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ARTICLE

Experiences of the Energy Community dispute settlement procedure in the field of environment

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Abstract
Dispute settlement is a key tool to ensure the application of Energy Community legislation, also in the field of the environment. Through several dispute settlement procedures, different experiences have been gained from this field, with diverging results and outcomes. In the present paper, we present a brief overview of the procedure, along with a selection of cases from the past years, with related experiences and certain proposals.

Keywords Energy Community · Dispute settlement · Infringement · Environmental law · Environmental impact assessment · Air pollution · Industrial emissions

1 Introduction

The alignment of the legislative frameworks of the Energy Community Contracting Parties with the environmental *acquis* of the Treaty Establishing the Energy Com-

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munity (hereinafter: "the Treaty") remains a fundamental prerequisite for advancing environmental protection – one of the Treaty's core objectives.[1]

In order to uphold this legal regime, a procedure similar to the EU's infringement scheme was established by the Treaty, albeit with significant differences. Under the Energy Community dispute settlement rules, a Party to the Treaty, the Regulatory Board and/or the Secretariat – upon complaint or on its own motion – may bring a case of non-compliance by a Party with Energy Community law to the attention of the Ministerial Council. A case is opened with the sending of an Opening Letter and is closed when a Party complies with its obligations under the Energy Community Treaty at any time after the dispute settlement procedure has been initiated. A Reasoned Opinion is the second step of dispute settlement, whereby the Party is requested to rectify the identified issues of non-compliance within a time-limit of two months. In light of the reply, the Secretariat may submit the case to the Ministerial Council for a decision on the Party's compliance with Energy Community law. In the Reasoned Request addressed to the Ministerial Council, the Secretariat seeks its decision on the Party's failure to comply with its obligation stemming from the Energy Community Treaty. Before taking a decision, the Advisory Committee[2] is asked for its opinion on the Secretariat's Reasoned Request. Before giving its opinion, the Advisory Committee conducts a public hearing and at the meeting following the adoption of the Advisory Committee's opinion, the Permanent High Level Group shall hear both parties to the case as well as the President of the Advisory Committee before including the case on the agenda of the next meeting of the Ministerial Council.[3]

A case under Article 91 of the Treaty[4] is closed with or without compliance with the adoption by a Decision of the Ministerial Council, or by closure of the case upon compliance prior to referring it to the Ministerial Council. In case the breach identified by the Ministerial Council has not been rectified by the party to the case, or in other cases of a serious and persistent breach of Energy Community law, a Party, the Secretariat or the Regulatory Board may request a decision of the Ministerial Council under Article 92 of the Treaty.

In the present paper, we present a brief selection of dispute settlement experiences from the environmental domain in an Energy Community context.

[1] According to point (d) of Article 2(1) of the Treaty, "[*t*]*he 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:* (...) *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*.".

[2] https://www.energy-community.org/aboutus/institutions/advisorycommittee.html.

[3] https://www.energy-community.org/legal/cases/dispute.html.

[4] Title VII of the Treaty ("Implementation of decisions and dispute settlement") sets the general framework, while the detailed rules are defined by the Dispute Settlement Procedures (Procedural Act 2008/01/MC-EnC on Rules of Procedure for dispute settlement under Treaty as amended by Procedural Act 2015/04/MC-EnC of 16.10.2015 on amending Procedural Act 2008/01/MC-EnC of 27.6.2008 on Rules of Procedure for dispute settlement under the Treaty).

2 Environmental impact assessment

2.1 Introduction

A cornerstone of the Treaty's environmental objective is the Environmental Impact Assessment (EIA) Directive,[5] which has been part of the Energy Community's environmental legislation since the Treaty's inception in 2005. The first EIA Directive has been amended three times, resulting in its codification as Directive 2011/92/EU.[6] This consolidated EIA Directive was further amended by Directive 2014/52/EU in 2014.[7] Under the Energy Community framework, the codified Directive 2011/92/EU was incorporated into the *acquis* on environment in 2016 with a transposition deadline of 1 January 2019 for the amendments introduced by Directive 2014/52/EU.[8]

Article 2(1) of the EIA Directive lays down its fundamental principle: projects likely to have significant effects on the environment, by virtue of their nature, size, or location, must be made subject to an environmental impact assessment *before* development consent is granted.[9] This provision establishes the EIA Directive's core preventive objective to ensure that environmental considerations are identified and integrated at the earliest possible stage of the decision-making process. Directive 2014/52/EU strengthened Article 2 by clarifying that the obligation to carry out an environmental impact assessment applies specifically before development consent is granted. It reinforced the duty of Contracting Parties to take all necessary measures to ensure that projects likely to have significant environmental effects are assessed in advance of any legally binding approval. This is not only essential for preventing environmental harm, but also for securing the public's right to meaningful participation in decisions affecting their environment.

While the principle appears unambiguous, the legal significance of development consent within the EIA framework is paramount, as the obligation mandates that the environmental assessment take place before development consent is granted. The EIA Directive recognises development consent in the singular as the formal decision by the competent authority or authorities authorising the developer to proceed with the project.[10] In practice, however, national legal systems exhibit considerable

[5] Council Directive 85/337/EEC of 27.6.1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985.

[6] Directive 2011/92/EU of the European Parliament and of the Council of 13.12.2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012.

[7] Directive 2014/52/EU of the European Parliament and of the Council of 16.4.2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124, 25.4.2014.

[8] Ministerial Council Decision 2016/12/MC-EnC adapting and implementing Directive 2011/92/EU of the European Parliament and of the Council, and amending the Treaty establishing the Energy Community.

[9] According to Article 2(1) of Directive 2014/52/EU (as amended) *"Contracting Parties shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4*."

[10] According to point (c) of Article 1(2) of Directive 2011/92/EU "'*development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project*".

variation in the definition and procedural requirements for granting development consent, often involving multiple stages or levels of approval. Consequently, a detailed, country-specific examination is necessary to determine whether this obligation has been accurately transposed and effectively implemented in each legal system.

In 2020, the Energy Community Secretariat received two complaints – one concerning a waste-to-energy facility and the other involving several small hydropower projects – raising substantive questions regarding Serbia's transposition and implementation of the EIA Directive.[11] At the core of these complaints was the issue of whether Serbia's legislative framework allows the issuance of construction permits – a critical component of development consent – prior to the completion of the EIA approval process, thereby potentially compromising the Directive's fundamental preventive objective.

This section of the article presents the key legal considerations and analysis conducted within the Energy Community's dispute settlement mechanism, offering a comprehensive examination of Serbia's domestic legislative framework in light of relevant EU law and jurisprudence on development consent. The section concludes by reflecting on the Secretariat's actions and available options regarding infringement proceedings, while also drawing broader lessons for enhancing environmental governance within the Energy Community framework.

2.2 The principle of prior EIA and development consent

The EIA Directive requires that decision-makers possess a comprehensive understanding of a project's potential environmental impacts before granting the legal authorisation to construct or operate it. This sequencing requirement – principle of prior assessment – is the Directive's lynchpin: it transforms environmental information from an ex-post justification into an ex-ante filter capable of shaping, conditioning, or even halting a proposal at its formative stage.[12]

To give legal effect to that principle, the Directive obliges competent authorities to withhold development consent until the EIA process has run its full course, and its conclusions can be embedded in the consent decision. Development consent is defined in point (c) of Article 1(2) as the decision that *"entitles the developer to proceed with the project"*, and the EIA Directive pointedly uses the term in the singular, signalling the expectation that there will be a single, identifiable authorisation that crosses the legal threshold from planning to execution.

The incorporation of this principle has proven complex as national legal frameworks often provide for multi-tiered approval systems, involving sequential authorisations such as urban planning permits, location permits, construction approvals, and

[11] Energy Community case register: Case ECS-06/20 and Case ECS-07/20.

[12] The term "principle of prior assessment" is not explicitly used in the EIA Directive. However, the Directive's core requirement—that projects likely to have significant effects on the environment must undergo an environmental impact assessment *before* development consent is granted, embodies this principle. The sequencing requirement reflects the essence of the "principle of prior assessment," which derives from two overarching principles underpinned in the EIA Directive, the precautionary principle and on the principles that preventive action reflected in recital 2 of the Directive 2011/92/EU.

operational licences.[13] In such systems, it may be unclear which stage constitutes the definitive "development consent" under the meaning of the Directive.

Importantly, the Directive refers to development consent in the singular, underscoring the requirement for a clear, identifiable decision that entitles the developer to carry out the project. This decision must be preceded by an EIA and reflect the findings of that assessment. The risk in fragmented systems is that earlier permits may effectively allow project implementation—directly or indirectly—before the environmental impacts are fully considered.[14]

In this context, the Court of Justice in European Union (CJEU) has played a critical role in interpreting the concept to maintain the effectiveness of the Directive. The CJEU has consistently emphasised that the environmental assessment must meaningfully inform the competent authority's decision, guarding against situations in which the EIA becomes a mere procedural formality carried out after the consent decision has already been made.[15] Likewise, in *Barker*,[16] the Court reaffirmed that the environmental assessment must be integrated into the decision-making process to ensure that environmental impacts are genuinely considered in the development consent.

Furthermore, the Court has adopted a functional rather than formal approach when interpreting the notion of "development consent." In *Wells*,[17] the CJEU held that even where a permit is not classified as final under domestic law, it may still constitute development consent under the Directive if it effectively authorises the developer to begin implementing the project.

The principle was further reinforced by the introduction of Article 8a through amending Directive 2014/52/EU, which clarified the content and procedural requirements of the development consent. Article 8a requires that the decision granting development consent must incorporate reasoned conclusions on the significant effects of the project on the environment, as well as conditions for monitoring and mitigation, where appropriate. This addition aims to ensure not only that the EIA informs the consent, but that its conclusions are explicitly reflected in the final authorisation, thereby enhancing transparency, accountability, and environmental protection.

2.3 Legal assessment of the Serbian legislative framework on EIA and construction permit

The complaints submitted in 2020 require a close examination of the Serbian rules governing EIA and the granting of construction permits. Three legal instruments are particularly relevant: Law on Environmental Impact Assessment (Serbian EIA Law); Law on Planning and Construction; and the Rulebook on the Electronic Conduct of

[13]Comparison of building permit procedures in EU, João Branco Pedro, Frits Meijer and Henk Visscher, RICS International Research Conference Construction and Property, Salford (UK), September 12-13, [2011], pg. 208.

[14]Permit-Granting and Planning of Energy Projects in the Energy Community: Overview, Recommendations and Best Practices, EIHP, [2024].

[15]See CJEU Case C-72/95 *Kraaijeveld*, EU:C:1996:404, p. xxx; Case C-295/10 *Valčiukienė and Others*, EU:C:2011:608, p. xxx.

[16]Case C-290/03 *Barker*, EU:C:2006:536, p. xxx.

[17]Case C-201/02 *Wells*, EU:C:2004:12, p. xxx.

the Unified Procedure.[18] Based on national legislation, the development consent in Serbia is structured as a two-stage process:

- Construction permit – determines the project's location, design, and technical specifications, thereby establishing its substantive characteristics;
- Notification of works commencement (notification) – a formal act that verifies compliance with administrative requirements, including the submission of the EIA approval, and authorises the start of construction.

This legal sequencing raises concerns about compliance with the EIA Directive, which requires that environmental impacts be assessed before any development consent is granted, that is, before any decision that confers the right to proceed with the project. Upon analysing the content of the two documents and the legal effects they produce, it becomes evident that, from a legal standpoint, the construction permit constitutes the decisive act that establishes the project's essential parameters, while the notification of works commencement functions primarily as a procedural formality.[19] Furthermore, the competent authority is under no legal requirement to revisit the construction permit or conduct compliance check in light of the EIA or the outcomes of the public consultation, issuing the EIA decision after the construction permit effectively deprives the assessment of any meaningful impact on development consent.[20]

2.4 Development consent in CJEU case-law

The CJEU has long held that "*development consent*" is an autonomous concept. Although each Member State – and, by analogy, each Energy Community Contracting Party – determines the form of its authorising acts, those acts must be classified for the purposes of the EIA Directive in a manner that secures the Directive's objectives.[21] Three key strands of guidance can be derived from the CJEU's jurisprudence on the EIA Directive, providing guiding criteria for evaluating whether national consent procedures comply with Articles 2 and 8a.

[18] Law on Environmental Impact Assessment (Official Gazette RS Nos 135/04, 36/09); Law on Planning and Construction (Official Gazette RS Nos 72/2009–105, 81/2009–76, 64/2010–66, 24/2011–3, 121/2012–14, 42/2013–37, 50/2013–23, 98/2013–258, 132/2014–3, 145/2014–72, 83/2018–18, 31/2019–9, 37/2019–3, 9/2020–3); and the Rulebook on the Electronic Conduct of the Unified Procedure (editions of 2015 and 2019).

[19] The notification is a consecutive next step in the construction practice – only the developer that holds a valid construction permit can submit a notification on works commencement (the construction permit is valid 3 years from the date of issuing). According to Article 30 of the Rulebook on the Process of Electronic Conduct of the Unified Procedure, the following documents are to be submitted along with the notification of works including the EIA Consent. According to Article 31 of the Rulebook on the Process of Electronic Conduct of the Unified Procedure the competent authority only verifies (performs a formal check) of the notification and the accompanying documentation based on Part I cited above.

[20] At the stage of notification on works commencement, the project design and the project itself is no longer a matter of debate or reconsideration. Therefore, the competent authority has no possibility to assess the alignment of the project with the EIA report (or the Reasoned conclusion) or impose conditions or request revisions of the issued construction permit. The competent authority simply concludes that the developer holds (or does not) the relevant documents, including the approval of the EIA study – but cannot request any further action from the developer on the basis of its conclusions.

[21] Case C-290/03 *Barker* p. xxx; C-201/02 *Wells*, para 37.

2.4.1 Integrated or multi-stage consents are permissible

The CJEU has recognised that "development consent" may be a complex concept, not necessarily a single act but a set of administrative acts forming an integrated consent.[22] In *Wells*, the CJEU also held that development consent may consist of "*a set of administrative acts forming an integrated consent*," provided that the environmental assessment "*covers all the effects which the project may have on the environment before the final decision authorising implementation is taken*." The same approach was reiterated in *Barker*; *Commission v United Kingdom*[23] and *Commission v Spain*,[24] confirming that national legal systems may operate multi-stage consent procedures only if the environmental impact assessment is completed before the final authorisation is granted.

2.4.2 The assessment must inform a decision that can still be influenced

In *Kraaijeveld*[25] and *Valčiukienė*,[26] the CJEU stressed that the EIA cannot become a *post-hoc* formality. A consent procedure that allows the EIA to follow a binding act fixing the project's key parameters contravenes the Directive, as the competent authority would no longer be able to refuse or materially condition the project in light of the environmental information.

2.4.3 Effectiveness and legal certainty

The CJEU has interpreted the EIA Directive in light of general principles of EU law, including the requirement of effectiveness and the need for legal certainty. In *Kovács*,[27] the CJEU held that a Hungarian permitting scheme allowing for the issuance of a permit pre-determining the project's essential characteristics prior to the completion of the EIA undermined the Directive's preventive objectives by creating a *fait accompli*. The judgment emphasised that transposition must ensure the Directive's objectives are not circumvented in practice. In parallel, the CJEU has also underlined the importance of legal certainty, requiring a clearly defined point in the procedure at which the developer acquires a legally enforceable right to proceed.[28]

2.4.4 Comparative models

Comparative jurisprudence shows two compliant patterns:

- Separate-consent model (e.g. Croatia): the EIA consent is adopted first and its conditions are incorporated into the subsequent construction permit;[29] and

[22] Case C-201/02 *Wells*, p. 52.

[23] Case C-508/03 Commission v United Kingdom, EU:C:2006:643, p. xxx.

[24] Case C-560/08 Commission v Spain, EU:C:2010:340, p. xxx.

[25] Case C-72/95 Kraaijeveld, EU:C:1996:404, p. xxx.

[26] Case C-295/10 Valčiukienė, EU:C:2011:608, p. xxx.

[27] Case C-260/11 Kovács, EU:C:2012:678, p. xxx.

[28] Case C-50/09 *Commission v Ireland*, EU:C:2011:109, p. xxx.

[29] Commission v Croatia, EU-Pilot 2018/003.

- Integrated-consent model (e.g. Slovenia): the EIA is conducted in parallel and its reasoned conclusion forms an integral part of a single construction permit.[30]

In both configurations, a construction permit is never issued unless the EIA has already been completed.

2.5 Implications for Serbia – infringement proceedings remain a powerful tool to enforce compliance, especially where legislative gaps threaten environmental protection

Serbia's two-stage scheme, construction permit followed by a notification, diverges from the above principles. The construction permit, once issued, definitively establishes the project's location, design and technical parameters; the subsequent notification merely verifies documentation. Allowing the EIA decision to be issued between these two stages therefore fails the *Wells* test: environmental effects are not assessed "at the time of the principal decision." The omission also infringes Article 8a of the EIA Directive, which requires the reasoned conclusion and mitigation conditions to be integrated into the development consent itself.

Although the Serbian EIA Law was intended to transpose Article 2(1) of the EIA Directive, the transposition remained legally deficient as it allows a construction permit to be issued before the EIA procedure is concluded, on the condition that the EIA decision is obtained and submitted before the notification. This undermines the Directive's core preventive objective: to ensure that environmental considerations are fully and effectively integrated into the decision-making process before any legally binding development right is conferred.

The legal assessment revealed a systemic deficiency in the national legal framework, which allowed construction permits to be issued in the absence of a completed EIA. The legal analysis also demonstrated that while certain elements of Art. 8a of the EIA Directive were transposed, its core provision was omitted, resulting in a lack of transposition. For these reasons, the Secretariat rightly concluded that Serbia's transposition is deficient and initiated Case ECS-23/21.[31] The case concluded with a Decision of the Ministerial Council, confirming that Serbia had failed to fully transpose the EIA Directive into its national legislation. The Ministerial Council, by its Decision 2021/21/MC-EnC, confirmed the breach and required Serbia to remedy it within a defined timeframe, warning that continued non-compliance could trigger measures under Article 92 of the Energy Community Treaty.

Based on the decision, the Secretariat worked with the Serbian authorities to map the legislative gaps and draft corrective amendments to the relevant legislation. The resulting reforms adopted in 2023 concerning the construction permitting process and in 2024 regarding the EIA procedure, now exclude the issuance of a construction permit prior to EIA and mandate that the EIA reasoned conclusion be incorporated in, and legally binding through, the construction permit itself.[32]

[30] Case C-399/14 *Grüne Liga Sachsen e.V.*, EU:C:2016:10, p. 52.

[31] Annual Implementation Report, Energy Community Secretariat [2021].

[32] Law on Environmental Impact Assessment, Official Gazette of the Republic of Serbia, No. 94/2024, and amendments to the Law on Planning and Construction, Official Gazette of the Republic of Serbia, No. 62/2023.

2.6 Conclusion

This Energy Community case law illustrates a complex intersection between national permitting procedures and the requirements of EU environmental law, particularly the EIA Directive. Serbia's former two-stage model, which allowed construction permits to be issued prior to the completion of environmental assessment, raised serious concerns regarding compliance with the Directive's foundational principle: that environmental impacts must be assessed before any development right is conferred.

The Secretariat's legal assessment had to grapple with the specific nature of development consent under Serbian law, the binding character of the construction permit, and the practical consequences for environmental protection and public participation. In doing so, it became clear that the issue extended beyond a single project. What began as a case-specific compliance review ultimately revealed a wider systemic flaw in the national framework governing environmental assessment and permitting.

This discovery triggered the launch of formal infringement proceedings, which culminated in a Ministerial Council Decision confirming Serbia's failure to transpose the Directive in full. Crucially, the decision established a legally binding timeline for reform and mobilised the Serbian authorities to act. Through close cooperation with the Secretariat, targeted legislative amendments were adopted in 2023 and 2024, bringing Serbia's permitting regime into substantial alignment with the EIA Directive and relevant CJEU jurisprudence.[33]

This evolution underscores the effectiveness of infringement proceedings as a systemic enforcement tool. The case powerfully demonstrates the broader value of infringement proceedings as a tool not only to enforce compliance in individual cases, but also to expose and correct structural deficiencies. It also highlights the Secretariat's dual role as both legal enforcer and technical partner—capable of guiding Contracting Parties from breach to compliance and ultimately strengthening the rule of environmental law across the Energy Community.

3 Emissions into the air from large combustion plants

3.1 Introduction

The Large Combustion Plants Directive[34] 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 that are significant contributors to emissions into the air. Air pollution is a major health and environmental risk in the Western Balkans Contracting Parties in particular, with an estimated several thousand premature deaths per year due to excess air pollution from combustion plants.[35]

[33] https://www.energy-community.org/news/Energy-Community-News/2025/01/03a.html.

[34] Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants; OJ L 309, 27.11.2001, p. 1.; hereinafter: "the LCPD".

[35] CEE Bankwatch Network and Centre for Research on Energy and Clean Air (CREA), Comply or Close, CEE Bankwatch Network, September 2021.

In the European Union, the LCPD was repealed by the Industrial Emissions Directive[36] in 2016. This Directive was incorporated into the Energy Community *acquis communautaire* on environment via two decisions of the Ministerial Council: one in 2013 with a deadline of 1 January 2018 for new plants,[37] and one in 2016 with a deadline of 1 January 2028 for existing plants.[38] For the years between 2018 and 2027, the Energy Community legislator decided for a "hybrid application" of the two directives, with their provisions working in parallel for existing combustion plants, as it will be illustrated in point b below.

3.2 National emission reduction plans

Decision 2013/05/MC-EnC amended Article 4(6) of the LCPD in the Energy Community, providing Contracting Parties the possibility to define and implement a national emission reduction plan (hereinafter: "NERP"). By choosing that implementation alternative, Contracting Parties may have established emission ceilings for one or more of the pollutants covered by the scope of the Directive for a conglomerate of existing[39] combustion plants. The NERP shall reduce the total annual emissions of the pollutants covered by Directive 2001/80/EC from existing plants to the levels that would have been achieved by applying the Directive's emission limit values for the plants in operation in the year 2012. Thereby, it provides flexibility for operators and regulators alike to coordinate the necessary investments into emissions abatement while ensuring compliance at the overall level of the NERP ceilings.

On 19 December 2014, the Secretariat published Policy Guidelines on the application of Article 4(6) of the LCPD in an Energy Community context (hereinafter: "Policy Guidelines").[40] The Policy Guidelines were developed on the basis of point d) of the fifth subparagraph of Article 4(6) of Directive 2001/80/EC, as adapted by Article 7 of Decision 2013/05/MC-EnC, whereby the Secretariat was requested to assist Contracting Parties opting for the development of a NERP. The Policy Guidelines provided such assistance for Contracting Parties intending to make use of the option to define and implement a NERP and set out the principles by which compliance with the NERPs will be verified by the Secretariat. In the Policy Guidelines, the Secretariat elaborated the calculation methods according to which the contributions

[36] Directive 2010/75/EU on industrial emissions, OJ L 334, 17.12.2010, p. 17 (hereinafter: "the IED").

[37] Decision 2013/06/MC-EnC of the Ministerial Council of the Energy Community of 24.10.2013 on the implementation of Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control) and amending Article 16 and Annex II of the Energy Community Treaty.

[38] Decision 2015/06/MC-EnC of the Ministerial Council of the Energy Community of 16.10.2015 on the implementation of Chapter III, Annex V, and Article 72(3)-(4) of Directive 2010/75/EU of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control) for existing combustion plants and amending Annex II of the Energy Community Treaty.

[39] In accordance with the definition provided by Article 2(10) of the LCPD as amended by Decision 2013/05/MC-EnC, "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 1.7.1992.

[40] Policy Guidelines 03/2014 by the Energy Community Secretariat on the Preparation of National Emission Reduction Plans.

of large combustions plants to the overall NERP ceilings for the three pollutants covered by the Directive's scope are to be calculated. These methods are based on the emission limit values of the LCPD for the implementation years 2018-2025, and of the IED for the implementation years 2026-2027.[41]

Starting in 2019,[42] Contracting Parties had to start with the reporting of their annual emission totals of sulphur dioxide, nitrogen oxides and dust from the plants falling under the scope of the LCPD/IED. The emission trends have, however, not changed significantly, and compliance could have only been ensured in the case of a few pollutants, while in most cases, non-compliance continued for years to come. The Energy Community Secretariat had reported on those in a series of its Implementation Reports[43] and in 2021, started dispute settlement procedures against four Contracting Parties.[44] Three of those cases were decided by the Ministerial Council in 2023, establishing the breach that by failing to achieve significant emission reductions with regard to the large combustion plants falling under the scope of their respective NERPs and by not applying effective, proportionate and dissuasive penalties for those breaches, Bosnia and Herzegovina,[45] Kosovo*[46] and North Macedonia[47] failed to comply with Articles 4(3), 4(6) and 16 of the LCPD read in conjunction with Articles 12 and 16 of the Energy Community Treaty. The case against Serbia[48] is still pending.

The situation on the ground remains constant: minor improvements, in particular related to dust emissions are happening, while at systemic level overall emissions remain well above the NERP ceilings. This is particularly the case for sulphur dioxide emissions, where non-compliance levels are very high, in some cases exceeding the ceilings several times.[49] The issue of nitrogen oxides is of the least concern, however, the rules for designing their NERPs required Contracting Parties to apply decreasing ceilings for the years 2023-2027 for that pollutant, hence compliance will be ever more challenging in the coming years. The issue of dust emissions is where some successes could have been recorded, albeit severe challenges remain apparent in Kosovo*, where reported emissions exceed the ceilings more than five times.[50]

[41] This is another example of the "hybrid application" of the LCPD and the IED in an Energy Community context.

[42] As reporting is always done for emission totals of the preceding year, it has started one year later than the generic implementation deadline for the LCPD. Contracting Parties have to submit their emission inventories by 31 March to the European Environment Agency for the year x-1.

[43] Annual Implementation Report, Energy Community Secretariat [2018], [2019], [2020], [2021].

[44] Cases ECS-7/21 *Secretarait v North Macedonia*, ECS-8/21 *Secretariat v Kosovo**, ECS-9/21 *Secretariat v Bosnia and Herzegovina* and ECS-10/21 *Secretariat v Serbia*.

[45] Decision 2023/04/MC-EnC on the failure by North Macedonia to comply with the Energy Community Treaty in Case ECS-7/21.

[46] Decision 2023/05/MC-EnC on the failure by Kosovo* to comply with the Energy Community Treaty in Case ECS-8/21.

[47] Decision 2023/06/MC-EnC on the failure by Bosnia and Herzegovina to comply with the Energy Community Treaty in Case ECS-9/21.

[48] Case ECS-10/21.

[49] Annual Implementation Report, Energy Community Secretariat [2024], pp. 38, 66, 108 and 122.

[50] Annual Implementation Report, Energy Community Secretariat [2024], pp.65-66.

3.3 Opt-out

Article 4(4) of the LCPD provided the operators of combustion plants to apply for limited lifetime derogation (also known as "opt-out"). According to that provision, as adapted for the Energy Community,[51] 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 opt-out could only remain in operation if their emissions were in line with the relevant limit values of the IED.

On 14 October 2016, the Ministerial Council adopted a decision[52] listing the plants that may be exempted from compliance with the emission limit values of the LCPD, thereby complementing the opt-out rules for the purposes of the Energy Community. After the implementation deadline kicking in on 1 January 2018, the Secretariat started observing the used and non-used operational hours of the plants concerned and published the results in its Annual Implementation Reports, including estimated expiry dates based on previously reported average usage ratios.[53]

The first plant in the region that reached the end of the 20,000 hours limit was TPP Pljevlja (Montenegro), which happened already in the 2020 reporting year due to the high usage of operational hours. Albeit a dispute settlement procedure was started by the Secretariat in 2021,[54] the plant has continued its operation. In the procedure, the Government of Montenegro offered justifications by dividing non-compliance into two time sections by claiming that for the period between February 2020 to January 2022, Covid-19-related triggering events rendered compliance with the opt-out 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. For both periods, the notion of *force majeure* and necessity, as well as fundamental threats to security of supply were used as underlying arguments.

The Advisory Committee held a public hearing of the case on 14 November 2023 and – after lengthy deliberations – delivered its Opinion on 25 November 2024, whereby it considered that unforeseeable circumstances or force majeure cannot be relied upon in circumstances in a case where a diligent and prudent Contracting Party would have been able to avoid the expiry of the period for implementation. According to the Advisory Committee, 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.[55]

[51] Adaptations made by Decision 2013/05/MC-EnC of 24.10.2013 on the implementation of Directive 2001/80/EC of the European Parliament and of the Council of 23.10.2001 on the limitation of emissions of certain pollutants into the air from large combustion plants.

[52] Decision 2016/19/MC-EnC on authorising exemptions of plants from compliance with the emission limit values set by Directive 2001/80/EC.

[53] Annual Implementation Report, Energy Community Secretariat [2019], [2020], [2021], [2022].

[54] Case ECS-15/21 *Secretariat v Montenegro*.

[55] Opinion of the Advisory Committee in Case ECS-15/21, p. 6.

Due to the late delivery of the Opinion of the Advisory Committee, however, the Ministerial Council could not adopt a decision on this case yet. Two other dispute settlement cases[56] of a similar subject matter are currently pending.

3.4 Conclusion

The experience with implementing industrial emissions legislation in the Energy Community is mixed – while Contracting Parties have transposed the legal framework into their national legislation correctly, implementation is lagging behind and the tools currently available, including the dispute settlement procedure, do not seem to be properly capable of addressing the ensuing breaches and of instigating changes that would ensure compliance.

4 Conclusions

The Energy Community dispute settlement procedure is a vital enforcement tool for upholding compliance with the *acquis communautaire* in all fields covered by the Treaty, including environment. Having said that, the procedure is bound by limitations that seriously undermine its efficiency, especially when not transposition-related issues are targeted, but the implementation of already transposed legislation and especially in cases where compliance requires serious investments and therefore comes with financial implications.

The recent developments in the enlargement pathway of the Western Balkans and the ongoing negotiations, however, put Contracting Parties on a clear track of EU accession, whereby their compliance with Energy Community law – including the *acquis communautaire* on environment – also became a milestone for Chap. 27 negotiations. It is therefore in the vital interest of Contracting Parties to ensure that compliance with their Treaty obligations is safeguarded.

Furthermore, the legislator both at EU and Energy Community level should consider the options for strengthening or formally linking the enforcement of Treaty obligations with the enlargement process.

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Declarations

Competing interests The authors declare no competing interests.

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[56] Cases ECS-1/22 *Secretariat v Bosnia and Herzegovina* and ECS-9/23 *Secretariat v Serbia*.

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