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Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union in the Energy Charter
Conference**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision on the position to be taken by the Member States in the Energy Charter Conference in connection with the envisaged adoption of a proposed amendment to Article 49 (Depositary) of the Energy Charter Treaty ('ECT') and the approval of (i) a new understanding with respect to Article 49 ECT on the roles of the Energy Charter Secretariat ('Secretariat'), and (ii) a decision of the Energy Charter Conference on the designation of the Secretariat as depositary under Article 49 ECT in the interim period as of 2 February 2025. The adoption of the amendment to the ECT and the additional approvals are to be passed simultaneously by the Energy Charter Conference.

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Charter Treaty

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 international cooperation in the energy field between its Contracting Parties. The European Union is a party to the ECT together with Euratom¹ 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 exception of Russia² and Belarus³. On 30 May 2024, the Council adopted a Decision⁴ concerning the withdrawal of the European Union from the ECT and mandated at the same time the Member States to not oppose the adoption by the upcoming Energy Charter Conference on 3 December 2024 of the modernised provisions of the ECT. The Union notified its withdrawal to the depositary of the ECT, which will take effect on 28 June 2025.

2.2. The Energy Charter Conference

The Energy Charter Conference is the governing and decision-making body, 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

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, p. 1.

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.

⁴ Council Decision (EU) 2024/1644 of 30 May 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference, OJ L, 2024/1644, 6.6.2024, ELI: <http://data.europa.eu/eli/dec/2024/1644/oj>.

voting, subject to a quorum of at least half of all Contracting Parties. 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 its right to vote if its Member States exercise theirs, and vice versa.

2.3. The envisaged act of the Energy Charter Conference

Article 49 ECT sets out that the Government of the Portuguese Republic shall be the depositary of the ECT. On 1 February 2024, the Portuguese Republic notified its intention to withdraw from the ECT and cease to be the depositary of the ECT, effective on 2 February 2025. Against this background, between July and August 2024 the Contracting Parties discussed the proposals to designate the Secretariat as a new depositary under Article 49 ECT following the withdrawal of the Portuguese Republic. In particular, they agreed to put forward to the Energy Charter Conference the following proposals and to vote on them as part of the already prepared modernisation package of the ECT:

- (a) an amendment to Article 49 ECT designating the Energy Charter Secretariat as depositary of the ECT (CC 760 REV2);
- (b) a new understanding with respect to Article 49 ECT on the roles of the ECT Secretariat, as secretariat and as depositary (CC 762 REV2).

The agreed proposals are to be voted on 3 December 2024, during the 35th meeting of the Energy Charter Conference. The decisions related to the modernisation of the ECT will be subject to unanimity vote and a quorum of at least half of all Contracting Parties present. If the vote is successful, the decisions 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, including the amended Article 49 ECT and a new understanding under that Article on the roles of the Secretariat.

The provisional application of the amendments to the ECT, including the new amendment of Article 49 ECT on depositary, 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 and Understandings. However, in the discussions it has become clear that not all Contracting Parties will be able to provisionally apply the amendment to Article 49 ECT and the new understanding on the depositary. In order to ensure institutional continuity for the function of depositary as of 2 February 2025, the Contracting Parties agreed to propose to the Energy Charter Conference

- (c) an additional, self-standing draft Decision which designates the Secretariat as depositary under Article 49 ECT in the interim period, starting on 2 February 2025, until the entry into force of the modernised ECT (CC 814).

The latter Decision will not as such be part of the package concerning the modernisation of the ECT and will be adopted at the Conference by a majority of $\frac{3}{4}$ of all Contracting Parties.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The Commission proposes that the Member States that are parties to the ECT take, at the meeting of the Energy Charter Conference, the positions described below.

3.1. Regarding the adoption of an amendment to Article 49 ECT (CC 760 REV2)

The designation of a new depositary following the effective withdrawal of the Portuguese Republic from the ECT is essential for the institutional functioning of the ECT to which the

Union and several Member States are parties. The amendment to Article 49 ECT designating the Secretariat as a new depositary is integrated in the modernised ECT package on which the Charter Conference is to vote on 3 December 2024.

The adoption of this amendment to 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 Member States take a position, at the Energy Charter Conference, not preventing the adoption of the proposed amendment to Article 49 ECT. This position will complement the Council Decision (EU) 2024/1644 of 30 May 2024⁵.

3.2. Regarding the approval of a new understanding with respect to Article 49 ECT on the roles of the Energy Charter Secretariat (CC 762 REV2)

The new understanding intends to clarify the different roles of the Secretariat under the ECT. On the one hand, the Secretariat performs its functions of a secretariat pursuant to Article 35 ECT. On the other hand, it is to undertake the role of depositary pursuant to amended Article 49 ECT, once adopted. The new understanding will be integrated in the modernised ECT package on which the Charter Conference is to vote on 3 December 2024.

The adoption of an understanding 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 Member States take a position, at the Energy Charter Conference, not preventing the approval of the proposed new understanding with respect to Article 49 ECT on the roles of the Energy Charter Secretariat. This position will complement the Council Decision (EU) 2024/1644 of 30 May 2024⁶.

3.3. Regarding the approval of a Decision on the Designation of the Energy Charter Secretariat as a Depositary under Article 49 ECT in the interim period as of 2 February 2025 (CC 814)

The self-standing Decision of the Energy Charter Conference on the designation of the Energy Charter Secretariat as an interim depositary of the ECT aims to ensure uninterrupted functioning of the ECT in the period following on the withdrawal of the Portuguese Republic from the ECT and the entry into force of the modernised ECT. Therefore, it sets out that the Secretariat should assume its function of depositary to the ECT as of 2 February 2025, i.e. the date on which the current depositary, the Government of Portuguese Republic ceases to perform this function.

As a result, the Commission proposes that the Member States take a position not preventing the approval of the self-standing Decision concerning the establishment of the Energy Charter Secretariat as depositary of the ECT in the interim period as of 2 February 2025.

Bearing in mind that the withdrawal of the EU and Euratom from the ECT was notified to the ECT depositary on 27 June 2024, it is expected that the EU 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

⁵ Council Decision (EU) 2024/1644 of 30 May 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference, OJ L, 2024/1644, 6.6.2024, ELI: <http://data.europa.eu/eli/dec/2024/1644/oj>.

⁶ Council Decision (EU) 2024/1644 of 30 May 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference, OJ L, 2024/1644, 6.6.2024, ELI: <http://data.europa.eu/eli/dec/2024/1644/oj>.

at the meeting of the Energy Charter Conference scheduled for 3 December 2024. This is without prejudice to the division of competences between the Union and its Member States.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union ('TFEU') provides for 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, with the exception of acts supplementing or amending the institutional framework of the agreement.*'

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'⁷.

4.1.2. Application to the present case

The Energy Charter Conference is a body set up by an agreement, namely the ECT.

The acts which the Energy Charter Conference is called upon to adopt constitute acts having legal effects.

The decision to be adopted by the Energy Charter Conference to adopt, pursuant to Article 34 ECT, the proposed amendment and an understanding with respect to Article 49 ECT constitute, in the particular circumstances of the case, acts having binding legal effects under international law because they are to be adopted simultaneously with the decision regarding the entry into force and provisional application of amendments and understandings to the text of the ECT, which obliges the Contracting Parties to provisionally apply these amendments and understandings on an agreed date if no contrary declaration is timely lodged.

The Decision to be adopted by the Energy Charter Conference establishing the Energy Charter Secretariat as depositary of the ECT in the interim period as of 2 February 2025 also constitutes an act having binding legal effect under international law. It constitutes the legal basis for the Energy Charter Secretariat to ensure a stable functioning of the Charter institutions and will enter into force immediately upon its adoption, without the need for ratification, pursuant to Article 48 ECT.

The envisaged act does not supplement or amend the institutional framework of the ECT.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

⁷ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

4.2.2. Application to the present case

The envisaged acts pursue objectives and have components in the area of energy and the common commercial policy. These elements of the envisaged acts are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Articles 194(2) and 207 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 194(2) and 207 TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the decisions of the Energy Charter Conference will amend the ECT, its Understandings, Declarations and Decisions and will establish a new depositary of the ECT, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

Proposal for a

COUNCIL DECISION

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article(s) 194(2) and 207, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Energy Charter Treaty ('ECT') was concluded by the Union by means of Council and Commission Decision 98/181/EC, ECSC, Euratom and entered into force on 16 April 1998.⁸
- (2) In the absence of any substantial update of the ECT since the 1990s, the ECT became increasingly outdated.
- (3) Article 49 ECT sets out that the Government of the Portuguese Republic shall be the depositary of the ECT. On 1 February 2024, the Portuguese Republic notified its intention to withdraw from the ECT and thereby also the intention to cease performing its function as the depositary. The withdrawal of the Portuguese Republic from the ECT will take effect on 2 February 2025.
- (4) An amendment to Article 49 ECT is necessary to designate a new depositary to the ECT. The Contracting Parties to the ECT ('Contracting Parties') agreed in negotiations to add such an amendment to the modernised text of the ECT, indicating the Energy Charter Secretariat ('Secretariat') as a new depositary. They also agreed to propose for approval by the Energy Charter Conference a new understanding with respect to Article 49 ECT on the roles of the Secretariat. Furthermore, given that not all Contracting Parties will apply the modernised ECT provisionally after its adoption, the Contracting Parties agreed to propose for approval by the Energy Charter Conference a decision, which will designate the Secretariat as an interim depositary as of 2 February 2025, pending the entry into force of amendments to the ECT.
- (5) Pursuant to Article 34 ECT, the Energy Charter Conference adopts texts of amendments to the ECT.
- (6) The Energy Charter Conference is to adopt the proposed acts at its meeting of 3 December 2024. The acts to be adopted by the Energy Charter Conference will be binding on the Union.
- (7) It is appropriate for the Union not to exercise its vote at the Energy Charter Conference voting on the proposed amendments to the ECT and to establish the position to be taken by the Member States that are Contracting Parties, acting jointly,

⁸ OJ L 69, 9.3.1998, p. 1.

for matters falling under the Union competence. This position is without prejudice to the division of competences between the Union and the Member States. It complements the Council Decision (EU) 2024/1644⁹.

- (8) The Member States that are Contracting Parties and that are present at the Energy Charter Conference should take a position which does not prevent the adoption or approval of the proposed acts,

HAS ADOPTED THIS DECISION:

Article 1

1. In accordance with Article 36(7) of the Energy Charter Treaty ('ECT'), the Union shall not exercise its right to vote in the Energy Charter Conference voting on the proposed amendment to and understanding on Article 49 ECT, and on the decision on the designation of a depositary under Article 49 ECT.
2. The Member States that are Contracting Parties to the ECT and that are present at the Conference shall, acting jointly, exercise their vote at the Energy Charter Conference on 3 December 2024 so as:
 - (a) not to prevent the adoption by the Conference of the proposed amendment to Article 49 ECT (CC 760 REV2);
 - (b) not to prevent the approval of the understanding with respect to Article 49 ECT on the roles of the Energy Charter Secretariat (CC 762 REV2); and
 - (c) not to prevent the approval of a decision on the designation of the Energy Charter Secretariat as depositary under Article 49 ECT with effect on 2 February 2025 (CC 814).

Article 2

This Decision is addressed to the Member States that are Contracting Parties to the ECT.

Done at Brussels,

*For the Council
The President*

⁹ Council Decision (EU) 2024/1644 of 30 May 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference, 6.6.2024, OJ L, 2024/1644, ELI: <http://data.europa.eu/eli/dec/2024/1644/oj>.