

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

REASONED REQUEST

in Case ECS-15/21

Submitted pursuant to Article 90 of the Treaty establishing the Energy Community (hereinafter: "the Treaty") and Articles 15 and 29 of Procedural Act No 2015/04/MC-EnC of the Ministerial Council of the Energy Community of 16 October 2015 on the Rules of Procedure for Dispute Settlement under the Treaty (hereinafter: "Dispute Settlement Procedures"),¹ the

SECRETARIAT OF THE ENERGY COMMUNITY

against

MONTENEGRO

is seeking a Decision from the Ministerial Council 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.

The Secretariat of the Energy Community submits the following Reasoned Request to the Ministerial Council.

I. Relevant Facts

1. Introduction

- (1) The present case concerns non-compliance of Montenegro with the provisions of Directive 2001/80/EC of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants² (hereinafter: "Directive 2001/80/EC") by not respecting its provisions on limited lifetime derogation (also known as "opt-out") stipulated in Article 4(4) thereof. According to that provision, as adapted for the Energy Community, large combustion plants subject to it can only be operated for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023. Following the expiry of this period or, in any event, from 1 January 2024 onwards, plants subject to Article 4(4) of Directive 2001/80/EC can only remain in operation if their emissions are in line with the limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU of the European Parliament and of the

¹ Procedural Act No 2015/04/MC-EnC of 16 October 2015.

² OJ L 309, 27.11.2001, p. 1.

Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (hereinafter: “Directive 2010/75/EU”).³

2. Background

- (2) Directive 2001/80/EC forms part of the Energy Community environmental *acquis communautaire* since the signature of the Treaty in 2005. The purpose of the Directive is to combat air pollution by reducing emissions of sulphur dioxide, nitrogen oxides and dust from large combustion plants. These pollutants are significant contributors to emissions into the air and the negative consequences thereof, such as acidification, eutrophication, and ground-level ozone.
- (3) According to point 3 of Annex II of the Treaty, each Contracting Party must have implemented Directive 2001/80/EC by 31 December 2017.
- (4) On 24 October 2013, the Ministerial Council adopted Decision 2013/05/MC-EnC on the implementation of Directive 2001/80/EC (hereinafter: “Decision 2013/05/MC-EnC”), whereby Directive 2001/80/EC was adapted for the specific needs of the Energy Community. Namely, Decision 2013/05/MC-EnC introduced amendments for the implementation of Article 4(4) of Directive 2001/80/EC in the Energy Community and specified the timeframes of its applicability for large combustion plants in the Contracting Parties.
- (5) On the same date, the Ministerial Council adopted Decision 2013/06/MC-EnC on the implementation of Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU and amending Article 16 and Annex II of the Energy Community Treaty (hereinafter: “Decision 2013/06/MC-EnC”). This decision requires that new large combustion plants meet the stricter emission requirements of Directive 2010/75/EU as of 1 January 2018.
- (6) On 14 October 2016, the Ministerial Council adopted Decision 2016/19/MC-EnC on authorising exemptions of plants from compliance with the emission limit values set by Directive 2001/80/EC. As stipulated in its Article 1(1), this decision lists the plants that may be exempted from compliance with the emission limit values referred to in Article 4(3) of Directive 2001/80/EC, thereby complementing the opt-out rules stipulated in Article 4(4) of Directive 2001/80/EC for the purposes of the Energy Community. TPP Pljevlja in Montenegro, operated by the public utility *Elektroprivreda Crne Gore AD* (hereinafter “EPCG”) is included in the list established by Decision 2016/19/MC-EnC.⁴
- (7) Following the expiry of the implementation deadline of Directive 2001/80/EC in the Energy Community, the Secretariat requested the Contracting Parties concerned by Decision 2016/19/MC-EnC to confirm whether the plants in question have started to operate under the opt-out regime. In response to a letter sent by the Secretariat on 15 February 2018,⁵ the Ministry of Economy of Montenegro confirmed the start of the opt-out of TPP Pljevlja by its letter dated 27 February 2018.⁶
- (8) In the same letter, the Ministry of Economy of Montenegro also informed about the start of the reconstruction of the plant with the aim of complying with the emission limit values of Part 2 of Annex V of Directive 2010/75/EU and the conclusions on the best available techniques for large combustion plants, as stipulated by Commission Implementing Decision (EU) 2017/1442 of 31 July 2017.

³ OJ L 334, 17.12.2010, p. 17, hereinafter: “Directive 2010/75/EU”.

⁴ Decision 2016/19/MC-EnC, p. 4, row no. 5. (ANNEX 1)

⁵ Ref. No ME-MIN/O/jko/04/15-02-2018. (ANNEX 2)

⁶ Ref. No 310-136/2018-2. (ANNEX 3)

- (9) On 27 March 2018, *EPCG* concluded a contract with *Steag Energy Services GmbH* for the preparation of the preliminary design for refurbishing TPP Pljevlja in accordance with the requirements of Directive 2010/75/EU and the environmental impact assessment study for the project. In terms of compliance with the emission limit values of Directive 2010/75/EU, this includes the installation of systems for desulphurisation and denitrification as well as the upgrade of the existing electrostatic precipitator to reduce dust emissions. Furthermore, the project includes other measures (waste water treatment, internal transport of slags and ashes, noise reduction) with the aim to implement the best available techniques as stipulated in Commission Implementing Decision (EU) 2017/1442 (hereinafter “the Refurbishment Project”). According to the information provided by the Ministry of Economy of Montenegro and later confirmed by the replies of the Ministry of Capital Investments of Montenegro to the Opening Letter and the Reasoned Opinion, if implemented, the Refurbishment Project would have ensured compliance with Directive 2010/75/EU and the best available techniques established thereunder.
- (10) On 7 November 2019, a consortium led by *Dongfang Electric Corporation* from the People's Republic of China (hereinafter “the Contractor”) was selected to implement the Refurbishment Project.
- (11) On 26 December 2019, the Environment Protection Agency of Montenegro approved the environmental impact assessment study for the Refurbishment Project.
- (12) On 10 June 2020, *EPCG* and the Contractor concluded the contract on implementing the Refurbishment Project (hereinafter: “the Refurbishment Agreement”), with a value of EUR 44,981,570.25 (VAT excluded).
- (13) This contract included the following deadlines in terms of execution of the Refurbishment Project:
- five months after the effective date of the contract for the development of the detailed design (which doesn't imply the deadline planned for detailed design audit);
 - twenty-one months after the Contractor's site possession date for the construction of the desulphurization facility, the construction of the denitrification facility, the construction of fittings for heating of Pljevlja and retrofitting of the facility for transport of slag below the boiler (first stage of works);
 - thirty-nine months after the Contractor's site possession date for the construction of the waste water treatment facility, retrofitting of the back-up furnace, the construction of the cooling tower and implementation of noise protection measures (second stage of works).
- (14) Montenegro submitted its emissions and plant operation data, as required by Annex VIII.B of Directive 2001/80/EC for the reporting years 2018-2022 on an annual basis. According to the reports, the situation with regard to the operational hours used by TPP Pljevlja between 2018 and 2020 presents itself as follows:

2018	2019	2020	Total
7,081	6,728	7,194	21,003

- (15) TPP Pljevlja has therefore come to the end of the opt-out period already in the 2020 reporting year. The plant has nevertheless continued its operation in the 2021 and 2022 reporting years. Thereby the excess of 1,003 operational hours by 31 December 2020 was exacerbated by

further 6,460 and 6,949 operational hours, respectively, raising the total amount of operational hours spent in breach of the provisions of Directive 2001/80/EC to 14,412 by 31 December 2022. This equals to 172% of the total amount of operational hours available for opt-out under Article 4(4) of Directive 2001/80/EC. In 2023, the plant remained in operation further.

- (16) In April 2021, the Contractor claimed that force majeure related to the Covid-19 pandemic made it impossible to implement the contractual obligations according to the agreed schedule and sought a review of the Refurbishment Agreement on the following grounds:
- staff availability is severely impacted by Covid-19 measures;
 - special security arrangements need to be implemented for the work on site in order to comply with Covid-19 measures, which causes significant delays;
 - supply chains have been seriously disrupted and therefore supply of equipment needs to follow different requirements, and the need to re-arrange supplies would cause further delays;
 - disruption of the market and price escalation makes performance significantly more costly or difficult in a way that substantially impacts the originally agreed economic balance of the contracts.
- (17) Following a renegotiation of the contract value between EPCG and the Contractor which resulted in an increase of 15 million € (VAT included), actual works on the site commenced in April 2022. According to the information provided by the Ministry of Capital Investments in the reply to the Reasoned Opinion, they are foreseen to be completed by October 2024.

3. Legal framework governing emissions into the air from large combustion plants in Montenegro

- (18) In Montenegro, the Law on Air Protection and the Decree on Limit Values of Pollutant Emissions into the Air from Stationary Sources (hereinafter: “the Decree”) regulate the operation of, as well as the emissions into the air from, large combustion plants. The emission limit values stipulated by Annexes III to VII of Directive 2001/80/EC are transposed in line with the Energy Community *acquis communautaire* by the Decree.
- (19) On 27 December 2022, the Assembly of Montenegro adopted amendments to the Law on Industrial Emissions.⁷ This law regulates the permitting aspects of industrial installations, including large combustion plants. The amendments exempt the operator of TPP Pljevlja from the obligation to submit a request for the validity of its integrated permit and further exempt the permit issued for TPP Pljevlja from compliance with the emission limit values of Directive 2001/80/EC until the finalization of alleged “*negotiations with the Energy Community Secretariat*”, and until the finalization of the case subject to the present Reasoned Request.

II. Relevant Energy Community Law

- (20) Energy Community Law is defined in Article 1 of the Dispute Settlement Procedures as “a *Treaty obligation or [...] a Decision or Procedural Act addressed to [a Party]*”. A violation of Energy Community Law occurs if “[a] *Party fails to comply with its obligations under the Treaty if any of*

⁷ Ref. no. 27-6/22-1/6. (ANNEX 4)

*these measures (actions or omissions) are incompatible with a provision or a principle of Energy Community Law”.*⁸

- (21) Point (d) of Article 2(1) of the Treaty reads:

The task of the Energy Community shall be to organise the relations between the Parties and create a legal and economic framework in relation to Network Energy, as defined in paragraph 2, in order to: (...)

(d) improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space

- (22) 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 the Treaty.

- (23) 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.

- (24) Article 16 of the Treaty reads:

The “acquis communautaire on environment”, for the purpose of this Treaty, shall mean (...)

(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,⁹ (...)

- (25) Article 94 of the Treaty reads:

The 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. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High Level Group. Such guidance shall not prejudice any interpretation of the acquis communautaire by the Court of Justice or the Court of First Instance at a later stage.

- (26) Point 3 of Annex II to the Treaty reads:

Each Contracting Party shall implement 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 by 31 December 2017.

- (27) Point 5 of Annex II to the Treaty reads:

Each Contracting Party shall implement Chapter III, Annex V, and Article 72(3)-(4) 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) from 1 January 2018 for new plants. For

⁸ Article 3(1) of the Dispute Settlement Procedures.

⁹ As amended by Decision 2013/05/MC-EnC and by Decision 2015/07/MC-EnC on amending Decision 2013/05/MC-EnC.

existing plants, Contracting Parties shall implement those provisions by 1 January 2028 at the latest. Prior to that date, they shall endeavour to implement the provisions of Chapter III and Annex V within the shortest possible timeframe, in particular in the cases of retrofitting existing plants. (...)

- (28) Article 2(9) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community¹⁰ 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.

- (29) Article 4(4) of Directive 2001/80/EC, as adapted for and adopted by the Energy Community¹¹ 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.

- (30) Part 2 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community¹² reads:

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 O₂ 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 O₂ content may be defined by the competent authority, taking into account the specific characteristics of the installation concerned.

¹⁰ Ministerial Council Decision 2013/05/MC-EnC.

¹¹ Ministerial Council Decision 2013/05/MC-EnC.

¹² Ministerial Council Decision 2013/06/MC-EnC.

2. Emission limit values (mg/Nm^3) for SO_2 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

(...)

4. Emission limit values (mg/Nm^3) for NO_x 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

(...)

7. Emission limit values (mg/Nm^3) 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

- (31) Point 2 of Part 5 of Annex V to Directive 2010/75/EC, as adapted for and adopted by the Energy Community¹³ reads:

2. Minimum rate of desulphurisation for combustion plants referred to in Article 30(3)

Total rated thermal input (MW)	Minimum rate of desulphurisation
50-100	93 %
100-300	93 %
> 300	97 %

III. Preliminary procedure

- (32) According to Article 90 of the Treaty, the Secretariat may bring a failure by a Party to comply with Energy Community law to the attention of the Ministerial Council. As stipulated in Article 12 of the Dispute Settlement Procedures, the Secretariat initiates a preliminary procedure against a Party before seeking a decision by the Ministerial Council under Article 91 of the Treaty. According to Article 13 of these Rules, such a procedure is initiated by way of an Opening Letter. According to Article 14 of the same Rules, in the light of the reply or absence of a reply from the Party concerned, the Secretariat may address a Reasoned Opinion to that Party. In the light of the reply or absence of a reply from the Party concerned to the Reasoned Request, the Secretariat may bring the matter to the attention of the Ministerial Council by way of a Reasoned Request in accordance with Article 29 of the Dispute Settlement Procedures. After the Secretariat has repeatedly recalled the significant non-compliance with the provisions of Directive 2001/80/EC,¹⁴ the present case was initiated on 20 April 2021.
- (33) In the Opening Letter,¹⁵ the Secretariat preliminarily concluded 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 Directive 2010/75/EU, fails to comply with Articles 12 and 16 of the Treaty read in conjunction with Article 4(4) of Directive 2001/80/EC. The Secretariat requested the Government of Montenegro to submit its reply on the points of fact and of law raised in the Opening Letter by 20 June 2021.

¹³ Ministerial Council Decision 2013/06/MC-EnC.

¹⁴ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 85; Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, pp. 93-94.

¹⁵ ANNEX 5.

- (34) On 17 June 2021, the Ministry of Capital Investments of Montenegro (hereinafter “the Ministry”) sent a letter to the Secretariat, requesting an extension of the deadline to reply to the Opening Letter based on Article 10(3) of the Dispute Settlement Procedures.¹⁶ By letter dated 22 June 2021, the Secretariat granted an extension of the deadline until 20 August 2021.¹⁷
- (35) On 16 August 2021, the Ministry granted Power of Attorney to Mr Andreas Gunst, Attorney-at-Law at DLA Piper Weiss-Tessbach Rechtsanwälte GmbH in Vienna, Austria.
- (36) On 20 August 2021, the Ministry, represented by Mr Gunst, replied to the Opening Letter.¹⁸
- (37) As the information and the legal arguments provided by the reply to the Opening Letter did not dispel the concerns raised in the Opening Letter, the Secretariat issued a Reasoned Opinion on 10 February 2023 and requested the Government of Montenegro to submit its reply on the points of fact and of law raised therein by 10 April 2023.¹⁹
- (38) On 11 April 2023, the Ministry, represented by Mr Gunst, replied to the Reasoned Opinion.²⁰
- (39) As will be argued below, the Secretariat considers that the authorities of Montenegro did not provide sufficient evidence of developments or arguments that would dispel the concerns raised in the Opening Letter and concluded in the Reasoned Opinion. Therefore, the Secretariat decided to submit the present Reasoned Request to the Ministerial Council.

IV. Legal Assessment

- (40) The present Reasoned Request addresses the non-compliance of Montenegro with the obligation of not to operate large combustion plants subject to Article 4(4) of Directive 2001/80/EC for a maximum of 20,000 operational hours starting from 1 January 2018 and ending no later than 31 December 2023. Following the expiry of this period, which occurred for TPP Pljevlja already in 2020, plants subject to Article 4(4) of Directive 2001/80/EC can only remain in operation if their emissions are in line with the limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.²¹
- (41) As a Contracting Party to the Treaty, Montenegro is under an obligation to implement, *i.e.* to transpose at national level and to apply the *acquis communautaire* on environment, including Directive 2001/80/EC as amended by Decision 2013/05/MC-EnC and Directive 2010/75/EU as adapted for and adopted by the Energy Community by Decision 2013/06/MC-EnC, as referred to in Article 12 of the Treaty and defined by Annex II thereof. Point 3 of Annex II to the Treaty establishes the general implementation deadline for Directive 2001/80/EC as 31 December 2017.

1. Expiry of the maximum of allowed operational hours under the opt-out regime

- (42) Article 4(4) of Directive 2001/80/EC allows for a period of non-compliance with the Directive’s individual emission limit values in case the operator of a large combustion plant undertakes, in the form of a written declaration, not to operate the plant for more than 20,000 operational hours starting from 1 January 2018 and ending not later than 31 December 2023. As explained above, this implementation alternative was chosen by the operator of TPP Pljevlja. The start of the

¹⁶ Ref. no.: 01-011/21-7123/1. (ANNEX 6)

¹⁷ ECS-15/21/O/22-06-2021. (ANNEX 7)

¹⁸ ANNEX 8.

¹⁹ ANNEX 9.

²⁰ ANNEX 10. As 10th April 2023 was an official holiday in Austria, the reply to the Reasoned Opinion arrived in compliance with Article 10(2) of the Dispute Settlement Procedures.

²¹ Fifth subparagraph of Article 4(4) of Directive 2001/80/EC, as amended by Decision 2013/05/MC-EnC.

plant's opt-out was explicitly confirmed by the Ministry of Economy of Montenegro on 27 February 2018 to the Secretariat.²²

- (43) Moreover, it is undisputed that from 1 January 2018 onwards, TPP Pljevlja had 20,000 operational hours at its disposal to comply with the provisions of Article 4(4) of Directive 2001/80/EC. By the end of the 2020 reporting year, TPP Pljevlja had exceeded the maximum amount of operational hours available under Article 4(4) of Directive 2001/80/EC. This finding is based on the number of operational hours of TPP Pljevlja provided to the Secretariat and the European Environment Agency in the framework of the reporting obligation under Annex VIII.B of Directive 2001/80/EC. Following the expiry of that time limit and in accordance with the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,²³ the plant could have remained in operation legally only if it had met the emission limit values stipulated by Part 2 of Annex V of Directive 2010/75/EU.
- (44) This fundamental information was explicitly confirmed by the two replies of the Ministry.²⁴ It is thus also undisputed that since the end of 2020, TPP Pljevlja has been in breach of Article 4(4) of Directive 2001/80/EC.
- (45) The state of non-compliance was further exacerbated in the course of 2021 and 2022 by additional 6,460 and 6,949 operational hours, respectively, raising the total amount of operational hours spent in breach of the provisions of Article 4(4) of Directive 2001/80/EC to 14,412 hours by 31 December 2022. The plant remains in operation and thus the total number of operational hours in breach of Directive 2001/80/EC will increase further in the course of 2023 and possibly beyond.
- (46) It is hence not merely the Secretariat's finding, as the reply to the Reasoned Opinion suggests,²⁵ but an objective fact, that TPP Pljevlja, as a plant falling under the scope of Directive 2001/80/EC and operating under the opt-out regime of Article 4(4) thereof, has reached the limit of 20,000 operating hours by the end of 2020 and has been operating since that point of time in breach of the provisions of Article 4(4) of Directive 2001/80/EC.

2. Compliance of TPP Pljevlja with Directive 2010/75/EU

- (47) According to the fifth subparagraph of Article 4(4) of Directive 2001/80/EC,²⁶ from the point in time when the plant has been operating for 20,000 hours since 1 January 2018, 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.
- (48) In the case of TPP Pljevlja, this provision became applicable at the end of 2020, following the expiry of the 20,000 hours used under the opt-out regime. Consequently, TPP Pljevlja may only have remained in operation beyond the 20,000 hours under the condition that it is able to meet the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU.
- (49) Both replies concur with this finding, by accepting that *"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 IED."*²⁷

²² See ANNEX 3.

²³ As amended by Decision 2013/05/MC-EnC.

²⁴ Paragraph 9 of the reply to the Opening Letter and paragraph 11 of the reply to the Reasoned Opinion.

²⁵ Paragraph 12 of the reply to the Reasoned Opinion.

²⁶ As amended by Decision 2013/05/MC-EnC.

²⁷ Paragraphs 34-35 of the reply to the Opening Letter and paragraphs 48-49 of the reply to the Reasoned Opinion.

- (50) In order to assess compliance with the emission limit values of Directive 2010/75/EU, the average emission concentrations expressed in mg/Nm³ are to be estimated. This assessment was carried out by the Secretariat in the Opening Letter,²⁸ with the following results:

Pollutant	Emission concentrations estimated by the Secretariat (mg/Nm ³)
SO ₂	11,702.6
NO _x	913.4
Dust	69.7

- (51) From these results, it follows that the applicable emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU²⁹ are not met. Hence, TPP Pljevlja should not have remained in operation after the 20,000 operational hours applicable under Article 4(4) of Directive 2001/80/EC.
- (52) Both replies indeed concede that *“Montenegro might appear to be technically in breach of the environmental requirements as the Pljevlja has passed the 20,000 hours threshold under the opt-out regime and it is being operated in excess of that limit without implementing BAT refurbishments as per the IED.”*³⁰
- (53) Yet in both replies, the Ministry claims that the average emission concentrations of TPP Pljevlja calculated by EPCG are significantly lower than those presented by the Secretariat in the Opening Letter and the Reasoned Opinion.³¹ The reply to the Reasoned Opinion claims that these calculations are confirmed by the measurement authority in Montenegro, the Center for Ecotoxicological Testing, without however providing evidence for this claim. For comparison, the differences are presented in the following table:

Pollutant	Emission concentrations estimated by the Secretariat (mg/Nm ³)	Emission concentrations estimated by EPCG in the Replies (mg/Nm ³)
SO ₂	11,702.6	6,879
NO _x	913.4	508
Dust	69.7	29.4

- (54) In this respect, the Secretariat notes that the estimations provided by the replies are not underpinned by any methodology on the calculations and/or measurements; only the bare numbers are presented. This is also the case for the confirmation of the Center for Ecotoxicological Testing, as referred to in the reply to the Reasoned Opinion. As for the numbers presented by the Secretariat in the Opening Letter, the Reasoned Opinion and paragraph 53

²⁸ The calculation details were presented in Annexes 1 to 3 to the Opening Letter.

²⁹ 150 mg/Nm³ for sulphur dioxide (or a minimum rate of desulphurisation of 97%), 150 mg/Nm³ for nitrogen oxides (200 mg/Nm³ in case of pulverised lignite combustion) and 10 mg/Nm³ for dust.

³⁰ Paragraph 72 of the Reply to the Opening Letter and paragraph 87 of the Reply to the Reasoned Opinion.

³¹ Paragraph 10 of the Reply to the Opening Letter and paragraph 14 of the Reply to the Reasoned Opinion.

above, reference is made to Annexes 1 to 3 to the Opening Letter³² establishing the average emission concentrations based on the data reported to the European Environment Agency and to the Secretariat by the Environment Protection Agency of Montenegro in the framework of Annex VIII.B of Directive 2001/80/EC.

- (55) In the Opening Letter, data for the 2020 reporting year was used as the calculation basis. Estimations based on the data submitted by Montenegro for the 2021 reporting year show slightly reduced, yet highly similar values (9,079.8 mg/Nm³ for sulphur dioxide, 855.47 mg/Nm³ for nitrogen oxides and 59.84 mg/Nm³ for dust). In the 2022 reporting year, emission estimations for sulphur dioxide and nitrogen oxides are similar (9,042.6 mg/Nm³ and 855.5 mg/Nm³, respectively), while a significant increase of dust emissions could be observed (109.0 mg/Nm³). This clearly shows that the significant breach of the applicable emission limit values of Directive 2010/75/EU persists. These estimations are presented in Annexes 11-16 to the present Reasoned Request.
- (56) That said, the Secretariat notes that even the emission concentration estimations presented in the replies significantly exceed the emission limit values stipulated by Part 2 of Annex V to Directive 2010/75/EU for a combustion plant with a rated thermal input greater than 300 MW_{th}, namely 150 mg/Nm³ for sulphur dioxide (or a minimum rate of desulphurisation of 97%), 150 mg/Nm³ for nitrogen oxides (200 mg/Nm³ in case of pulverised lignite combustion) and 10 mg/Nm³ for dust. Regardless of its magnitude, the existence of the breach can thus not be called into question.
- (57) It is thus to be concluded that in any event, TPP Pljevlja does not meet the requirements of Part 2 of Annex V to Directive 2010/75/EU. Consequently, TPP Pljevlja in its current configuration may not have remained in operation beyond the 20,000 operational hours under the opt-out regime, as stipulated by the fifth subparagraph of Article 4(4) of Directive 2001/80/EC.

3. Non-compliance with Article 4(4) of Directive 2001/80/EC

- (58) The consequence of the above is that the continued operation of the Pljevlja power plant after the expiry of the maximum opt-out hours in 2020 is in breach of Article 4(4) of Directive 2001/80/EC. This provision establishes a clear and unequivocal *obligation de résultat*, by requiring that from the point in time when the plant has been operating for 20,000 hours since 1 January 2018, it 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. Neither Directive 2001/80/EC itself, nor Decision 2013/05/MC-EnC of the Ministerial Council provides any exemption to this straight-forward rule.
- (59) The fact that Montenegro, by legislative amendments of 27 December 2022 presented in paragraph 19 of the present Reasoned Request, has attempted to legalize the non-compliant operation of TPP Pljevlja, going even beyond the ultimate end-date for all opt-out mechanisms in the Energy Community, namely 31 December 2023, shows clearly that the country is fully aware of its breach of the Energy Community *acquis communautaire* on environment. Instead of resolving the non-compliant situation in the shortest possible timeframe, however, it rather decided to extend the breach via non-compliant domestic legislation.
- (60) A Contracting Party which delays the implementation and does not take the required emission abatement measures to comply with its emission limit values undermines the environmental objectives pursued by Directives 2001/80/EC and 2010/75/EU, namely to effectively abate pollution in the forms of acidification, eutrophication and ground-level ozone.³³ The Secretariat

³² See ANNEX 5.

³³ Recital 3 of Directive 2001/80/EC and Recital 29 of Directive 2010/75/EU.

recalls that improving the environmental situation in the Contracting Parties is an overriding objective of the Treaty set out in point (d) of its Article 2(1).

- (61) It should also be borne in mind in this context that as a Contracting Party to the Treaty since 2005, Montenegro benefited from a long deadline for the implementation of Directive 2001/80/EC of not less than twelve years (between 2006 and 2018). Moreover, Article 4(4) of Directive 2001/80/EC is already an expression of flexibility within the compliance regime established by that Directive. The possibility to “opt out” individual power plants provides for a significant extension of operational lifetime for highly polluting combustion plants. This extension was introduced for the benefit of operators which find it economically or technically difficult to implement emissions abatement measures necessary to comply with the emission limit values of the Directive in 2018, the year when the implementation deadline expired. It is the very purpose of the additional 20,000 operational hours to allow Contracting Parties to prepare for and manage this transition.³⁴
- (62) It is against this background that the Secretariat has reviewed the various justifications brought forward by Montenegro for the breach of Article 4(4) of Directive 2001/80/EC in its replies to the Opening Letter and the Reasoned Opinion.

4. Justifications put forward by Montenegro

- (63) The reply to the Reasoned Opinion essentially divides the Government’s argument into two time sections by claiming that for the period between February 2020 to January 2022, Covid-19-related triggering events rendered compliance with Article 4(4) of Directive 2001/80/EC impossible, while for the period between February 2022 and April 2023, the energy price surge and the Russian invasion of Ukraine produced the same effect.³⁵

i. Deviations from the applicable legal framework

- (64) The Ministry, in its replies to the Opening Letter and the Reasoned Opinion refers to the letters sent in September and November 2020 to the Secretariat informing about its difficulties in meeting the requirements of Directive 2001/80/EC due to the situation related to the Covid-19 pandemic.³⁶ In these notifications, Montenegro proposed that the 2020 and 2021 reporting years are not counted into the consumption of the opted-out hours. This suggestion, however, would have amounted to an amendment of the provisions of Directive 2001/80/EC applicable in the Energy Community, which cannot be made unilaterally neither by Montenegro nor by the Secretariat. Amending the *acquis communautaire* would have required a decision of the Ministerial Council under Article 24 of the Treaty, upon proposal of the European Commission. As neither such a proposal let alone a decision has been adopted, this suggestion does not bear any legal relevance in justifying the breach of Article 4(4) of Directive 2001/80/EC.
- (65) The Secretariat will further consider the Ministry’s arguments related to the Covid-19 pandemic under the notion of *force majeure* and necessity below at paragraphs 89-117.

ii. Alleged threat to security of energy supply

- (66) In its replies, the Ministry claims that Montenegro’s failure to ensure compliance with Article 4(4) of Directive 2001/80/EC was motivated by concerns related to security of energy supply. The Ministry considers that “[t]he Covid-19 emergency and other surrounding circumstances placed Montenegro authorities in a situation of necessity to maintain the Pljevlja plant in operation. This was the only way for the State to safeguard an essential interest against a grave and imminent

³⁴ Common Position (EC) No 52/2000 of 9 November 2000, as adopted by the Council.

³⁵ Paragraph 88 of the reply to the Reasoned Opinion.

³⁶ Paragraph 28 of and Annexes 7 and 8 to the reply to the Opening Letter and paragraph 26 of the reply to the Reasoned Opinion.

*peril; and on a balance it outweighs the long-term impact towards the Energy Community obligations and other parties.*³⁷

- (67) In the reply to the Reasoned Opinion, the Ministry further claims that the military aggression of Russia against Ukraine and its direct and indirect effects, in particular the energy price shocks observed in European markets in the course of 2022, further exacerbated the situation and continued to render compliance of Montenegro with Article 4(4) of Directive 2001/80/EC impossible for security of supply reasons.³⁸
- (68) The Secretariat respectfully disagrees with this line of justification.
- (69) At the outset, the Secretariat recalls that the breach of a clear and unequivocal obligation enshrined in a directive cannot be justified by general principles of European energy policy such as security of supply, which is protected by a separate set of *acquis communautaire*.³⁹ The objective of Directive 2001/80/EC, by contrast, is the protection of the environment and human health, as set out by point (d) of Article 2(1), Chapter III of Title II and Annex II of the Treaty. According to Article 6 of the Treaty, Parties shall rather abstain from any measure which could jeopardise the attainment of the objectives of the Treaty, including those related to the improvement of the environmental situation in the Contracting Parties related to Network Energy.
- (70) The continued operation of TPP Pljevlja impairs the achievement of one of the fundamental objectives of the Treaty as stipulated in its point (d) of Article 2(1), namely the improvement of the environmental situation in relation to Network Energy in the Contracting Parties and in the Energy Community as a whole. If the objective of ensuring security of energy supply, not less important under the Energy Community Treaty, were to be balanced against the objective of protecting the environment and human health in a different way than requiring compliance with both sets of rules meant to achieve them, and in particular by allowing for derogations from the unequivocal and binding obligations under the Large Combustion Plants Directive, this would have again to be done by the Ministerial Council of the Energy Community as its supreme legislature, and not individually by and in discretion of the Contracting Parties. and act upon by amending the *acquis communautaire*. In the absence of (even) a proposal of the European Commission to amend Article 4(4) of Directive 2001/80/EC, the applicable legal framework remains as established by the Treaty and the relevant Decisions of the Ministerial Council.
- (71) If a weighing between different interest were to be made, it would have been for the Energy Community legislature, *i.e.* the Ministerial Council, to do so.
- (72) That said, the Secretariat notes that in essence, the argument by Montenegro related to energy security builds on the fact that TPP Pljevlja is the only thermal power plant in the country and assumes that its closure would deprive Montenegro of stable power supply. Already this assumption is factually not correct.
- (73) For the sake of completeness, the replies by Montenegro need to be complemented by the fact that the electricity generation mix in the country is diversified and includes hydropower generation capable of covering 46 % of domestic demand on average between 2017 and 2022.⁴⁰ The same, and more importantly, applies to the fact that in a power market integrated with

³⁷ Paragraph 74 of the reply to the Opening Letter. Paragraph 89 of the reply to the Reasoned Opinion reiterated this argument.

³⁸ Paragraphs 31-43 and 89 of the reply to the Reasoned Opinion.

³⁹ According to point 5 of Annex I to the Treaty, as amended by Ministerial Council Decision 2021/13/MC-EnC, security of electricity supply is governed in Energy Community in particular by Regulation (EU) 2019/941 of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC as adopted by Decision No 2021/13/MC-EnC of the Ministerial Council of 30 November 2021.

⁴⁰ In 2021, hydropower plants covered 57% of domestic consumption in Montenegro. In 2022, they accounted for 46 % despite a drop in consumption, due to unfavourable hydrological conditions.

neighbouring systems, technical conditions in Montenegro allow domestic thermal generation to be compensated by imports of electricity. The Montenegrin power system features interconnection capacities more than ten times higher than the maximum production of TPP Pljevlja. The integrated market and the interconnectors of Montenegro with all its neighbours provide a viable technical possibility for imports, not jeopardizing security of supply. Following the initiation of the operation of the submarine electric transmission cable between Montenegro and Italy in November 2019, Montenegro is also capable to directly import electricity also from the EU markets. As argued by the Secretariat in the Reasoned Opinion, imports could have easily compensated domestic thermal generation from the perspective of security of supply.⁴¹ This is underpinned by the fact that ever since 2021, following the expiry of the opt-out available for TPP Pljevlja and the closure of the Podgorica aluminium plant (KAP),⁴² Montenegro has been, as confirmed by EPCG's own assessment included in the reply to the Reasoned Opinion,⁴³ a net exporter of electricity, an activity from which EPCG, the operator of TPP Pljevlja, derived significant income.

- (74) Nevertheless, the Ministry argues in its replies that imports were ruled out by financial impossibility⁴⁴ and would have led to Montenegro going default on its state debt thus causing a potential serious disruption on its economy⁴⁵ as a whole.
- (75) In an attempt to underpin the alleged “financial impossibility” of electricity imports, the Ministry presented in both replies financial assessments made by EPCG's Directorate for Energy Management. The first assessment⁴⁶ confirms that the decision to operate TPP Pljevlja beyond the 20,000 operational hours was taken based on comparing the price of TPP Pljevlja's low operational costs with the price of imported electricity. The second assessment⁴⁷ provides a comparison of EPCG's export revenues and import costs with a conclusion that the only manner to compensate for the difference would have been an increase of the electricity price.⁴⁸
- (76) In response to those arguments, the Secretariat recalls, firstly, that in accordance with the established case-law of the Court of Justice of the European Union, measures impinging on European rules and principles cannot be justified by purely economic aims.⁴⁹ EPCG's two assessments confirm that the operator of TPP Pljevlja took its decision to extend the operational lifetime beyond the timeframe established by Article 4(4) of Directive 2001/80/EC on economic grounds. EPCG's revenues made from exporting electricity during the price surge also suggest that keeping TPP Pljevlja in operation beyond the timeframe available under limited lifetime derogation were motivated by commercial reasons.⁵⁰
- (77) In this context, the Secretariat recalls that according to the same assessment,⁵¹ it is demonstrated that the extended operation of TPP Pljevlja yielded highly positive financial results for the years 2020 and 2021. That the company benefited from high electricity prices on the European market through exports is also confirmed by the Chief Financial Officer of EPCG, who stated publicly in January 2022 that *“[i]f the energy balance we projected is achieved, we would have over 100 million euro positive effect of electricity exports [in 2022].”*⁵² According to EPCG's

⁴¹ Paragraph 63 of the Reasoned Opinion.

⁴² Due to the closure of this plant, domestic electricity demand was significantly reduced.

⁴³ Appendix 2.2. of the reply to the Reasoned Opinion, p. 2. In 2020, exports were 8% higher than imports. In 2021, this has grown to 36%, while in 2022, the difference was 23%.

⁴⁴ Paragraphs 112-116 of the reply to the Reasoned Opinion.

⁴⁵ Paragraph 23 of the reply to the Opening Letter; paragraphs 43 and 115 of the reply to the Reasoned Opinion.

⁴⁶ Annex 5 to the reply to the Opening Letter.

⁴⁷ Annex 2.2 to the reply to the Reasoned Opinion, dated 11 April 2023.

⁴⁸ Page 3 of Annex 2.2 to the reply to the Reasoned Opinion.

⁴⁹ See, inter alia, Cases C-288/83 *Commission v Ireland*, paragraphs 10 and 28; C-164/99 *Portugaia Construções*, paragraph 26 and C-324/93 *Evans Medical*, paragraph 36.

⁵⁰ Appendix 2.2 of the reply to the Reasoned Opinion.

⁵¹ Ibid, p. 2.

⁵² <https://seenews.com/news/montenegros-epcg-to-export-electricity-worth-40-mln-euro-in-q1-cfo-768934>

own, publicly available financial statements,⁵³ the net revenues from electricity sales have indeed grown by almost 160 million euros in 2022, representing an increase of approximately 45% compared to 2021. This increase was mainly fuelled by exports.⁵⁴ The claim of alleged “financial impossibility” should be put in perspective of these figures.

- (78) Secondly, the Secretariat considers it worth noting that the mandatory cap on revenues temporarily imposed by Articles 6 and 7 of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices includes the generation of electricity from lignite as an inframarginal fuel, assuming that windfall revenues were being made by the respective companies under the condition of high market prices.
- (79) Thirdly, the Secretariat emphasises that Energy Community law did and does not prevent Montenegro from providing compensatory liquidity support to *EPCG* and/or end customers of electricity in the country, as legitimate remedies to address the price surge. In the European Union, this possibility was explicitly acknowledged in the European Commission’s *REPowerEU* plan.⁵⁵ Furthermore, the European Commission’s Temporary Crisis and Transition Framework, dated 9 March 2023, replacing the Temporary Crisis Framework adopted on 28 October 2022, enables States to cushion the economic impact of Russia’s aggression of Ukraine and to (i) grant limited amounts of aid to companies affected by the current crisis; (ii) ensure that sufficient liquidity remains available to businesses; (iii) compensate companies for the additional costs incurred due to exceptionally high gas and electricity prices; and (iv) incentivise additional reduction of electricity consumption, in compliance with the State aid *acquis*. Whether or not Montenegro would have defaulted on its debt in doing so cannot be established based on the information provided. In this respect, it is to be recalled that it is for the Contracting Party which relies on an imperative requirement to justify contraventions of European law to demonstrate that the conditions for such exemptions are satisfied, accompanied by appropriate evidence.⁵⁶
- (80) Moreover, it is to be noted that the European Commission provided Montenegro with a significant energy support package to overcome the energy price surge. On 27 February 2023, a Financial Agreement between the European Commission and the Government of Montenegro was signed and the support package was officially launched on 8 March 2023,⁵⁷ with the first fixed tranche of twenty-seven million euros available immediately to Montenegro and the remaining three million euros becoming available at the beginning of 2024. The Government of Montenegro, following its session held on 25 April 2023, confirmed that the first fixed tranche of the energy support package was received on 23 March 2023.⁵⁸ The aim of this support package is to fight the energy crisis via the direct financial support of vulnerable households and small and medium enterprises not to default on their energy bills. This should significantly alleviate the financial concerns raised in the reply to the Reasoned Opinion. To the Secretariat’s knowledge, even this financial support did not influence *EPCG*’s decision to continue the operation of TPP Pljevlja despite the expiry of the life-time derogation.
- (81) Fourthly, the reference to the potential increase of domestic electricity prices also completely ignores the fact that air pollution has external costs that societies have to bear as a whole. In the reply to the Reasoned Opinion, the Ministry merely states that “*on a balance, this* [i.e. the

⁵³ ANNEX 17, p. 3.

⁵⁴ In 2021, exports represented 21.7% of *EPCG*’s net revenue (77.7 million euros of 357.3 million euros). In 2022, this has grown to 40.2% (207.5 million euros of 516.5 million euros).

⁵⁵ 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 *REPowerEU*: Joint European Action for more affordable, secure and sustainable energy COM/2022/108 final, 8.3.2022, p. 3; see also Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices.

⁵⁶ See, to that effect, Case 518/06 *Commission v Italy*, paragraph 84 and Case C-333/14 *Scotch Whisky Association*, paragraph 55.

⁵⁷ https://www.eeas.europa.eu/delegations/montenegro/eu-energy-support-package-launched-montenegro_en?s=225

⁵⁸ <https://www.gov.me/dokumenta/019dedd4-5ac9-4729-baf9-602bd28c8d5b>, p. 1.

breach of opt-out rules] *outweighs the long-term impact towards the Energy Community obligations*".⁵⁹ The health and environmental costs of high levels of air pollution are completely ignored in the financial assessments presented and apparently were left out of the balance.

- (82) Fifthly, it is evident from the established facts and the reply to the Reasoned Opinion that *EPCG* did not consider any alternative measures such as (at least) a significant reduction of the remaining operational hours of TPP Pljevlja in combination with (only) a partial increase in electricity prices. Any (futile) attempt for justification of the breach of Article 4(4) of Directive 2001/80/EC would thus have to fail on account of lack of proportionality.
- (83) Finally, and most pertinent for the case at hand, the Secretariat recalls that the surge of wholesale electricity prices which has been affecting the whole of Europe starting in the second half of 2021, cannot justify the breach of Article 4(4) of Directive 2001/80/EC which occurred already in the course of 2020. Likewise, the Russian full-scale invasion of Ukraine started in February 2022 and thus cannot be brought into connection with the expiry of the opt-out hours some two years prior to that.
- (84) The Reply to the Reasoned Opinion also claims that "[t]he measures implemented by the Montenegrin authorities are somewhat comparable to similar transition measures taken by EU countries in reaction to the energy crisis induced by the Russian war in Ukraine".⁶⁰ In this context, the Ministry invokes several measures and instruments that the European Union took with the aim of addressing the harmful effects of energy market disruptions.⁶¹
- (85) In response to this argument, the Secretariat recalls that that the subject matter of the present case is not compliance by Member States of the European Union with the environmental *acquis* but by Montenegro. It is evident, as the reply to the Reasoned Opinion concedes,⁶² that there is no indication of non-compliance with the applicable emission limit values for large combustion plants put in short-term operation in certain Member States in response to the price surge and the war in Ukraine, which would in case be subject to infringement procedures by the European Commission.
- (86) Moreover, derogations from, and let alone a breach of environmental legislation, were not included as legitimate remedies by any of the measures and instruments invoked by the Montenegrin replies. In Article 8(2) of Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, the European Union's legislature emphasized that any national crisis measure taken must be taken in full compliance with Union law, including the environmental *acquis*.

⁵⁹ Paragraph 89 of the reply to the Reasoned Opinion.

⁶⁰ Paragraphs 38 and 131-133 of the reply to the Reasoned Opinion.

⁶¹ Paragraph 37 of the reply to the Reasoned Opinion. The measures mentioned include the 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, COM(2021) 660 final of 13 October 2021 - Tackling rising energy prices: a toolbox for action and support; 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, COM/2022/230 final of 18 May 2022 – REPowerEU Plan; Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) No 715/2009 with regard to gas storage; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 360 final of 20 July 2022 – 'Save gas for a safe winter'; Council Regulation (EU) 2022/1369 of 5 August 2022 on coordinated demand-reduction measures for gas; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices; 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, COM/2022/553 final of 18 October 2022 - Energy Emergency - preparing, purchasing and protecting the EU together; Proposal for a Council Regulation, COM/2022/549 final of 18 October 2022 - Enhancing solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks.

⁶² Paragraphs 38 and 131 of the reply to the Reasoned Opinion.

- (87) It is also worth noting that in its bilateral relations with Montenegro, the European Commission insisted on – and Montenegro accepted – the importance of respecting environmental legislation in and by Montenegro, by including conditionalities linked to the compliance of TPP Pljevlja with Directive 2010/75/EU in the Financial Agreement on liquidity support quoted in paragraph 80 above.
- (88) In conclusion, the Secretariat respectfully submits that any attempt to justify the evident breach of Article 4(4) of Directive 2001/80/EC on account of the energy price surge and the war in Ukraine is to be rejected.

iii. Alleged force majeure and necessity

- (89) The replies to the Opening Letter and the Reasoned Opinion further invoke the notion of *force majeure* and necessity as another line of justification for non-compliance with Article 4(4) of Directive 2001/80/EC.
- (90) In particular, the Ministry claims that “*Montenegro cannot (...) be held responsible for the alleged failure to fulfil the LCPD international obligations, as these are attributable to events which constitute force majeure, and/or are induced by a necessity state, and/or are attributable to a fundamental change in circumstances under article 62 of the VCLT, arising: 1. for the period from February 2020 to January 2022, from the Covid19-related events and the resulting Covid19-related failure by the selected contractor to implement the Pljevlja BAT refurbishments as required (referred also as “Covid19-related triggering events”) 2. For the period from February to April 2023, from the energy crisis and energy prices shock following the Russian invasion of Ukraine (referred also as Russian war-related triggering events).*”⁶³ The replies refer to this line of argument as “*the force majeure and necessity defences*”.
- (91) The Ministry further insists that action taken by Montenegro before the outbreak of Covid-19 was “*materially compliant and highly likely to meet the target dates in accordance with the opt-out regime*”.⁶⁴ According to the Ministry, the outbreak of the Covid-19 pandemic and the restriction measures imposed to contain it frustrated EPCG’s plans to bring the plant in compliance with Directive 2010/75/EU and to conclude the Refurbishment Agreement of the reconstruction of TPP Pljevlja by the end of 2019. This delayed both the conclusion of the Refurbishment Agreement and the completion of the various milestones envisaged by it.⁶⁵
- (92) The Ministry also reckons that the Refurbishment Agreement would have been concluded by 2019 and the major works ensuring compliance with Directive 2010/75/EU would have been implemented in due time by 2020, i.e. before exceeding the 20,000 hours threshold of the opt-out regime, would the outbreak of the Covid-19 pandemic not have disrupted the project.⁶⁶ In its reply to the Reasoned Opinion, the Ministry insists that non-compliance with Article 4(4) of Directive 2001/80/EC was the result of *force majeure* triggering events. In this respect, the Ministry claims that Montenegro has taken all possible due diligence measures to limit or eliminate the possible extent of the consequences of the Covid-19 pandemic by triggering the relevant contractual mechanisms. In its replies, the Ministry maintains that the Contractor submitted a contingency plan and adopted mitigation measures to perform works in the most effective way under the circumstances of the Covid-19 pandemic and that an amendment of time-schedule for the completion of works and review of payment terms was concluded.⁶⁷
- (93) The Secretariat respectfully submits that these arguments must be rejected.

⁶³ Paragraph 88 of the reply to the Reasoned Opinion.

⁶⁴ Paragraph 76 of the reply to the Opening Letter, paragraphs 92 and 100 of the reply to the Reasoned Opinion.

⁶⁵ Paragraphs 80-99 of the reply to the Opening Letter and paragraphs 137-140 of the reply to the Reasoned Opinion.

⁶⁶ Paragraph 79 of the reply to the Opening Letter, paragraph 95 of the reply to the Reasoned Opinion.

⁶⁷ Paragraph 24 of the reply to the Opening Letter, paragraph 30 of the reply to the Reasoned Opinion.

- (94) At the outset, the Secretariat recalls that Article 4(4) of Directive 2001/80/EC establishes a clear and unequivocal *obligation de résultat*, by requiring that from the point in time when a plant has been operating for 20,000 hours since 1 January 2018, it may not be operated further unless it meets the emission limit values set out in Part 2 of Annex V to Directive 2010/75/EU. The mere prospect of achieving compliance prior to reaching the 20,000 operational hours is irrelevant for achieving actual compliance with Article 4(4) of Directive 2001/80/EC.
- (95) In its attempt to deviate from this general principle, Montenegro invokes a number of judgments by the Court of Justice of the European Union⁶⁸ and an overview of defences for non-performance of international obligations under public international law, namely Articles 61 and 62 of the Vienna Convention on the Law of Treaties (hereinafter: “the Vienna Convention”) and Article 23 and 26 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter: “the ILC Articles”).⁶⁹
- (96) In this respect, the Secretariat first recalls that the Treaty establishing the Energy Community has created a legal order very closely modelled on the one of the European Union. This is reflected in the EU-origin of the *acquis communautaire*, in the legal binding character of the implementation commitment (Article 76 of the Treaty stipulates that “a *Decision* [by the Ministerial Council] is legally binding in its entirety upon those to whom it is addressed”, whereas Article 89 of the Treaty provides that “*The Parties shall implement Decisions addressed to them in their domestic legal system within the period specified in the Decision*”) and the enforceability of failures to comply according to the procedure established by Articles 90 et seq. of the Treaty, the procedure applied to the case at hand.
- (97) The legal order established by the Treaty leaves no room for deviating approaches to state responsibility under public international law. The Vienna Convention explicitly acknowledges that in Article 5, according to which the Convention “*applies to any treaty which is the constituent instrument of an international organization (...) without prejudice to any relevant rules of the organization*”. As regards the ILC Articles, it is to be noted that UN General Assembly in 2001 took note of the articles and “*commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action*”.⁷⁰ A convention on the topic has not been concluded to date.
- (98) To the extent the Advisory Committee has invoked public international law, and the Vienna Convention more specifically,⁷¹ it referred to the *pacta sunt servanda* principle as the underlying principle from which specific implementation duties by parties entering into an international treaty such as the Treaty establishing the Energy Community derive. That principle suggest that Montenegro implements its obligations under Directive 2001/80/EC in a full and timely manner.
- (99) For the sake of argument, the Secretariat observes that Articles 61 and 62 of the Vienna address the invoking of “*impossibility of performance*” and “*fundamental change of circumstances*” as grounds for terminating, withdrawing from or suspending the operation of a treaty. To the Secretariat’s knowledge, Montenegro does not intend to pursue either course of action with regard to the Treaty establishing the Energy Community. As regards Article 23 of the ILC Articles, the Secretariat notes that the provision addresses cases of *force majeure*, a concept elaborated and developed in European law by the Court of Justice of the European Union. The concept of “*necessity*” under Article 26 of the ILC Articles and referred to by the Ministry as “*the only way for the State to safeguard an essential interest against a grave and imminent peril*”⁷² does not exist in European law. Article 26(2) of the ILC Articles acknowledges that by stipulating

⁶⁸ Case 101/84 *Commission v Italy*, paragraph 16; Case 296/86 *McNicholl and Others*, paragraph 11; Case C-297/08 *Commission v Italy*, paragraphs 52-53 and 86.

⁶⁹ Paragraphs 53-71 of the reply to Opening Letter and paragraphs 67-86 of the reply to the Reasoned Opinion.

⁷⁰ General Assembly Resolution 56/83 of 12 December 2001.

⁷¹ Opinion in Case ECS-7/18 Secretariat v Republic of Moldova.

⁷² Paragraphs 155-167 of the reply to the Reasoned Opinion.

that “*necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity.*” Instead, the related argument brought forward by the Ministry are being dealt with by the Secretariat within the scope of the defences available under Energy Community law.

- (100) In this respect, it is important to recall that Article 94 of the Treaty explicitly stipulates that “[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.” Those courts’ jurisprudence constitute the sole point of reference for the interpretation of the Energy Community Treaty.
- (101) In its case-law, the Court of Justice of the European Union has set a test of three cumulative conditions to establish *force majeure*: first, the failure to fulfil obligations must be the result of abnormal and unforeseeable circumstances; second, the reason of the failure must be outside the control of operator concerned and third, its consequences must have been unavoidable despite the exercise of all due diligence.⁷³ In addition, a situation of *force majeure* may be pleaded only for the period necessary in order to resolve those difficulties.⁷⁴
- (102) As regards the first and the second criteria, the Secretariat agrees that both the outbreak of the Covid-19 pandemic during 2020 and the full-scale Russian invasion of Ukraine in 2022 were abnormal and unforeseeable, and beyond the control of both EPCG and Montenegro.⁷⁵ Yet the failure by EPCG to respect the expiry of the opt-out hours for TPP Pljevlja and the ensuing breach by Montenegro of Article 4(4) of Directive 2001/80/EC cannot be considered the *result* of these events (or attributable to them),⁷⁶ as required by the case-law of the Court of Justice of the European Union. This would suggest a causality which Montenegro assumes in its replies, but which cannot be established.
- (103) The full-scale Russian war against Ukraine started two years after the expiry of the opt-out hours in 2020 and hence the breach of Article 4(4) of Directive 2001/80/EC. A causality between both events cannot be established by any means. The Secretariat addressed the related arguments by Montenegro in assessing energy supply security as an alleged reason for justification above.
- (104) As regards the outbreak of the Covid-19 pandemic in 2020, the Secretariat can agree that this event may have caused *additional* delays in implementing the Refurbishment Project for TPP Pljevlja. However, it must be recalled that the Refurbishment Agreement was only concluded in June 2020, and hence several months *after* the outbreak of the Covid-19 pandemic and the introduction of the first restrictive measures globally. By that date, TPP Pljevlja had a minimal number of operational hours remaining available from the opt-out mechanism.⁷⁷ The deadlines agreed in the Refurbishment Agreement extended its implementation subject to a staged procedure, including the development of the detailed design within five months upon entry into force of the Refurbishment Agreement, and twenty-one months after the Contractor’s site possession for the construction of the first stage of works. As a consequence, even in the absence of the Covid-19 pandemic, compliance with Directive 2010/75/EC could not have been achieved before the expiry of the opt-out regime.

⁷³ Case C-330/14 *Szemerey*, paragraph 58; Case C-297/08 *Commission v Italy*, paragraph 85; Case 296/86 *McNicholl and Others*, paragraph 11.

⁷⁴ Case C-540/21 *Commission v Slovakia*, paragraph 81.

⁷⁵ See also Case C-540/21 *Commission v Slovakia*, paragraph 83.

⁷⁶ Case C-540/21 *Commission v Slovakia*, paragraph 81.

⁷⁷ On 1 January 2020, TPP Pljevlja had 6,191 at its disposal from the operational hours available for opt-out. The plant was in operation for 7,194 operational hours in the 2020 reporting year, representing a monthly average of 599.5 hours. Therefore, by the end of May 2020, the plant already consumed approximately a further 3,000 operational hours, leaving it with not more than slightly above 3,000 hours for the entire remaining period under the opt-out regime until 31 December 2023.

- (105) This refutes the Ministry's assertion that compliance would have been achieved by 2020-2021 if only the outbreak of the Covid-19 pandemic would not have interrupted the rehabilitation works. In the reply to the Reasoned Opinion, the Ministry claims that in order to achieve compliance with the emission standards of Directive 2010/75/EU, only the first stage of works (namely the actual refurbishment works, to be completed within twenty-one months from site possession) were necessary.⁷⁸ While the Secretariat concurs with that assessment,⁷⁹ it also notes that the Refurbishment Agreement also sets a five months deadline after its entry into force for the development of the detailed design.⁸⁰ This was a precondition for the Contractor's site possession. As a consequence, the refurbishment works would have been completed in a no-Covid-19 scenario at the earliest within twenty-six months in total following the effective date of the contract, and not, as the Ministry claims,⁸¹ by 2020-2021. The delay in the implementation of the refurbishment works and hence the breach of Article 4(4) of Directive 2010/75/EU would have occurred in either scenario. The situation which the Ministry attributes to *force majeure*, namely the failure to achieve compliance with the Large Combustion Plants Directive, was already well-known at the time of the outbreak of the Covid-19 pandemic and the signature of the Refurbishment Agreement. It was obvious that, should the operation TPP Pljevlja continue in the same or even in a slightly reduced manner as it did in the 2018 and 2019 reporting years, the plant would reach the end of the opt-out period before the end of 2020, which the Secretariat repeatedly recalled in its Implementation Reports and meetings with the Montenegrin authorities. In the end, the breach has materialised as predicted. Invoking *force majeure* under such circumstances establishes a hypothetical causality which is not supported by facts, and does not satisfy the test established by the Court of Justice of the European Union.
- (106) With regard to the third criteria to be complied with according to the test established by the Court of Justice of the European Union in cases of Member States invoking *force majeure*, namely that the consequences of the breach of European law could not have been avoided despite the exercise of all due diligence, the Ministry asserts that it indeed has exercised all due diligence to avoid the consequences of the breach.⁸²
- (107) Based on the facts and circumstances established during the preliminary procedure, the Secretariat respectfully disagrees with that assertion.
- (108) At the outset, the Secretariat recalls that Court of Justice's yardstick for proving the exercise of due diligence on the side of the operator and the State authorities in charge of ensuring compliance with European law is strict. Even for non-performance in the so-called Campania waste crisis, where the opening of landfills was impeded by protests of local inhabitants which even triggered an intervention by the armed forces, the Court concluded that "*a diligent authority should have taken the necessary precautions either to guard against the contractual non-performance in question in the region of Campania or to ensure that, despite those shortcomings, actual construction of the infrastructures necessary for waste disposal in the region would be completed on time.*"⁸³
- (109) In a recent judgment related specifically to the notion of *force majeure* in the context of the Covid-19 pandemic, the Court of Justice of the European Union made it clear that the outbreak of the Covid-19 pandemic cannot be used as a general relief from obligations stemming from

⁷⁸ Paragraph 100.1 of the reply to the Reasoned Opinion.

⁷⁹ Paragraph 96 of the Reasoned Opinion.

⁸⁰ First point of Article 7 of the Refurbishment Agreement.

⁸¹ Paragraph 100 of the reply to the Reasoned Opinion.

⁸² Paragraphs 142-148 of the reply to the Reasoned Opinion.

⁸³ Case C-297/08 *Commission v Italy*, paragraph 86, referred to in paragraphs 59-60 and 120 of the reply to the Reasoned Opinion.

the *acquis communautaire*⁸⁴ and that Contracting Parties have to address such a situation with measures that avoid the infringement of European law.⁸⁵

- (110) In this respect, the Secretariat recalls that the obligation to respect the opt-out regime for TPP Pljevlja in line with Article 4(4) of Directive 2001/80/EC was well-known both to EPCG⁸⁶ and the Ministry. The fact that TPP Pljevlja will have at its disposal not more than 20,000 operational hours after 1 January 2018 was well-known several years ahead of the occurrence of the breach. Directive 2001/80/EC entered into force in the Energy Community with the entry into force of the Treaty, that is on 1 July 2006. Since then, the Ministerial Council adopted Decision 2013/05/MC-EnC on 24 October 2013, *i.e.* more than four years ahead of the general implementation deadline under Directive 2001/80/EC, and more than six years prior to the outbreak of the Covid-19 pandemic. The aim of this Decision was precisely to provide, well in advance, legal certainty for Contracting Parties and operators who wanted to use the flexibility instruments of Directive 2001/80/EC, and to accommodate the need for planning, design and implementation of projects such as the one covered by the Refurbishment Agreement. Among others, the Decision amended Article 4(4) of Directive 2001/80/EC and clarified that operators wanting to make use of the limited lifetime derogation provided by Article 4(4) of Directive 2001/80/EC had to submit a written declaration to their competent authority (in the case of Montenegro, the Ministry of Economy, the predecessor of the Ministry) by 31 December 2015, *i.e.* two years ahead of the general implementation deadline and almost four years prior to the outbreak of the Covid-19 pandemic. Subject to the submission of this written declaration and the approval of the Ministerial Council, which happened in the form of its Decision 2016/19/MC-EnC that included TPP Pljevlja on the list of plants allowed for opt-out, large combustion plants in the Contracting Parties could have benefitted from this derogation.
- (111) In its reply to the Reasoned Opinion, the Ministry maintains that it had started preparatory work for compliance with Directive 2001/80/EC “as early as 2017”.⁸⁷ Taking into account the timeframes applicable to large-scale projects such as the refurbishment of a coal-fired power plant in line with Directive 2010/75/EC based on general industrial practice, the Refurbishment Project should have indeed started much earlier than with the signature of the Project Agreement in 2020 to ensure its accomplishment by the time the opt-out hours for Pljevlja would expire. The Ministry’s conclusion that “*action taken by Montenegro before the Covid-19 outbreak was materially compliant and highly likely to meet the target dates in accordance with the opt-out regime*”⁸⁸ is not comprehensible. In managing the time period between 2013 and the outbreak of the Covid-19 pandemic in 2020, the plant operator EPCG and the Ministry, as the State authority responsible for the implementation of the obligations stemming from the Treaty in Montenegro, did not exercise due diligence in avoiding non-compliance in line with the deadlines stemming from European law. Instead, the contractual relations with an external Contractor were timed and designed in a manner which, even without the outbreak of the pandemic, would have frustrated the achievement of the goals prescribed by Directive 2001/80/EC,
- (112) Even if it may not have been possible to design, conclude and implement a Refurbishment Agreement within this time period, other measures would have been available to EPCG.⁸⁹ As

⁸⁴ Case C-540/21 *Commission v Slovakia*, paragraphs 80-89.

⁸⁵ Case C-540/21 *Commission v Slovakia*, paragraphs 85 and 88.

⁸⁶ EPCG’s own publication on TPP Pljevlja (<https://www.epcg.com/en/media-centar/publications>, p. 20) states that “[a]s for the strategic plans referring to the possible extension of thermal complex of TPP Pljevlja with a new Unit (TPP Pljevlja Unit II Project), the Request for exemption mechanism was approved to EPCG at the end of 2016, according to the Decision of Ministerial Council of Energy Community D/2013/05/MC-EnC on implementation of the Directive 2001/80/EU about high furnaces (LPC). According to that Decision, TPP Unit I may operate 20 000 hours in the period 2018–2024 (whereby emissions would be reduced by approximately 50%). Afterwards it may operate only in case the plant meets requirements stated in IED 2010/75/EC.”

⁸⁷ Paragraph 100.2 of the reply to the Reasoned Opinion.

⁸⁸ Paragraph 76 of the reply to the Opening Letter, paragraph 92 of the reply to the Reasoned Opinion.

⁸⁹ Paragraph 81 of the Reasoned Opinion.

acknowledged by the Ministry in its reply to the Reasoned Opinion,⁹⁰ Article 4(4) of Directive 2001/80/EC leaves the exact manner of compliance following the expiry of the 20,000 operational hours to the discretion of Contracting Parties and the operator, who may decide, within their own managerial responsibility, on the exact allocation of those hours between 1 January 2018 and 31 December 2023.

- (113) It follows from the above that it was clear to the responsible Montenegrin authorities and to EPCG that the plant cannot remain in operation for more than 20,000 operational hours up until 31 December 2023, and that in the case the plant is run at or close to full load, the end of the opt-out period can arrive as early as 2020. Since one (regular) year consists of 8,760 hours, by simple mathematical calculation it was easily foreseeable that in case a plant is run at or close to full load, it would reach the end of the 20,000 hours period in less than three years, instead of the maximum six-years period available between 1 January 2018 and 31 December 2023 according to Article 4(4) of Directive 2001/80/EC. In fact, the Secretariat consistently and repeatedly warned Montenegro in its 2019⁹¹ and 2020⁹² Implementation Reports that based on its current usage ratio, TPP Pljevlja would reach the end of its limited lifetime derogation by end 2020. In the 2020 Implementation Report, the Secretariat also expressed its concerns that Montenegro will not respect the opt-out provisions once the limit of 20,000 operational hours is reached and the plant will not cease its operations afterwards.⁹³
- (114) A diligent management of the remaining lifetime of TPP Pljevlja would have included the reduction of the operational hours of the plant from 1 January 2018 onwards. This was evidently not considered among the scenarios available to EPCG, as clearly shown by the number of operational hours presented in paragraph 14 above. In fact, TPP Pljevlja since 2018 displayed one of the highest utilization ratios of large combustion plants even in a regional comparison. By contrast, the exercise of due diligence with the aim of ensuring compliance with Energy Community law would have suggested that the 20,000 operational hours limit is managed in a manner that ensures that the opt-out timeframe is not depleted too early, irrespective of subsequent *force majeure* events. A diligent management of the remaining operational hours would have also corresponded to the intent of the legislator of Directive 2001/80/EC, namely to phase non-compliant large combustion plants out according to a fixed timeframe or date as a last resort by rationalizing the use of their operational hours,⁹⁴ and not to run the plant close to full load ever since the start of implementation of Directive 2001/80/EC, *i.e.* from 1 January 2018,
- (115) Furthermore, as is also clearly visible from its operational data, a reduction of the operation of TPP Pljevlja that could have stretched the remaining operational hours over the remaining four years of application of the opt-out mechanism up until 31 December 2023 was not considered even *after* the outbreak of the Covid-19 pandemic. Quite the contrary, the plant was kept in operation close to full load, according to a business-as-usual scenario. By the end of 2019, the plant had consumed 13,809 operational hours, thereby leaving well above 6,000 operational hours⁹⁵ that could have been used up until 31 December 2023 in a compliant manner with Article 4(4) of Directive 2001/80/EC.⁹⁶ EPCG would have been in a position to spread the remaining 30% of available operational hours over the remaining timespan from early 2020 up until the end of 2023, and partially purchase replacement volumes through imports to cover a reduced operation of TPP Pljevlja, and thus ensure compliance with Article 4(4) of Directive 2001/80/EC. In this respect, the Secretariat recalls that a Contracting Party cannot rely on an actual or

⁹⁰ Paragraph 101 of the reply to the Reasoned Opinion.

⁹¹ Annual Implementation Report of the Energy Community Secretariat, 1 November 2019, p. 124.

⁹² Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, p. 134.

⁹³ Annual Implementation Report of the Energy Community Secretariat, 1 November 2020, p. 133.

⁹⁴ Opinion of the Commission on the European Parliament's amendments in the second reading, COM/2001/0222 final, point 3.1.

⁹⁶ Paragraph 89.7 of the Reply to the Opening Letter and paragraph 122 of the Reply to the Reasoned Opinion; Appendix 5 of the Reply to the Opening Letter and Appendix 2.2 of the Reply to the Reasoned Opinion.

alleged instance of *force majeure* to justify its continuing failure to comply with their obligations years later.⁹⁷

- (116) In its replies, the Ministry further maintains that *EPCG* triggered all mechanisms available under the Refurbishment Agreement to perform the works necessary to comply with Directive 2010/75/EU as soon as practicably possible.⁹⁸ While it acknowledges that internal situations cannot be considered as *force majeure* to justify a breach of European law,⁹⁹ it considers – in the reply to the Opening Letter – that the Covid-19 pandemic was of such an extraordinary nature that different standards should apply. With regard to this argument, the Secretariat considers it sufficient to recall the recent judgment by the Court of Justice of the European Union in the *Commission v Slovakia* case, where the Court clearly maintained its well-established approach to the consideration of *force majeure* events.¹⁰⁰ Moreover, the breach of Article 4(4) of Directive 2001/80/EC was easily foreseeable well before the outbreak of the pandemic, and the fact that measures with the aim of mitigating its consequences were not taken on time rules out the exercise of due diligence. Furthermore, as the Refurbishment Agreement was concluded several months *after* the outbreak of the Covid-19 pandemic and the first restriction measures imposed globally, it is incorrect to claim that its effects were unforeseeable at the time of its signature.
- (117) The Secretariat thus respectfully submits that Montenegro and the operator of TPP Pljevlja have not exercised all due diligence to avoid or mitigate the breach of Directive 2001/80/EC, as required by the case-law of the Court of Justice.

iv. *The relevance of the National Energy and Climate Plan*

- (118) In its reply to the Reasoned Opinion also refers to the ongoing drafting of the National Energy and Climate Plan of Montenegro¹⁰¹ whereby concerns related to emissions abatement from TPP Pljevlja are said to be addressed. It suffices to recall in this respect that this Plan, which is still in a draft stage and the submission date of which to the Secretariat is not yet communicated, has a different subject matter and legal relevance. It is a strategic document with a focus on the mitigation of greenhouse gas emissions, which are explicitly excluded from the scope of both Directive 2001/80/EC¹⁰² and Directive 2010/75/EU.¹⁰³ More importantly, even if adopted, this strategic document cannot rectify breaches of the *acquis communautaire* on environment, let alone those which already occurred long before its adoption.

V. Conclusion

- (119) Based on the above, the Secretariat respectfully submits that following the expiry of the opt-out period in the course of the 2020 reporting year, TPP Pljevlja has neither been put out of operation or continued its operation at emission limits applicable to a new plant under Directive 2010/75/EU. This constitutes a breach of Article 4(4) of Directive 2001/80/EC, which cannot be justified by the arguments put forward by the Ministry.

⁹⁷ Case C-101/84 *Commission v Italy*, paragraph 16.

⁹⁸ Paragraph 89.4 of the Reply to the Opening Letter, paragraphs 30 and 144.4 of the Reply to the Reasoned Opinion.

⁹⁹ Case C-45/91 *Commission v Greece*, paragraphs 20-21 and Case C-121/07 *Commission v France*, paragraph 72 as quoted by paragraph 86 of the Reply to the Opening Letter.

¹⁰⁰ Case C-540/21 *Commission v Slovakia*, paragraphs 80-89.

¹⁰¹ Paragraphs 148-151 of the reply to the Reasoned Opinion.

¹⁰² Articles 4(1) and 4(2), read in conjunction with Annexes III to VII of Directive 2001/80/EC.

¹⁰³ Article 9 of Directive 2010/75/EU.

ON THESE GROUNDS

The Secretariat of the Energy Community respectfully requests that the Ministerial Council of the Energy Community declare in accordance with Article 91(1)(a) of the Treaty establishing the Energy Community 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.

On behalf of the Secretariat of the Energy Community,

Vienna, 13 July 2023

A handwritten signature in blue ink, reading "Artur Lorkowski".

Artur Lorkowski
Director

A handwritten signature in blue ink, reading "Dirk Buschle".

Dirk Buschle
Deputy Director / Legal Counsel

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