combustion plants referred to in Article 30(3)

1. All emission limit values shall be calculated at a temperature of 273,15 K, a pressure of 101,3 kPa and after correction for the water vapour content of the waste gases and at a standardised O<sub>2</sub> content of 6% for solid fuels, 3% for combustion plants other than gas turbines and gas engines using liquid and gaseous fuels and 15% for gas turbines and gas engines.

In case of combined cycle gas turbines with supplementary firing, the standardised O<sub>2</sub> content may be defined by the competent authority, taking into account the specific characteristics of the installation concerned.

2. Emission limit values (mg/Nm<sup>3</sup>) for SO<sub>2</sub> for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

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

3. Emission limit values (mg/Nm<sup>3</sup>) for SO<sub>2</sub> for combustion plants using gaseous fuels with the excep-

tion of gas turbines and gas engines

In general	35
Liquefied gas	5
Low calorific gases from coke oven	400
Low calorific gases from blast furnace	200

4. Emission limit values (mg/Nm<sup>3</sup>) for NO<sub>x</sub> for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

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

5. Gas turbines (including CCGT) using light and middle distillates as liquid fuels shall be subject to an emission limit value for NO<sub>x</sub> of 50 mg/Nm<sup>3</sup> and for CO of 100 mg/Nm<sup>3</sup>

Gas turbines for emergency use that operate less than 500 operating hours per year are not covered by the emission limit values set out in this point. The operator of such plants shall record the used operating hours.

6. Emission limit values (mg/Nm<sup>3</sup>) for NO<sub>x</sub> and CO for gas fired combustion plants

	NO <sub>x</sub>	CO
Combustion plants other than gas turbines and gas engines	100	100
Gas turbines (including CCGT)	50 <sup>(1)</sup>	100
Gas engines	75	100

<sup>(1)</sup> For single cycle gas turbines having an efficiency greater than 35% – determined at ISO base load conditions – the emission limit value for NO<sub>x</sub> shall be 50x/35 where x is the gas turbine efficiency at ISO base load conditions expressed as a percentage.

For gas turbines (including CCGT), the NO<sub>x</sub> and CO emission limit values set out in this point apply only above 70% load.

Gas turbines and gas engines for emergency use that operate less than 500 operating hours per year are not covered by the emission limit values set out in this point. The operator of such plants shall record the used operating hours.

7. Emission limit values (mg/Nm<sup>3</sup>) for dust for combustion plants using solid or liquid fuels with the exception of gas turbines and gas engines

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

8. Emission limit values (mg/Nm<sup>3</sup>) for dust for combustion plants using gaseous fuels with the exception of gas turbines and gas engines

In general	5
Blast furnace gas	10
Gases produced by the steel industry which can be used elsewhere	30

As to the procedure under Article 91 of the Treaty the amended rules of procedure on dispute settlement under the Treaty (Procedural Act 2008/01/MC-EnC of 27 June 2008, amended by by Procedural Act 2022/03/MC-EnC of 15 December 2022) state in its Article 31:

*(1) Within two months following receipt of a copy of the reasoned request, the Party concerned may reply in writing to the Secretariat.*

*(2) The Secretariat shall notify all Parties and Participants, the Regulatory Board, the Advisory Committee as well as persons and bodies participating in the preliminary procedure of the reasoned request as well as any reply to it. Within two months of this notification, they shall be entitled to submit written observations to the Secretariat. The Regulatory Board and the Secretariat may submit written observations where they are not the initiator of the case.*

*Article 31 (2) of the Dispute Settlement Rules 2022 reads:*

*Before taking the decision pursuant to Article 91 of the Treaty, the Presidency and the Vice-Presidency shall ask an [the] Advisory Committee for its opinion on the reasoned request, taking into account any reply by the Party concerned. The Ministerial Council shall not be bound by the opinion of the Advisory Committee.*

### 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 maintaining the operation of TPP Pljevlja after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), Montenegro fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

In its reply to the Reasoned Opinion and in the public hearing Montenegro did not dispute that TPP Pljevlja has run more hours than it should have. The arguments brought forward by Montenegro to justify this were the COVID-19 pandemic, technical barriers, and the energy crisis, which had been unforeseen at the time of its adoption in 2018 and should be considered a force majeure.

Montenegro knew it had to refurbish the power plant many years in advance of the deadline. It also knew that the deadline was likely to be met earlier, given the plant's capacity utilisation. It delayed selecting a contractor until November 2019 and only concluded the contract with the contractor in June 2020 on or at about the point it went over the 20,000 operating hours. The arguments brought forward by Montenegro could only justify Montenegro's breach after the time span ranging from the outbreak of the COVID 19 pandemic in 2020. By raising such a

plea, Montenegro contends in substance a *force majeure* releasing it temporary from the obligation to perform the Treaty. While it might be correct that COVID-19 presents certain elements of *force majeure*, it is also true that it is an epidemic that came to Europe in January and February 2020. Montenegro cannot rely on unforeseeable circumstances or *force majeure* in circumstances in this case where a diligent and prudent Contracting Party would have been able to avoid the expiry of the period for implementation. Thus, Montenegro's breach of Article 4(3) and 4(6) Directive 2001/80/EC cannot be considered the result of events – and this applies similarly to the energy crisis starting in 2022 – originating after 2018.

Therefore, the failure to take steps earlier to refurbish the plant taints both the argument in respect of COVID 19, and in respect of high energy prices in part due to COVID 19 and following the Russian invasion in Ukraine. The initial failure removes all force majeure defences.

As to the procedural question regarding additional documents provided by Montenegro:

On 16 November 2023 Montenegro's representative submitted a report prepared by the Montenegro University of Economy on "The participation of TPP 'Pljevlja' in the production of EPCG with reference to the importance of base energy" stating that the deadline of 16 November 2023 "had been interpreted as the deadline for the submission of new evidence in support of the previously submitted counterarguments." This document cannot be taken into consideration:

Article 31 (1) states that the Party concerned may reply in writing to the Secretariat within two months following receipt of a copy of the Reasoned Request. Article 31 (2) is addressed to other Parties and Participants who have the right to submit written observations, having received the Reasoned Request and any reply to it. Also Article 32 (1) refers to the reply of the Party concerned which has to be taken into account by the Advisory Committee. Therefore, the Party concerned is not entitled to submit additional documents after this deadline according to Article 31 (2) of the Dispute Settlement Rules 2022 and by this way prolong the time limit for a reply stated in Article 31 (1). In consequence the report cannot be taken into consideration. This is not altered by the fact that the Secretariat has sent – with regard to the rights of the Party concerned – an unclear email in which by quoting Article 31 (2) 1st sentence the recipients of this email were invited to submit written observations by 16 November 2023. The Dispute Settlement Rules 2022 specify the procedure to be followed in cases of failure by a Party to comply with a Treaty obligation and therefore cannot be changed by the Secretariat. It should be noted that the report would not affect the present conclusions.

#### **IV. Conclusions**

The Advisory Committee considers that

Montenegro by maintaining the operation of TPP Pljevlja after the expiry of 20,000 operational hours and not in line with the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), Montenegro fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

Done in Vienna on 25 November 2024

On behalf of the Advisory Committee

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

Wolfgang Urbantschitsch, President