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Proposal for a

COUNCIL DECISION

on the adoption by the European Atomic Energy Community of the Agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

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 European Union is a Contracting Party to the ECT¹, together with Euratom, 22 EU Member States (as of 19 June 2024)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.

In *Komstroy*⁵, the CJEU held that Article 26(2)(c) ECT must be interpreted as not being applicable 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. Arbitral tribunals nevertheless continue to accept jurisdiction and to hand down awards in intra-EU proceedings. On 5 October 2022, the Commission sent a Communication to the Council, the European Parliament and the Member States setting out its intention to open negotiations on an agreement between the Union, Euratom and the Member States in relation to the interpretation of the Energy Charter Treaty that would include, in particular, a confirmation that the ECT has never, does not and will not apply intra-EU, that the ECT cannot serve as a basis for arbitration proceedings, and that the sunset clause does not apply. Those negotiations have taken place. The text of the *inter se* agreement is now considered stable. The initialling of the text, signalling that negotiations are closed, took place on 26 June 2024.

- **The envisaged agreement**

Nothing in the agreement states anything novel. It is a reflection of the case law of the CJEU and entirely in line with the established position of the Union as expressed on numerous occasions including in open court in third country jurisdictions. The recitals to the agreement recount the history and context of the agreement, including in particular the interpretation of Union law as handed down by the CJEU, and acknowledge the fact that the effective implementation of Union law is being undermined by the issuing of awards in intra-EU arbitration proceedings. The single provision of substance (Article 2) sets out the common understanding of the parties to the agreement in relation to the inapplicability of Article 26(2)(c) ECT intra-EU and the consequent absence of any legal basis for intra-EU arbitration proceedings as expressed in the *inter se* agreement.

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 Italy unilaterally withdrew in 2015. France, Germany, Poland and Luxembourg also initiated a procedure of withdrawal between December 2022 and June 2023, which led to their effective exit from the Energy Charter Treaty, for France, Germany and Poland in December 2023 and for Luxembourg as of 17 June 2024.

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.

⁵ Judgment in *République de Moldavie*, C-741/19, EU:C:2021:655.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

The *Komstroy* judgment has not been respected by arbitral tribunals, who consistently do not decline jurisdiction for lack of a valid arbitration agreement and, as a result, arbitral awards have been and continue to be rendered in a manner contrary to the rules of the European Union and EURATOM. Those awards are often the subject of enforcement proceedings, including in third countries. There is a risk of conflict between the Treaties and the ECT as interpreted by some arbitral tribunals which, 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.

According to the case-law of the Court, the risk of legal conflict is such as to render an international agreement incompatible with EU law. In the Commission's view, in order for the ECT to be compatible with the Treaties, all risk of conflict needs to be eliminated. The energy policy of the Union must include achieving compliance with the case law of the CJEU and avoiding a conflict between the ECT, an act of Union law, and the FEU and EU Treaties. Given the stance of arbitral tribunals, it will be important that the risk is addressed from the perspective of international law. To that end, the Commission negotiated an Agreement on the interpretation and application of the Energy Charter Treaty between the European Union, the European Atomic Energy Community and their Member States.

The Agreement is a necessary measure to achieve the objectives of the Union energy policy, as detailed above. The Euratom Treaty does not provide the necessary powers. The decision to authorise signature of the agreement on behalf of the European Atomic Energy Community should therefore be adopted on the basis of Article 203 EURATOM.

• Proportionality

The European Atomic Energy Community is also a Contracting Party to the ECT and as such, it falls to the Council to decide whether the Euratom should become a party to the Agreement interpreting that Treaty. Existing case law of the CJEU and numerous interventions of the Commission before arbitral tribunals and courts of third countries have not been sufficient to ensure an effective implementation of Union law and elimination of the risk of conflict between the ECT and the FEU and EU Treaties. If it is to have the desired effect on the decision-making practice of arbitral tribunals, the act to be adopted must be an act of international law. The Commission is, therefore, of the view that the appropriate response is to adopt an instrument in the form of an agreement between the parties regarding the interpretation of the treaty.

3. BUDGETARY IMPLICATIONS

none

4. OTHER ELEMENTS

In the late stages of the negotiation of the Agreement, the possibility of making a Declaration on the legal consequences of the *Komstroy* judgment was raised as a means to formalise, already now, the common understanding reflected in the inter se agreement. The Commission has signed that Declaration on behalf of the Union.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament⁶,

Whereas:

- (1) In *Republic of Moldova v Komstroy*, C-741/19, the CJEU held that Article 26(2)(c) ECT must be interpreted as not being applicable 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.
- (2) Arbitral tribunals nevertheless continue to accept jurisdiction and to hand down awards in intra-EU proceedings purportedly based on Article 26(2)(c) ECT. According to the CJEU, any such arbitral award must be regarded as incompatible with EU law, in particular Articles 267 and 344 TFEU. Such an award cannot therefore produce any effect and thus cannot be enforced in order to pay the compensation awarded by it.
- (3) The effective implementation of Union law is being undermined by the issuing of such awards in intra-EU arbitration proceedings. There is a risk of conflict between the Treaties and the Energy Charter Treaty as interpreted by some arbitral tribunals which, 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.
- (4) According to the case law of the Court, the risk of legal conflict is such as to render an international agreement incompatible with EU law. The risk of legal conflict should be eliminated. The adoption of an instrument of international law setting out the common understanding of the signatories on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings should help to achieve that aim.
- (5) The Commission, on behalf of the European Union and the EURATOM, and the Member States have successfully concluded negotiations on the terms of such an agreement. The common understanding contained in that Agreement has been reiterated in a Declaration on the legal consequences of the judgment of the Court of Justice in *Komstroy* and common understanding on the non-applicability of Article 26

⁶ OJ C , , p . .

of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings, of 26 June 2024.

(6) The Agreement should be adopted, subject to it being signed at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The Agreement in the Annex is hereby adopted, subject to the signing, on behalf of the European Atomic Energy Community, of the said Agreement.

The President of the Commission is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Union.

Article 2

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

*For the Council
The President*