



Brussels, 27.3.2024
COM(2024) 143 final

2024/0077 (NLE)

Proposal for a

COUNCIL DECISION

on the partial suspension of the application of the Energy Charter Treaty between the European Atomic Energy Community (Euratom) and any legal entity that is owned or controlled by citizens or nationals of the Russian Federation or of the Republic of Belarus, and any Investment within the meaning of the Energy Charter Treaty which is an Investment of an Investor of the Russian Federation or of the Republic of Belarus

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision to partially suspend the application of the Energy Charter Treaty (“ECT”) between Euratom and any legal entity that is owned or controlled by citizens or nationals of the Russian Federation or of the Republic of Belarus and that has no substantial business activities in the Area of the Contracting Party in which it is organised, and any Investment within the meaning of the ECT which is an Investment of an Investor of the Russian Federation or of the Republic of Belarus.

2. CONTEXT OF THE PROPOSAL

The 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 cooperation in the energy field between its Contracting Parties. The EU is a party to the ECT¹, together with Euratom, a number of Member States, as well as Japan, Switzerland, Turkey and most countries from the Western Balkans and the former USSR, with the exceptions of Russia² and Belarus³.

Pursuant to Article 17(1) ECT, each Contracting Party reserves the right to deny the advantages of Part III of the ECT to a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised. In addition, pursuant to point (b) of Article 17(2) ECT, each Contracting Party reserves the right to deny the advantages of Part III of the ECT to an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party adopts or maintains measures that (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of Part III of the ECT were accorded to Investors of that state or to their Investments.

Since March 2014, the EU has progressively imposed sanctions against the Russian Federation, initially in response to the illegal annexation of Crimea and Sevastopol and the deliberate destabilisation of Ukraine. On 23 February 2022, the EU expanded the sanctions in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk ‘oblasts’ of Ukraine, and the ordering of Russian armed forces into those areas. After 24 February 2022, in response to Russia’s military aggression against Ukraine, the EU significantly expanded the sanctions. It added a significant number of individuals and organisations to the sanctions list and adopted unprecedented measures with the aim of weakening Russia's economic base, depriving it of critical technologies and markets, and significantly curtailing its ability to wage war.

In parallel, the EU’s sanctions regime concerning the Republic of Belarus has been expanded in response to the country’s involvement in Russia’s aggression against Ukraine. This is in

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.

addition to the sanctions aimed at the Republic of Belarus that were already in place. This sanctions regime consists of a range of financial, economic and trade measures.

Neither the Russian Federation nor the Republic of Belarus is a Contracting Party to the ECT. However, investors from these countries could use corporations established in the territory of a Contracting Party to the ECT to allege that Euratom or its Member States have acted inconsistently with the investment protection obligations of the ECT and hence bring investor-state dispute settlement proceedings against Euratom or its Member States.

Euratom's actions and those of its Member States are consistent with the ECT and other relevant agreements and, in any event, claims with respect to such measures are precluded pursuant to the applicable instruments and general international law. Notwithstanding this, it is appropriate to take complementary procedural steps to avoid investor-state dispute settlement proceedings against Euratom or its Member States under the ECT.

3. PROPOSED MEASURES

Article 17 ECT allows Contracting Parties to deny the benefits of the investment protection provisions of the ECT to investors from non-Contracting Parties that seek to abuse the ECT by bringing investment claims through shell corporations or over measures that pertain to sanctions ("denial of benefits").

It is appropriate to invoke Article 17(1) ECT and to deny the advantages of Part III of the ECT to any legal entity that is owned or controlled by citizens or nationals of the Russian Federation or of the Republic of Belarus and that has no substantial business activities in the Area of the Contracting Party in which it is organised. It is likewise appropriate to deny those advantages to any Investment within the meaning of the ECT which is an Investment of an Investor of the Russian Federation or of the Republic of Belarus in the circumstances of Article 17(2)(b).

The denial of benefits pursuant to Article 17 implies a partial suspension of the ECT and should be implemented by the Commission by issuing a public declaration on behalf of Euratom and all Member States that are Contracting Parties to the ECT.

4. LEGAL BASIS

The Euratom Treaty contains no provision equivalent to Article 218(9) TFEU for Council decisions suspending the application of an agreement. When an agreement concluded by Euratom, such as the ECT, is to be suspended, 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.'*

The invocation of Article 17 ECT leads to a partial suspension of the ECT, namely of Part III of the ECT on investment promotion and protection, vis-à-vis investors from the Russian Federation and the Republic of Belarus. Therefore, the legal basis for the proposed decision is Article 101 paragraph 2 of the Euratom Treaty.

5. PUBLICATION OF THE ENVISAGED ACT

As the declaration under Article 17 ECT will suspend the application of the ECT by Euratom and all Member States that are Contracting Parties to the ECT, it is appropriate to publish it in the *Official Journal of the European Union*.

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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 paragraph 2 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Energy Charter Treaty ('the Agreement') was concluded by 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) Pursuant to Article 17(1) of the Agreement, each Contracting Party reserves the right to deny the advantages of Part III of the Agreement to a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised.
- (3) Pursuant to point (b) of Article 17(2) of the Agreement, each Contracting Party reserves the right to deny the advantages of Part III of the Agreement to an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party adopts or maintains measures that (i) prohibit transactions with Investors of that state; or (ii) would be violated or circumvented if the benefits of Part III of the Agreement were accorded to Investors of that state or to their Investments.
- (4) The Union has progressively imposed restrictive measures (sanctions) against the Russian Federation, initially in response to the illegal annexation of Crimea and Sevastopol and the deliberate destabilisation of Ukraine. The Union expanded the sanctions in response to the recognition of the non-government controlled areas of the Donetsk and Luhansk 'oblasts' of Ukraine, and the ordering of Russian armed forces into those areas. In response to Russia's military aggression against Ukraine, the Union significantly expanded the sanctions.
- (5) In parallel, the Union's sanctions regime concerning the Republic of Belarus has been expanded in response to the country's involvement in Russia's aggression against Ukraine.
- (6) Neither the Russian Federation nor the Republic of Belarus is a Contracting Party to the Agreement. However, investors from these countries could attempt using

corporations established in the territory of a Contracting Party to the Agreement to allege that Euratom or its Member States have acted inconsistently with the investment protection obligations of the ECT and hence bring investor-state dispute settlement proceedings against Euratom or its Member States.

- (7) Euratom's actions and those of its Member States are consistent with the ECT and other relevant agreements and, in any event, claims with respect to such measures are precluded pursuant to the applicable instruments and general international law. Notwithstanding this, it is appropriate to take complementary procedural steps to avoid investor-state dispute settlement proceedings against Euratom or its Member States under the ECT.
- (8) Article 17 of the Agreement allows Contracting Parties to deny the benefits of the investment protection provisions of the Agreement to investors from non-Contracting Parties that seek to abuse the Agreement by bringing investment claims in the aforementioned situations ("denial of benefits").
- (9) It is appropriate to invoke Article 17(1) of the Agreement with regard to any legal entity that is owned or controlled by citizens or nationals of the Russian Federation or of the Republic of Belarus and that has no substantial business activities in the Area of the Contracting Party in which it is organised. It is likewise appropriate to invoke Article 17(2)(b) with regard to any Investment within the meaning of the Agreement which is an Investment of an Investor of the Russian Federation or of the Republic of Belarus in the circumstances described in that provision.
- (10) The denial of benefits pursuant to Article 17 of the Agreement implies the partial suspension of the Agreement and should be implemented by the Commission by issuing the public Declaration in the Annex to this Decision on behalf of Euratom and all Member States that are Contracting Parties to the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

1. The denial by the European Atomic Energy Community, pursuant to Article 17(1) of the Energy Charter Treaty, of the advantages of Part III of that agreement to any legal entity that is owned or controlled by citizens or nationals of the Russian Federation or of the Republic of Belarus, and that has no substantial business activities in the Area of the Contracting Party in which it is organised, is hereby approved.
2. The denial by the European Atomic Energy Community, pursuant to Article 17(2)(b) of the Energy Charter Treaty, of the the advantages of Part III of that agreement to any Investment of an Investor of the Russian Federation or of the Republic of Belarus in the circumstances described in that provision is hereby approved.

Article 2

The issuance by the Commission of the Declaration in the Annex is hereby approved.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*