

Non-paper from the European Commission

Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty

DISCLAIMER

This non-paper has not been adopted or endorsed by the European Commission. Any views expressed are the preliminary views of the Commission services and may not in any circumstances be regarded as stating an official position of the Commission.

1. Purpose of the non-paper

This non-paper aims at guiding a discussion with Member States on the possible options available to EU, Euratom and Member States as regards their respective membership in the Energy Charter Treaty (ECT) in light of the absence of EU and Euratom positions on the modernisation of the ECT and of the outcome of the Energy Charter Conference of 22 November 2022.

2. Background

The negotiations on the modernisation of the ECT were concluded on 24 June 2022 after 15 rounds of negotiations, achieving an outcome in line with the negotiating directives received from the Council. The modernised ECT was scheduled for adoption by the Energy Charter Conference on 22 November 2022.

Despite the efforts to build a compromise allowing the EU and Euratom to take a position at the Conference, the proposed Council decision for the EU and Euratom to endorse the modernised ECT was rejected in Coreper on 18 November 2022.

Consequently, in agreement with the Member States, the Commission requested the removal of the modernisation of the ECT from the agenda of the Energy Charter Conference. The practical consequence is that the modernisation was neither adopted nor rejected by the Energy Charter Conference. In the absence of an EU and Euratom endorsement of the modernisation of the ECT, the unmodernised ECT – which is not in line with the EU's policy on investment protection or the Green Deal – continues to apply.

In addition, the European Parliament adopted a resolution on the modernisation of the ECT on 24 November 2022 – supported by a coalition composed of S&D, Greens/EFA, The Left, and Renew – calling on the Commission and Member States to start preparing both a

coordinated exit from the ECT, and an agreement excluding the application of the sunset clause between willing Contracting Parties.¹

3. Options available to the EU, Euratom and Member States

In this context, the Commission has assessed the options for a way forward regarding the EU, Euratom and Member States' membership in the Energy Charter Treaty.

Considering the outcome of Coreper on 18 November 2022, securing a Council Decision that allows for an endorsement of the modernised ECT does not appear feasible in current circumstances. As a result, the EU, which had requested the modernisation of the ECT in the first place and has been the most active Contracting Party in pushing for an ambitious reform during the negotiations, is now in a situation where it effectively blocks its adoption by other Contracting Parties.

It is also understood that, due to the above stance of Member States in the Council and several Member States' announcements to withdraw from the ECT, leaving aside whether other Contracting Parties would actually be interested, re-negotiating the outcome of the modernisation process does not seem feasible.

At the same time, remaining in an unmodernised ECT is not an option either. Indeed, the unmodernised ECT is not in line with the EU policy on investment protection and the EU Green Deal:

- The unreformed substantive standards of investment protection, as well as the ISDS (investor-to-State dispute settlement) mechanism for enforcing such standards are not compatible with the EU approach to investment protection;
- The protection granted by the unmodernised ECT to fossil fuel investments, including new investments, for an unlimited period of time, and in conditions deprived of any of the benefits afforded by the modernised Treaty – such as recalling the right of States to regulate, especially in view of achieving climate and environmental objectives in line with the Paris Agreement – would clearly undermine EU efforts to decarbonise its energy mix and achieve climate neutrality by 2050.

Yet, in the absence of a position in the Council and given the position of the European Parliament, it appears there is no scenario in which the EU and Euratom could allow the adoption of the modernised ECT, ratify it and remain party to a modernised ECT. As a result, a withdrawal of the EU and Euratom from the Energy Charter Treaty appears to be unavoidable.

The options presented below aim at facilitating the discussion. The Commission services consider option 1 as the most adequate option, taking into account the different dimensions of this debate.

¹ European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)).

Option 1: Coordinated withdrawal of EU, Euratom and Member States from the ECT

In this scenario, the EU, Euratom and Member States would engage in a parallel process of withdrawal from the ECT.

Regarding the EU and Euratom, the procedure would be as follows:

For the EU: a decision of the Union to terminate an international agreement must be adopted on the same legal basis, and following the same procedure, as a decision to conclude that agreement on behalf of the Union. Therefore, the withdrawal of the European Union from the ECT requires the adoption of a Council decision based on Article 218(6)(a) of the Treaty on the Functioning of the European Union (TFEU), in conjunction with the relevant substantive legal bases (in principle, Articles 207 and 194 of the TFEU), and the consent of the European Parliament.

Following the reasoning of the most recent case law of the Court of Justice on the decision-making for mixed agreements, namely Opinion 1/19 on the Istanbul Convention, it is clear that a decision of the Council to let the EU withdraw from the ECT must be adopted by qualified majority. A prior “common accord” by all MS cannot be required in place of a qualified majority in the Council.

The European Parliament would need to give its consent. Given the position taken in the resolution of 24 November 2022, it is likely that the European Parliament would give its consent.

For Euratom: the termination procedure would generally follow from Article 101, second paragraph of the Euratom Treaty, which is similar to the rules set out in Articles 218 TFEU, albeit with a lesser role for the European Parliament (which is informed but does need to give its consent).

For **Member States:** withdrawal would be subject to the applicable domestic rules.

Arguments

First, as previously explained, it is clear that, in the current setup, the ECT cannot be modernised. Given that the **unmodernised Treaty is not in line with the EU policy** on investment protection or the EU Green Deal, membership of the unmodernised Treaty is neither legally nor politically sustainable, as reflected also by the positions of several Member States that have recently announced to withdraw from the Treaty.

Second, the provisions of the ECT (other than on ISDS) largely fall within the areas of **EU exclusive competence**. Pursuant to Article 2(1) TFEU, only the Union may act in the areas falling within EU exclusive competence. Member States could only remain in the ECT and act in these areas of exclusive competence if empowered by the Union to do so.

Third, pursuant to the **principle of sincere cooperation** in Article 4(3) of the Treaty on European Union (TEU), Member States must take any appropriate measure to ensure the

fulfilment of the obligations arising out of the Treaties or resulting from the acts of EU institutions; facilitate the achievement of the Union's tasks; and refrain from taking any measure that could jeopardise the attainment of the Union's objectives. Arguably, by remaining Contracting Parties to the ECT, Member States may impinge on the obligations arising from the acts of EU institutions of the Union that decided an EU withdrawal from the ECT and risk jeopardising the attainment of the Union's objective in the fields of energy and trade policy.

Option 2: Withdrawal of the EU and Euratom with prior authorization for some Member States to remain party to a modernised ECT

Pursuant to Article 2(1) of the TFEU, the Union may authorise those EU Member States that want to remain Contracting Parties to the ECT to vote in favour of the modernisation at a future Energy Charter Conference and subsequently to remain party to the ECT. This option would allow for the modernisation of the ECT to be adopted, also for the benefit of non-EU Contracting Parties.

It is important to note that the Member States could only remain party to the ECT provided that the modernisation is effectively adopted and that there is reassurance that it enters into force within a reasonable time.

The prior authorisation would be necessary for Member States to vote in favour of the modernisation in the Energy Charter Conference, but also for the subsequent ratification of the amendments to the treaty. The prior authorisation would also have to lay down the conditions for the Member States to remain Contracting Parties. Effectively, the legislative act providing for the prior authorisation would not only have to include the mere empowerment of Member States to remain Contracting Parties to the ECT when the EU has withdrawn, but would also have to establish mechanisms for the coordination of Member States' actions within the ECT and the cooperation with the EU-level. This would be necessary to ensure compliance with the EU's overall policy on trade and investment. The mechanisms for the continuous coordination and cooperation between the remaining Member States and the EU would in practice have to foresee individual acts to be adopted by the Commission, similarly to the mechanisms established under the Grandfathering Regulation for BITs.²

The legal basis for prior authorisation is normally Article 2(1) TFEU in combination with a substantive legal basis (namely the energy and trade legal bases under Articles 194 and 207 TFEU). The applicable procedure is co-decision, requiring thereby the vote of the Council and European Parliament, while the European Parliament has clearly indicated that it favours a coordinated withdrawal.

² Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 351, 20.12.2012, p. 40–46.

The Euratom Treaty does not foresee an authorisation procedure. If Member States were to remain party to the ECT, it could be argued that they would have to submit notifications to the Commission on the basis of Article 103 of the Euratom Treaty.

Arguments

This approach could facilitate constructive discussions that could enable a compromise in the Council, but this would be one which involves significant complexity and an administrative burden, where some Member States remain a Contracting Party, while the EU, Euratom and a significant number of other Member States withdraw from the ECT.

Option 3: Council decision allowing adoption of the modernisation followed by the (coordinated) withdrawal of the EU, Euratom and Member States

Completing the procedure to withdraw from the ECT will take time – regardless of whether the EU and Euratom leave the Treaty alone or in a coordinated way with Member States. In the meantime, the adoption of the modernised ECT is blocked for other Contracting Parties.

It would be possible for the EU and Euratom to allow the adoption of the modernised ECT by the Energy Charter Conference while starting proceedings for their withdrawal in parallel. This would require the adoption of a Council decision pursuant to Article 218(9) of the TFEU (as regards the EU) and Article 101 second paragraph of the Euratom Treaty (as regards Euratom) such as the ones blocked in Coreper on 18 November 2022. Therefore, Member States having abstained from the Coreper vote on 18 November 2022 would need to reflect as to whether the current situation – including a perspective for the EU and Euratom to withdraw from the ECT – would lead to an adjustment of their initial position.

Arguments

The modernised ECT could be adopted, before a withdrawal process would be initiated, but this would run counter to the public and political announcement already made by a number of Member States, while also being disingenuous vis-à-vis other non-EU Contracting Parties.

4. Practical implications of a withdrawal from the ECT

The practical consequences of a withdrawal from the ECT are spelled out in paragraphs 2 and 3 of Article 47 of the ECT.

Pursuant to Article 47.2 of the ECT, one year after the date of the receipt of the withdrawal notification by the depositary, **new investments** will no longer be protected under the unmodernised ECT.

Pursuant to the **sunset clause** enshrined in Article 47.3 of the ECT, **existing investments** will continue to be protected under all the provisions of the unmodernised ECT for a **period of 20 years** counting from the moment the withdrawal becomes effective, i.e. one full year after the withdrawal notification has been received by the depositary. This is valid both for foreign investments made in the territory of the former Contracting Party, and for

investments made by the former Contracting Party in the territory of other remaining Contracting Parties.

In practice, the following can be expected for the EU:

- Most energy investments in the EU are intra-EU investments, and therefore, have never been covered by the ECT's dispute settlement provisions³;
- Existing EU investments in the territory of other Contracting Parties and investments by other Contracting Parties in the territory of the EU would remain protected for 20 years after the expiry of the one-year period for the notification of withdrawal to become effective, under the conditions set out in the unmodernised Treaty;
- New investments by ECT Contracting Parties in the EU would not be protected under the ECT after the expiry of the one-year period for the notification of withdrawal to become effective. Our general assessment is that modes of investment protection such as the one provided by the ECT are not required to attract investments in the EU, given the levels of access to justice and rule of law – especially not in the energy sector, where the EU energy market is dynamic and very attractive. Therefore, a withdrawal from the ECT should not have major effects on decisions by actors from Japan, the UK, Switzerland, Azerbaijan or any other ECT Contracting Party to invest in the EU energy sector;
- New EU investments in the territory of other Contracting Parties would no longer be protected either after the expiry of the one-year period for the notification of withdrawal to become effective. Key investments could still benefit from additional guarantees, including those enshrined in contracts between the investor and the host State.

While the ECT, including the sunset clause, does not apply, and has never applied between the EU Member States, arbitral tribunals have often taken a different view. The risk of application by arbitration tribunals of the unmodernised ECT in intra-EU relations pursuant to the ECT sunset clause could be mitigated by the negotiation of an *inter se* Agreement amongst the EU, Euratom and the Member States, confirming that the ECT in its entirety does not apply, and has never applied, in intra-EU relations. This negotiation is currently ongoing. Such an agreement would however not exclude the application of the ECT between the EU and its Member States, on the one hand, and non-EU Contracting Parties, on the other, or the application of the sunset clause in the case of a withdrawal from the ECT. For that, it would be necessary to conclude another *inter se* agreement with willing non-EU Contracting Parties, as requested by the European Parliament in its resolution of 24 November 2022. This appears however challenging given the current position of non-EU Contracting Parties on the ECT as a whole and their possible business interests currently covered by the ECT. For the time being, no non-EU Contracting Party has indicated they would be open to such a solution.

Beyond what purely concerns investment protection, a withdrawal from the ECT also means **ceasing to contribute to the international organisation that implements the Treaty and to participate in its internal processes**. The EU and Euratom do not contribute to the ECT

³ As per the Court of Justice's case law in *Republic of Moldova*, Case C-741/19.

budget but Member States do – their withdrawal from the ECT will therefore have an impact on the functioning of the Energy Charter Secretariat irrespective of the EU and Euratom withdrawal. In addition, the EU has been the main promoter of the modernisation of the ECT.