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Recommendation for a

COUNCIL DECISION

**on the approval of the withdrawal of the European Atomic Energy Community from the
Energy Charter Treaty**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This recommendation concerns the decision to withdraw Euratom from the Energy Charter Treaty, in accordance with Article 47 of that treaty. This recommendation is proposed at the same time as the Commission proposal to withdraw the Union from the Energy Charter Treaty, in accordance with Article 47 of that treaty.

2. CONTEXT OF THE PROPOSAL

• 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 54 Contracting Parties. Euratom is a Contracting Party to the ECT¹, together with the European Union, 26 EU Member States (as of 8 May 2023)², as well as Japan, Switzerland, Turkey and most countries from the Western Balkans and the former USSR, with the exception of Russia³ and Belarus⁴.

• Modernisation of the ECT: outcome of the process and state of play

In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated.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 such protection for investments in fossil fuels, in order to bring the ECT in line with the Paris Agreement.

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, held in Brussels.

The negotiated outcome is considered by the Commission to be in line with the mandate received from the Council.

The revised text of the ECT and its Annexes underwent a legal review and final draft-decisions containing the revised texts and modalities for their entry into force (together referred to as “the modernisation package”) 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.

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 All but Italy that unilaterally withdrew in 2015. France, Germany and Poland also initiated a procedure of withdrawal in December 2022, which will lead to their effective exit of the Energy Charter Treaty by December 2023.

³ The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of the Russian Federation.

⁴ The extraordinary Energy Charter Conference of 24 June 2022 withdrew the observer status of Belarus and the provisional application of the ECT by Belarus.

The intention at the time was to list the “modernisation package” for adoption at the 33rd meeting of the Energy Charter Conference on 22 November 2022. To that end, the Commission presented proposals for two decisions under Article 218(9) TFEU and Article 101 of the Euratom Treaty with a view to establish the position to be adopted on EU and on Euratom’s behalf at the 33rd meeting of the Energy Charter Conference. At the same time, the Commission adopted a Communication highlighting the need to eliminate the risk of conflict between the Treaties and the ECT as interpreted by some arbitral tribunals, which have held that the ECT applies to intra-EU disputes. That interpretation, if confirmed by the courts of a third country, would de facto turn into a legal conflict because arbitration awards violating EU law would circulate in the legal orders of third countries. The proposals put before the Council suggested that the EU and Euratom support the adoption of the “modernisation package” at the 33rd meeting of the Energy Charter Conference. However, these proposals were not adopted by the Council, due to the abstention of a blocking minority of four Member States (Germany, France, Spain and the Netherlands) at the COREPER meeting of 18 November 2022. As a result, the “modernisation package” was taken off the agenda of the 33rd meeting of the Energy Charter Conference and the modernisation of the Energy Charter Treaty was not adopted. In the meantime, the current, unmodernised Treaty continues to apply to the EU, Euratom, and all Member States that are party to the ECT in their relations with other contracting parties. In addition, proceedings to obtain and enforce awards issued by tribunals purportedly established pursuant to Article 26 ECT in intra-EU disputes continue unabated.

- **Current situation and suggested way forward**

In the absence of EU and Euratom decisions, the EU and Euratom cannot take part in a vote on the adoption of the modernisation package at a meeting of the Energy Charter Conference. As a rule, when voting at an ECT Conference, the EU and Euratom has a number of votes equal to the number of its member states which are Contracting Parties to the ECT. Without the participation of the EU and Euratom in such a vote, the voting quorum in the Conference is not met, and the modernisation package cannot be adopted.

There is no qualified majority in the Council for an EU or Euratom decision allowing the EU and Euratom to take part in the vote at a meeting of the Energy Charter Conference on the by supporting the adoption of the modernisation package.

In addition, notwithstanding the issue of the adoption of the modernisation package by the Energy Charter Conference, the entry into force or provisional application of a modernised Treaty would require the consent of the European Parliament, which has clearly stated that it does not support the reform of the Treaty and calls on the EU and Member States to organise a coordinated withdrawal from the ECT⁵.

Consequently, there is no legal and/or institutional avenue for the modernisation of the ECT to be adopted and produce its effects, a condition for the EU/Euratom to remain party to the Treaty.

Remaining a Contracting Party to the current, unmodernised ECT is not an option for the EU/Euratom or its Member States. The current, unmodernised Treaty is not in line with the EU’s investment policy and law and with the EU’s energy and climate goals.

The provisions of the Treaty on investment protection, including the investor-to-State dispute settlement (ISDS) mechanisms are not in line with the EU approach to investment protection. In particular, the unmodernised ECT is incompatible with the principle of autonomy of Union

⁵ Resolution of the European Parliament of 24 November 2022 on the Energy Charter Treaty modernisation

law, as it does not include some of the safeguards identified by the Court in the CETA opinion in order to conclude that the arbitration awards would not have the “effect of preventing the EU institutions from operating in accordance with the EU constitutional framework”.⁶

In addition, the protection granted to fossil fuels, under the conditions described above and for an unlimited period of time, does not fit with EU objectives as defined in the European Green Deal, the REPowerEU Plan, or the Climate Law – namely: to accelerate the shift away from fossil fuels and towards renewable energy, to achieve a greater energy independence, ensure the EU’s energy security, and, not least, deliver on the commitment to cut emissions by at least 55% by 2030 and to reach climate neutrality by 2050.

As a result, the withdrawal of the EU and Euratom from the ECT is the only available solution.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Nature and context of the proposal

The Commission proposal concerns a Council decision approving the withdrawal of Euratom from the Energy Charter Treaty pursuant to Article 47.1 of that Treaty (concomitant with the parallel withdrawal of the EU).

The adoption of such decision by the Council, would enable the Commission to finalise the process by adopting the decision on the conclusion of Euratom withdrawal and by empowering the Member of the Commission to give written notification to the Depositary of the Energy Charter Treaty (i.e. the Republic of Portugal) of its withdrawal from the Treaty pursuant to Article 47.1 of the ECT.

Pursuant to Article 47.2 of the ECT, the withdrawal of Euratom shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.

Pursuant to Article 47.3 of the ECT, the provisions of the ECT shall continue to apply to investments made in Euratom by investors of other Contracting Parties, or in the other Contracting Parties by investors of Euratom, for a period of 20 years as of the date of Euratom withdrawal from the ECT. Article 47 (3) of the ECT would have **no impact** on intra-EU relations, to which the ECT has never, does not and will never apply, including its Article 47.3. However, as noted in the Communication referred to above, there is a risk of legal conflict that must be eliminated. The Commission remains of the view that the appropriate response is to adopt an instrument that is a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), among the Member States, the Union and EURATOM. The Commission will therefore continue the negotiations of the text of such an agreement which, once they are completed, would be the subject of a proposal for the conclusion of the subsequent agreement on behalf of the Union and of EURATOM. The codification of the interpretation of the EU and its Member States in a separate treaty (something that is possible because of the bilateral nature of the obligations) is all the more pressing in the absence of the ECT modernisation that would have embedded 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.

⁶ Opinion 1/17, paras. 152-161.

- **Legal basis**

Principles

According to Article 101 of the Euratom Treaty, in particular the first and second paragraphs thereof, *“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 organization or a national of a third State. 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

Euratom joined the Energy Charter Treaty on the basis of Article 101 of the Euratom Treaty. A decision of Euratom to terminate and withdraw from an international agreement is a way to exercise the same power given by that article. For this reason, this decision is to be adopted on the same legal basis, and following the same procedure, as a decision to conclude that agreement on behalf of Euratom. Therefore, Euratom’s termination of, and withdrawal from, the Energy Charter Treaty requires the adoption of a Council decision and a Commission Decision on the conclusion based on the second paragraph of Article 101 of the Euratom Treaty.

Recommendation for a

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THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Energy Charter Treaty ('the Agreement') was concluded by the European Atomic Energy Community by Council and Commission Decision 98/181/EC, ECSC, Euratom⁷ 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) In 2019, the Contracting Parties to the Agreement engaged in negotiations aimed at modernising the Agreement, in order to bring it into alignment with the principles of the Paris Agreement⁸, the requirements of sustainable development and the fight against climate change, as well as with modern standards of investment protection.
- (4) The Contracting Parties concluded the negotiations on 24 June 2022. The negotiated outcome was meant to be adopted at the 33rd meeting of the Energy Charter Conference on 22 November 2022.
- (5) Ahead of the meeting of the Conference, the Community was unable to find a common position on the modernisation of the Agreement.
- (6) In the absence of a Community position, the adoption of the modernised Agreement by the Energy Charter Conference is impossible. The current, unmodernised Agreement continues to apply to the Community, in spite of the fact that it is not in line with the Union's investment policy and law, including in particular the principle of autonomy of Union law, and with the Union's energy and climate goals.
- (7) With no alternative available, the Community should withdraw from the Agreement. In accordance with Article 101, second paragraph, of the Treaty establishing the European Atomic Energy Community, the decision of the withdrawal is to be taken by the Commission subject to the approval of the Council. It is therefore necessary to adopt a decision on the approval of the withdrawal of the Community from the Agreement.

⁷ 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, p. 1).

⁸ OJ L 282, 19.10.2016, p. 4.

HAS ADOPTED THIS DECISION:

Article 1

The withdrawal of the European Atomic Energy Community from the Energy Charter Treaty is approved.

Done at Brussels,

*For the Council
The President*