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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of Euratom in the Energy Charter Conference

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

This proposal concerns the Council's approval of the Commission decision establishing the position to be taken by the Member States as regards matters falling under the Euratom Treaty, in the Energy Charter Conference in connection with the envisaged adoption of proposed amendments to the Energy Charter Treaty and the approval of (i) proposed modifications and changes to the Annexes to the Energy Charter Treaty, (ii) proposed changes to Understandings, Declarations and Decisions, and (iii) a decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes. The adoption of the amendments to the Energy Charter Treaty and the additional approvals are to be passed simultaneously by the Energy Charter Conference.

The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a multilateral trade and investment agreement applicable to the energy sector that was signed in 1994 and entered into force in 1998. The ECT contains provisions on investment protection, trade and transit in energy materials and products, and dispute settlement mechanisms. The ECT also sets up a framework for international cooperation in the energy field between its Contracting Parties. The European Union is a party to the ECT, together with Euratom[1] and most EU Member States, as well as Japan, the United Kingdom, Switzerland, Turkey and most countries from the Western Balkans and the former USSR, with the exceptions of Russia[2] and Belarus[3]. On 7 July 2023, the European Commission tabled a proposal for a Council Decision withdrawing the Euratom from the ECT. This proposal is currently under consideration in the Council.

The Energy Charter Conference

The Energy Charter Conference is the governing and decision-making body for the Energy Charter and was established by the ECT. All states or Regional Economic Integration Organisations (such as the EU and Euratom) who have signed or acceded to the ECT are members of the Conference, which meets on a regular basis to discuss issues affecting energy cooperation among the ECT signatories, to review the implementation of the provisions of the ECT and the Protocol on Energy Efficiency and Related Environmental Aspects, and to consider possible new instruments and joint activities within the Energy Charter framework. In particular, the Energy Charter Conference adopts texts of amendments to the ECT and approves modifications of, and technical changes to, the Annexes to the ECT. When voting on proposed amendments to the text of the ECT, the Energy Charter Conference passes a decision to adopt the amendments by unanimity vote of the Contracting Parties present and voting. The EU and Euratom have a number of votes equal to the number of their Member States that are Contracting Parties to the ECT, provided that the EU and Euratom shall not exercise their right to vote if their Member States exercise theirs, and vice versa.

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1 Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, pp. 1-116).

2 The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of the Russian Federation.

3 The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of Belarus and the provisional application of the ECT by Belarus.

Decisions to be taken at the Energy Charter Conference

Following the 33rd meeting of the Energy Charter Conference on 22 November 2022, it is expected that the Conference will retable in the course of 2024 the proposal to the Contracting Parties to take four decisions related to the modernisation of the ECT. These decisions will be taken simultaneously to:

– adopt the proposed amendments to the text of the ECT ;

– approve the proposed modifications and changes to the Annexes to the ECT ;

– approve the proposed changes to Understandings, Declarations and Decisions ; and

– approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes .

In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated. It also became one of the most litigated investment treaties in the world, with EU Member States being the principle target of claims by investors, most of them based in other EU countries. As a result, a modernisation process was initiated in November 2018. The Energy Charter Conference first approved a list of topics for discussion, chiefly concerning provisions related to investment protection. The EU then proposed the removal of protections for investments in fossil fuels.

After 15 rounds of multilateral negotiations held between July 2019 and June 2022, an "agreement in principle" to close negotiations was reached at the extraordinary Energy Charter Conference of 24 June 2022 in Brussels. The revised text of the ECT and its Annexes then underwent a legal revision. Thereafter, the final draft decisions containing the revised texts were shared on 19 August 2022 with all Contracting Parties, including the EU, Euratom, and all EU Member States that are Contracting Parties to the ECT.

The decisions related to the modernisation of the ECT will be subject to a unanimity vote. If the vote is successful, the decisions for the modernisation of the ECT will be considered "adopted" by the Energy Charter Conference. This adoption will trigger subsequent processes for the ratification, provisional application, and eventual entry into force of the various elements of the reform package.

The provisional application of the amendments to the ECT and the other elements of the modernisation will be governed by the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes. In line with this decision, the modernisation is expected to be provisionally applied by all Contracting Parties automatically at a fixed date following the adoption. Moreover, any Contracting Party may deliver to the depositary (Portugal) a declaration that it is not able to accept the provisional application of the amendments to the ECT, effectively allowing each Contracting Party to opt out from provisional application. The ECT Secretariat will make such declarations public. Even if a Contracting Party initially makes such a declaration, it may at any time withdraw the declaration again, allowing it to apply the modernisation of the ECT provisionally at a later point in time.

The present proposal for the Council's approval of a Commission decision under Article 101 of the Euratom Treaty seeks to establish the position to be adopted by the Member States in the Energy Charter Conference, to be expressed either at a meeting or in a written procedure, as the case may be, regarding the decisions described above.

At the same time, the Commission is proposing the adoption of an agreement between the European Union, Euratom, and the Member States on the interpretation of the ECT. That agreement should include, in particular, a confirmation that a clause such as Article 26 ECT could not in the past, and cannot now or in the future serve as legal basis for arbitration proceedings initiated by an investor from one Member State concerning investments in another Member State, and that the sunset clause provided for in Article 47(3) ECT cannot extend, and was not intended to extend, to such proceedings. It should also set out the obligations of the Member States in the event that they are involved in arbitration proceedings pursuant to a request based on Article 26 ECT.

It has been the consistent interpretation of the EU that the ECT does not apply and was not meant to apply to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State. This interpretation was specifically confirmed by the Court of Justice of the European Union (CJEU) in its Komstroy judgment . Yet, arbitral tribunals have held and continue to hold, that they are not bound by the judgments of the CJEU. In order to prevent tribunals from continuing to accept jurisdiction in such disputes, it is necessary to reiterate, expressly and unambiguously, the authentic interpretation of the ECT. The most appropriate way to do so is by means of an agreement under customary international law as codified in the VCLT.

While that agreement will codify the interpretation of the EU and its Member States in a separate instrument of public international law (something that is possible because of the bilateral nature of the obligations), the ECT modernisation will embed in the text itself and via a "for greater certainty" clause, the understanding of all Contracting Parties that its Article 26 does not apply intra-EU. Both elements will help to remove any ambiguity and eliminate present or future risks of intra-EU arbitration under the ECT with the necessary degree of legal certainty.

Position to be taken

The Commission proposes that the Member States that are parties to the Energy Charter Treaty take, as regards matters falling under the Euratom Treaty, at the meeting of the Energy Charter Conference or in a written procedure as the case may be, the positions described in points 1 to 4 below.

Regarding the adoption of the proposed amendments to the text of the ECT

The proposed amendments to the text of the ECT consist of substantial improvements that will effectively bring the ECT in line with modern standards of investment protection and EU positions in other fora (e.g. UNCITRAL[4]). The amendments will also bring the ECT in line with the EU's approach to investment protection in its recently agreed free trade and investment agreements.

In particular, the amended ECT contains:

– **New investment protection provisions, in line with modern standards and EU positions**, reaffirming the right of Contracting Parties to take measures to achieve legitimate policy objectives ("**right to regulate**"), including as regards the fight against climate change; Only investors with real economic interest will be protected, with no protection being afforded to mailbox companies[5];

4 United Nations Commission on International Trade Law.

5 Mailbox companies are companies that have a business address in an ECT Contracting Party without having any actual economic activity in such a Contracting Party, only seeking protection under the ECT.

– **New provisions on dispute settlement**, protecting Contracting Parties from frivolous claims, foreseeing security for costs, and introducing a high level of transparency to the proceedings;

– **New provisions on sustainable development**, in particular on climate change and the clean energy transition, and providing an actionable mechanism in case of misalignment, in a way that was never achieved before in a multilateral investment treaty;

– In addition, the EU secured provisions for regional economic integration organisations (such as the EU), expressly confirming that it is **not possible to bring intra-EU investment arbitration under the ECT**[6], in line with the case law of the Court of Justice of the EU[7];

– **Substantial clarifications regarding to transit-related provisions** to factor in the requirements of integrated energy markets with third party access rights, such as in the EU, without creating new obligations for the EU[8];

– **An updated definition of economic activity in the energy sector**, which, together with Annexes EM/EM I, EQ/EQ I and NI (see point 2 below), allows to align investment protection in the EU with the EU's objectives.

The adoption of the amendments to the text of the ECT does not, in principle, have legal effects. Under international law, it is not equivalent to a signature but to the initialling of the negotiated text.

As a result, the Commission proposes that the Member States take theposition, as regards matters falling under the Euratom Treaty, at the Energy Charter Conference, not preventing the **adoption** of the proposed amendments to the ECT.

Regarding the approval of the proposed modifications and changes to the Annexes

Article 34(3)(m) of the ECT provides for a simplified procedure empowering the Conference to adopt modifications to the Annexes of the ECT. The proposed changes to the Annexes to the ECT (CC 761) bring about an essential change to the current Treaty: the exclusion, through **Annex NI,** of **certain Energy Materials and Products and activities from the scope of investment protection under Part III of the ECT**. As a result, the EU obtained the right to carve out investment protection in the EU as follows:

– Exclusion of protection for **all new investments in fossil fuels in the EU at a specified date following the adoption**, with a transition period for hydrogen/low-carbon gas-ready gas power plants and infrastructure emitting less than 380 gCO2/kWh – until 31 December 2030 by default or until 15 August 2033 if they replace a coal, peat or oil shale-fired facility;

– Exclusion of protection for **all existing investments in fossil fuels in the EU as of 10 years after the entry into force (or entry into provisional application) of the amendments to the ECT**, and by 31 December 2040 at the very latest;

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6 Such claims represented the overwhelming majority of claims against EU countries in the last decade, despite the position of the Commission, confirmed by the Court of Justice of the EU, that EU law precludes intra-EU investment arbitration.

7 Case C-284/16 *Slovak Republic v. Achmea BV*, 6 March 2018, and C-741/19 *Republic of Moldova v. Komstroy LLC*, 2 September 2021.

8 Importantly, new commitments related to third-party access, capacity allocation mechanisms and tariffs are "best endeavour" commitments, which are "subject to" the laws and regulations of the EU, and thus would only have to be respected if they do not impinge upon the EU legal framework and the EU's international commitments.

– Protection for **renewable and low-carbon hydrogen and synthetic fuels** only;

– Exclusion of protection for activities in **carbon capture, utilisation and storage**.

The proposed changes also **bring the scope of the ECT into line with the new landscape of renewable and low-carbon technologies required for the green energy transition. This will be achieved through changes to Annex EM/EMI** (adding new energy materials and products, e.g., hydrogen and derivative fuels such as ammonia and methanol, biomass, biogas and synthetic fuels) **and Annex EQ/EQ I** (adding new energy equipment, e.g., various insulation materials, as well as multiple-walled insulating glass).

In addition, new Annexes have been created to implement the **principle of reciprocity**, according to which Contracting Parties cannot be forced to protect investments from other Contracting Parties if such investments have been excluded by the latter in Annex NI, either by not applying the investor-state dispute settlement mechanism in Article 26 of the ECT (**new Annex IA-NI**) or the entirety of Part III on investment protection (**new Annex NPT)**. Nuclear energy, which is included in the current scope of the Treaty, remains so after changes to the Annexes, in particular Annex NI, without any modification or change.

As a result, the Commission proposes that the Member States take the position at the Energy Charter Conference of not preventing the **approval** of the proposed changes and modifications to the Annexes to the ECT.

Regarding the approval of the proposed changes to Understandings, Declarations and Decisions

Changes introduced to Understandings, Declarations and Decisions concern corrections of obsolete provisions (e.g., replacing "*European Communities*" with "*European Union, the European Atomic Energy Community*"), as well as additional clarifications for the text of the ECT (e.g., the clarification that "subsidy" includes "State aid" as defined in EU law). The approval of such changes to Understandings, Declarations and Decisions will bring further clarity and precision to the text of the ECT.

As a result, the Commission proposes that the Member States take the position at the Energy Charter Conference not preventing the **approval** of the proposed changes to Understandings, Declarations and Decisions .

Regarding the approval of the decision on the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes

The Conference will approve a decision that provides for the following modalities of entry into force and provisional application of the proposed amendments to the ECT and the changes to its Annexes:

– **The amendments to the text of the ECT** will enter into force in accordance with Article 42(4) of the ECT. This means that the amendments will enter into force once three-fourths of Contracting Parties have ratified them. In addition, the decision provides that the amendments will be provisionally applied by default by all Contracting Parties, unless they lodge a declaration that they are not able to do so;

– **Changes to Section C of Annex NI,** which notably contains the rules providing for the transition period of 10 years to phase out the protection of existing investments in fossil fuels in the EU, **and changes to other Annexes**: these changes will enter into force when the amendments to the ECT enter into force (see above). Section C of Annex NI and changes to other Annexes will be provisionally applied by default by all Contracting Parties unless they make a contrary declaration (see above);

– **Changes to Section B of Annex NI**, which notably contains the rules providing for the exclusion of new investments in fossil fuels from protection in the EU, will enter into force automatically on the date specified in the Conference without any further ratification;

– **Changes to Understandings, Declarations and Decisions** will enter into force on the date of adoption as far as they concern corrections of obsolete references. The remaining changes will enter into force when the amendments to the ECT enter into force. In the meantime, they will apply provisionally in the same way as the amendments to the ECT.

The modalities of entry into force and provisional application of the amendments to the ECT and of Section C of Annex NI, as well as the changes to other Annexes, are in conformity with the provisions of the original ECT as regards entry into force and provisional application. In addition, the EU achieved that Section B of Annex NI enters into force automatically on the date specified in the Conference decision, further securing the date of entry into force of the EU's carve-out for investments in fossil fuels regarding new investments.

As a result, the Commission proposes that the Member States take the position, as regards matters falling under the Euratom Treaty, at the Energy Charter Conference, not preventing the **approval** of the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes.

Bearing in mind that the European Commission put forward proposals for a Decision on the withdrawal of, respectively, the EU and Euratom from the ECT, it is expected that the European Union and Euratom, while still being Contracting Parties to the ECT at the time of vote on the above-mentioned decisions of the Energy Charter Conference, will neither be present nor voting. Therefore, this proposal sets out the position to be taken by the Member States that remain Contracting Parties to the ECT either at the meeting of the Energy Charter Conference, should they decide to participate, or in a written procedure, as the case may be. This is without prejudice to the division of competences between the Union and its Member States.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

Principles

The Euratom Treaty contains no provision equivalent to Article 218(9) TFEU for Council decisions establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects. When a body set up by an agreement concluded by Euratom, such as the ECT, adopts acts having legal effects, the procedures provided in Articles 101 of the Euratom Treaty apply.

Article 101 paragraph 1 of the Euratom Treaty provides that: '*The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organisation or a national of a third State*'.

Article 101 paragraph 2 of the Euratom Treaty provides that: '*Such agreements or contracts shall be negotiated by the Commission in accordance with the directives of the Council; they shall be concluded by the Commission with the approval of the Council, which shall act by a qualified majority.*'

Application to the present case

The Energy Charter Treaty is an international agreement to which, *inter alia*, Euratom is a party.

On 22 November 2022, the Energy Charter Conference will be called upon to adopt acts having legal effects. These acts will be binding under international law. As a result, pursuant to Article 101 paragraph 2 of the Euratom Treaty, they shall be subject to the approval of the Council under qualified majority.

The decisions to be adopted by the Energy Charter Conference to approve the proposed modifications and changes to the Annexes to the ECT (CC 761), as well as to approve the proposed changes to Understandings, Declarations and Decisions (CC 762), constitute acts having binding legal effects under international law. This is because the ECT grants the Energy Charter Conference the power to amend the Annexes, Understandings, Declarations and Decisions to the ECT without the need for any subsequent ratification by the Contracting Parties. Under Article 48 of the ECT, the Annexes and Decisions are an integral part of the Treaty.

The decision to be adopted by the Energy Charter Conference to approve the decision regarding the entry into force and provisional application of amendments to the text of the ECT and changes/modifications to its Annexes constitutes an act having binding legal effects under international law because it obliges the Contracting Parties to provisionally apply the amended text of the ECT and the changes to certain sections of its Annexes on an agreed date, if no contrary declaration is timely lodged.

The decision to be adopted by the Energy Charter Conference to adopt the proposed amendments to the text of the ECT constitutes, in the particular circumstances of the case, an act having binding legal effects under international law because it is to be adopted simultaneously with the decision regarding the entry into force and provisional application of amendments to the text of the ECT (see above), which obliges the Contracting Parties to provisionally apply these amendments on an agreed date, if no contrary declaration is timely lodged.

Therefore, the procedural legal basis for the proposed decision is Article 101 paragraph 2 of the Euratom Treaty as the Euratom Treaty contains no provision equivalent to Article 218(9) TFEU for decisions establishing the positions to be adopted on the Union's behalf in a body set up by an agreement.

Publication of the envisaged acts

As the decisions of the Energy Charter Conference will amend the Annexes to the ECT, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

2024/0058 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of Euratom in the Energy Charter Conference

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 101 paragraph 2 thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Energy Charter Treaty ('the Agreement') was concluded by European Atomic Energy Community ('the Euratom') by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ L 69, 9.3.1998, pp. 1-116) and entered into force on 16 April 1998.

(2) In the absence of any substantial update of the Agreement since the 1990s, the Agreement became increasingly outdated

(3) Pursuant to Article 34 of the Agreement, the Energy Charter Conference adopts texts of amendments to the Agreement and approves modifications of, and technical changes to, the Annexes to the Agreement.

(4) The Energy Charter Conference is to adopt the proposed amendments to the Energy Charter Treaty and to approve (i) the proposed modifications and changes to the Annexes to the Energy Charter Treaty, (ii) the proposed changes to Understandings, Declarations and Decisions, and (iii) the decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes. It is expected that the Conference will retable the proposed amendments for adoption in the course of 2024, either in a meeting or by written procedure, as the case may be.

(5) It is appropriate to establish the position to be taken by the Member States who are Contracting Parties to the Energy Charter Treaty. This is without prejudice to the division of competences between the Euratom and the Member States.

(6) In parallel, the European Commission has tabled proposals for Decisions on the withdrawal of the EU and of Euratom from the Agreement that are to be adopted jointly with this proposal.

(7) As the areas covered by the Energy Charter Treaty fall largely under the exclusive Union and Euratom competence, the Member States cannot remain Contracting Parties to the Energy Charter Treaty once the Union and the Euratom have withdrawn unless they are authorised to do so by the Union and Euratom. Hence, once the withdarwal of the Union and the Euratom from the Energy Chartery Treaty take effect and absent an authorisation by the Union and Euratom to remain Contracting Parties, the Member

States wil have to withdraw from the Energy Charter treaty within a reasonable period of time.

HAS ADOPTED THIS DECISION:

Article 1

The following position to be taken by Member States that are Contracting Parties to the Energy Charter Treaty at the Energy Charter Conference, as regards matters falling under the Euratom Treaty, is hereby approved by the Council:

(a) not to prevent the adoption by the Conference of the proposed amendments to the Energy Charter Treaty;

(b) not to prevent the approval of the proposed modifications and changes to the Annexes to the Energy Charter Treaty;

(c) not to prevent the approval of the proposed changes to Understandings, Declarations and Decisions; and

(d) not to prevent the approval of the decision regarding the entry into force and provisional application of amendments to the Energy Charter Treaty and changes/modifications to its Annexes.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President