POLICY GUIDELINES

by the Energy Community Secretariat

on the definition of “new” and “existing” plant in the context of Decision 2013/06/MC-EnC of the Ministerial Council

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1. History

On 24 October 2013, the Ministerial Council of the Energy Community adopted its Decision D/2013/06/MC-EnC 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 November 2010 on industrial emissions (integrated pollution prevention and control) and amending Article 16 and Annex II of the Energy Community Treaty.

The Energy Community Secretariat (hereinafter: "the Secretariat"), on 8 April 2014, provided a position paper on the definition of "new" and "existing" plant in the context of Decision 2013/06/MC-EnC, a document that served as basis for subsequent discussions as well as the present policy guidelines.

The Environmental Task Force of the Energy Community, at its meetings of 8 April 2014 and 15 October 2014 discussed the position paper of the Secretariat. Conclusion no. 43 of the 8th meeting of the Environmental Task Force (15 October 2014) invited the Secretariat to present a preferred interpretation option with regard to the definition of new and existing plants.

2. Purpose and scope

The purpose of the present policy guidelines is to provide a legal analysis on the definition of the term "new" and "existing" plant under Decision D/2013/06/MC-EnC.

During the preparatory phase of Ministerial Council decision D/2013/06/MC-EnC[1], the terms "existing" and "new" plants were used in the context of Directive 2010/75/EU, however without defining the two terms. Based on the documents produced throughout the preparatory phase of the 2013 Ministerial Council, it is not possible to draw a conclusive interpretation of these two terms.

[1] 5th meeting of the Environmental Task Force (16 May 2013), 29th meeting of the Permanent High Level Group (19 June 2013), 6th meeting of the Environmental Task Force (17 September 2013), 30th meeting of the Permanent High Level Group (23 October 2013)

A common understanding of these terms is necessary in order to allow for the implementation of the provisions of Directive 2010/75/EU by the Energy Community Contracting Parties. According to Article 94 of the Energy Community Treaty (hereinafter: "the Treaty"), the Ministerial Council is the only institution that has the mandate to provide guidance in interpreting the provisions of the Treaty and the related Energy Community *acquis*[2]. Therefore, while the Secretariat considers it useful to present its opinion in the form present analysis, this opinion is not binding on the institutions and Parties to the Treaty and is without prejudice to any conclusions the Ministerial Council may reach on the same subject in the future.

3. Legal background

The overall aim of Directive 2001/80/EC on the limitation of emissions into the air from large combustion plants is to reduce emissions of acidifying pollutants, particles and ozone precursors by the control of emissions from large combustion plants (i.e. those whose rated thermal input is equal to or greater than 50 MW). The Directive entered into force on 27 November 2001 in the EU. According to point 3 of Annex II to the Energy Community Treaty, each Contracting Party shall implement Directive 2001/80/EC by 31 December 2017.

Since the Energy Community Treaty does not provide further rules for the implementation of Directive 2001/80/EC, the Ministerial Council, by Decision 2013/05/MC-EnC of 24 October 2013, adapted the Directive for the specific needs of the Energy Community.

With the same date, the Ministerial Council, by Decision 2013/06/MC-EnC, agreed to include the provisions of Chapter III and Annex V of Directive 2010/75/EU in the Energy Community *acquis communautaire* and to implement those from 1 January 2018 for "new" plants. In the case of "existing" plants, the Contracting Parties are encouraged to implement the provisions of the Directive. Directive 2010/75/EU was adopted in the European Union on 24 November 2010 and entered into force on 6 January 2011. EU Member States have to apply its provisions from 7 January 2013 onwards[3]. It is the successor of Directive 2001/80/EC (amongst others) which it repeals with effect of 1 January 2016.

Article 1(2) of Ministerial Council Decision 2013/06/MC-EnC stipulates that

> *2. The following text shall be added to Annex II of the Treaty:*
>
> *"5. 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*

[2] *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 prejudge any interpretation of the acquis communautaire by the Court of Justice or the Court of First Instance at a later stage.*

[3] As regards large combustion plants falling within the scope of Article 30(2) and consequently Part 1 of Annex V, the deadline for applying the provisions of the directive is 1 January 2016.

(integrated pollution prevention and control) from 1 January 2018 ***for new plants****. For* ***existing plants****, the Contracting Parties shall endeavour to implement the provisions of Chapter III and Annex V within the shortest possible timeframe, in particular in the case of retrofitting existing plants."*

The terms "new plants" and "existing plants" are not further defined by Decision 2013/06/MC-EnC. Neither does Directive 2010/75/EU define the terms "new plant" or "existing plant". Instead, it makes a clear distinction, in its Article 30, between two categories of plants according to the date on which a permit was issued for them. The first category of plants is subject to the emission limit values in Part 1 of Annex V of Directive 2010/75/EU while the second is subject to the stricter ones of Part 2 of the same Annex. Article 30(2) of Directive 2010/75/EU stipulates:

All permits for installations containing combustion plants which have been granted a permit before 7 January 2013, or the operators of which have submitted a complete application for a permit before that date, provided that such plants are put into operation no later than 7 January 2014, shall include conditions ensuring that emissions into air from these plants do not exceed the operation no later than 7 January 2014, shall include conditions ensuring that emissions into air from these plants do not exceed the emission limit values set out in Part 1 of Annex V.

All permits for installations containing combustion plants which had been granted an exemption as referred to in Article 4(4) of Directive 2001/80/EC and which are in operation after 1 January 2016, shall include conditions ensuring that emissions into the air from these plants do not exceed the emission limit values set out in Part 2 of Annex V.

The cut-off date between plants subject to Part 2 (that have to meet the more stringent emission limit values) and plants subject to Part 1 (having the possibility to meet less stringent emission limit values) is thus 7 January 2013. This is also the date referred to in Article 80(1) of the Directive which sets out the rules for transposing its provisions into national law by EU Member States, and requires them to

apply those measures from that same date.

4. Possible interpretations

Several interpretations of the terms "new" and "existing" plant under Decision 2013/06/MC-EnC are possible:

a) The definitions of "new" and "existing" plant as stipulated by Article 1 of Ministerial Council Decision 2013/05/MC-EnC (adapting the Large Combustion Plants Directive 2001/80/EC could be applied by analogy also when interpreting Decision 2013/06/MC-EnC (incorporating Directive 2010/75/EU).

Article 1 of Ministerial Council Decision 2013/05/MC-EnC reads:

For the purposes of the Energy Community, Articles 2(9) and 2(10) of Directive 2001/80/EC shall be read as follows:

"(9) 'new plant' means any combustion plant for which the original construction licence or, in the absence of such a procedure, the original operation licence was granted on or after 1 July 1992;

(10) '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."

As a consequence, plants that were permitted on or after 1 July 1992 would be subject to the emission limit values under Directive 2010/75/EU from 1 January 2018 onwards.

Proponents of this interpretation have relied on jurisprudence of the EU Court of Justice requiring the consistent use of legal terms in EU law[4].

However, while the uniformity of interpretation of EU legislation is certainly an important principle also in the context of Energy Community law, it has to be pointed out that an analogy cannot be drawn in cases the subject-matter and context of two pieces of legislation differ from each other as in the present case. In Case C-513/99 *Concordia Bus Finland*, the Court clarified the relation between two parallel and co-existing pieces of EU law, namely Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts and Directive 93/38/EEC coordinating the procurement procedures for entities operating in the water, energy, transport and telecommunications sectors. The relation between Directive 2001/80/EC and Directive 2010/75/EU is however different: the latter repeals the former and Directive 2010/75/EU has explicitly abandoned the dichotomy between "existing" and "new" plants. Therefore the definitions of Directive 2001/80/EC have no legal effect once Directive 2010/75/EU replaces it, and cannot be taken into account when interpreting the rules of Directive 2010/75/EU.

In paragraph 55 of Joined Cases C-165/09 to C-167/09 Stichting Natuur en Milieu, the Court elaborates on the relation between Directive 96/61/EC concerning integrated pollution prevention and control and Directive 2008/1/EC concerning integrated pollution prevention and control (Codified version). As the latter directive is a codified version of the former, it cannot contain rules that are different from its predecessor due to the nature of codification: it is the process of bringing together a legislative act and all its amendments in a single new act. It takes place on the basis of a consolidated text that assembles the articles of an original act and the amendments in a single non-official document intended for use only as a documentation tool. On the basis of that text a complete new act is prepared combining the original act and the successive amendments without any further substantive changes.[5] The case of codification and thus the jurisprudence quoted is not comparable to the case at issue, where a new piece of legislation has been adopted to substantially amend the content of and repeal the earlier Directive.

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[4] Case C-513/99 Concordia Bus Finland, para. 91: *"In those circumstances, there is no reason to give a different interpretation to two provisions which fall within the same field of Community law and have substantially the same wording."* and Joined Cases C-165/09 to C-167/09 Stichting Natuur en Milieu, para. 55: *"However, inasmuch as the provisions of Article 9 of Directive 96/61 and of the IPPC Directive to which the first question relates have the same wording and must therefore be interpreted in the same way (...)"*

[5] http://ec.europa.eu/dgs/legal_service/codifica_en.htm

Therefore, the Secretariat considers that the definitions of Directive 2001/80/EC as well as the act incorporating it and adapting it for the purposes of the Energy Community cannot be relied upon for the interpretation of the terms "new" and "existing" plant under Ministerial Council Decision 2013/06/MC-EnC.

b) According to Article 15 of the Energy Community Treaty,

> *[a]fter the entry into force of this Treaty, the construction and operation of new generating plants shall comply with the* acquis communautaire *on environment.*

By this clause, the Energy Community Treaty itself links the definition of "new" plants to its entry into force. As the Energy Community Treaty entered into force on 1 July 2006, it may be argued that the legislative intent was to set that day as the cut-off date between "new" and "existing" plants. This would allow for a coherent interpretation of Energy Community primary law, namely Article 15 on the one hand and the amendments made to the Treaty and its Annex II by Decision 2013/06/MC-EnC.

It is, however, doubtful whether the Energy Community legislature wanted to link the dichotomy made between "existing" and "new" plants for the purpose of implementing Directive 2010/75/EU to Article 15. At the time of the entry into force of the Energy Community Treaty (1 July 2006), the *acquis communautaire* on environment included Directive 2001/80/EC but not Directive 2010/75/EU. The relevance of Article 15 of the Treaty is an historic one; it was explicitly meant to subject any plants being built and operated after 1 July 2006 immediately to the *acquis* on environment, inter alia, Directive 2001/80/EC. It did not intend to affect the clear distinction between "new" and "existing" plants not even in that Directive. It can be relied upon even less to define a similar dichotomy in an act incorporating Directive 2010/75/EU of 2013. Moreover, this has never been discussed in the negotiations leading up to the adoption of Decision 2013/06/MC-EnC.

Therefore, the Secretariat considers that Article 15 of the Treaty is not directly relevant for the interpretation of the terms "new" and "existing" plant under Ministerial Council Decision 2013/06/MC-EnC.

c) From the negotiations for the preparation of the meeting of the Ministerial Council on 24 October 2013, without however defining the terms "existing" and "new" plants, it was clear that the Contracting Parties agreed to apply the provisions of Chapter III and Annex V of Directive 2010/75/EU to plants that are permitted and built only after the Decision has been taken. According to its Article 3, Decision 2013/06/MC-EnC entered into force upon its adoption by the Ministerial Council, namely on 24 October 2013.

In applying Article 15 of the Treaty by analogy, one could argue that in the Energy Community, combustion plants which have been granted a permit before 24 October 2013 (the date of the decision of the Ministerial Council), or the operators of which have submitted a complete application for a permit before that date (provided that such plants are put into

operation no later than 24 October 2014), should be considered as "existing" while all other plants should be considered as "new" under Article 1(2) of Ministerial Council Decision 2013/06/MC-EnC.

While the Secretariat considers this as a valid interpretation of Decision 2013/06/MC-EnC indeed, it must be recalled that, according to Article 2(1) of Decision 2013/06/MC-EnC,

> *each Contracting Party shall bring into force the laws, regulations and administrative provisions necessary to comply with Chapter III, Annex V and Article 72(3)-(4) of Directive 2010/75/EU by 1 January 2018.*

Not having transposed the Directive by 24 October 2013 (and not being under a legal obligation to do so) may make it difficult if not impossible to grant permits based on Directive 2010/75/EU in accordance with the respective domestic legal orders. For example, in a permitting procedure in the course of 2016, the emission limit values of Annex V of Directive 2010/75/EU may not be included in the permit conditions for a "new" plant due to the lack of domestic legislation.

d) More importantly, the cut-off date between the two categories of plants in Directive 2010/75/EU in the European Union is set as 7 January 2013 in Article 30(2). This date corresponds to the transposition deadline as set out by its Article 80(1). Within the European Union, the transposition/implementation date and the cut-off date are thus aligned. This allows EU Member States to apply the stricter rules of Part 2 of Annex V only as from the date of transposition. There is no obvious reason why the Contracting Parties to the Energy Community should not be treated equally in this respect, even more so as Article 7 of the Treaty stipulates that

> *any discrimination within the scope of this Treaty shall be prohibited.*

5. Conclusion

Based on the above, the Secretariat considers the following interpretation of the terms "new" and "existing" plant under Decision 2013/06/MC-EnC as preferable:

> ***"combustion plants that have been granted a permit before 1 January 2018, or the operators of which have submitted a complete application for a permit before that date (provided that such plants are put into operation no later than 1 January 2019), should be considered as existing plants under Article 1(2) of Ministerial Council Decision 2013/06/MC-EnC. All other plants should be considered as new plants under Article 1(2) of Ministerial Council decision D/2013/06/MC-EnC."***

6. The decisive permit for the cut-off date

Article 3(7) of Directive 2010/75/EU defines the notion of "permit" as follows:

> *'permit' means a written authorisation to operate all or part of an installation or combustion plant, waste incineration plant or waste co-incineration plant;*

In most Contracting Parties, the operator requires more than one permit to operate a combustion plant. In its position paper of 8 April 2014, the Secretariat considered that it is the final permit allowing the operator to permanently operate the combustion plant that determines which category the plant would fall into. Any former permits (e.g. planning, building, environmental etc.) do not provide a legal effect in determining the relevant category.

The 7th meeting of the Environmental Task Force (8 April 2014), via its conclusions no. 19 and 24 invited the Secretariat to obtain references from Contracting Parties and/or from EU Member States regarding permitting practices that would facilitate putting Contracting Parties on an equal footing with EU Member States regarding this interpretational matter. At the 8th meeting of the Environmental Task Force, a summary of permitting procedures in the Contracting Parties and in a selection of EU Member States was presented. Based on that analysis, it can be concluded that while in EU Member States, it is clear that there is a common practice to issue an integrated permit for installations falling under the scope of Directive 2010/75/EU (including large combustion plants), this is not the case for Contracting Parties where the operator has to obtain a set of different permits (environmental permit, water permit, construction permit, etc.) in order to operate a combustion plant.

Given the differences between the permitting regimes of EU Member States and Contracting Parties as well as between Contracting Parties, it is not possible to draw a direct conclusion relevant for the purposes of the Energy Community from the permitting practices of EU Member States. To simply consider a document entitled "operation permit" as the decisive one for the purpose of Directive 2010/75/EU in all cases would not correspond to this diversity. The Secretariat believes that in such a situation, regard must be had to the objective of Directive 2010/75/EU, namely to create legal certainty as to the emission limit regime applicable to each individual plant. In the case of several permits issued for the same plant, it is thus rather the content of the permit than its title that should be taken into account when considering its relevance for the purpose of deciding which regime it should comply with. In the Secretariat's view, the reference to „operate" is to be understood that where Directive 2010/75/EU refers to a „permit", this should be considered as the final decision allowing the operation of the plant concerned under the specific emissions-related conditions set out therein. Such an analysis can only be provided on a case-by-case basis and requires the circumstances of each relevant jurisdiction and procedure to be taken into account.

7. Final remarks

Recognizing that there is a large degree of ambiguity in the use of the terms "new" and "existing" in the Ministerial Council Decision under scrutiny here, the Secretariat is ready to submit a request for interpretation to the Ministerial Council under Article 94 of the Treaty if needed.

Finally, the Secretariat would like to recall the fact that whenever new projects are planned and/or realised, the long-term nature of such investments should be strictly considered and it should be born in mind that new plants in the case of which the best available techniques are not applied may end up as falling short of compliance (and consequently, as regret investments) in the future. Furthermore, the Secretariat would like to remind the Contracting Parties that such plants cannot be covered by the National Emission Reduction Plan under Article 5 of Ministerial Council Decision 2013/05/MC-EnC.

Done at Vienna on 17 November 2014

For the Secretariat:

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Director