
The EU and Euratom withdraw from the Energy Charter Treaty

In addition, they deny the application of its advantages to investors from Russia and Belarus

European Union - Legal flash

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Key aspects

- On June 27, 2024, the Government of the Republic of Portugal, in its capacity as the provisional depositary of the ECT, received notices of withdrawal by the European Union and the European Atomic Energy Community (Euratom) from the treaty.
- EU and Euratom's withdrawals will take effect on June 28, 2025.
- Investments made within the territory of the EU and Euratom (in the sense of the territory of their Member States) and with respect to measures adopted by the EU and Euratom within their attributed competences, will continue to be protected by the ECT until June 28, 2045.
- Within the context of the restrictive measures adopted by the EU and Euratom due to the war of aggression by Russia against Ukraine, the EU and Euratom have denied the advantages of Part III of the ECT to investors and investments controlled by nationals of Russia or Belarus.



Within the past few weeks, the European Union (“EU”) and the European Atomic Energy Community (“Euratom”) have adopted several normative acts of great relevance regarding the Energy Charter Treaty (“ECT”), done in Lisbon on December 17, 1994.¹ It is convenient to analyze them together in order to accurately understand the effect of each of them.

Withdrawal from the ECT

Firstly, on June 5, 2024, the Official Journal of the EU (“OJEU”) published Council Decision (EU) of May 30, 2024 on the withdrawal of the EU from the ECT.² Similarly, on June 13, 2024 the OJEU published Council Decision (EU) 2024/1677 of May 30, 2024 on the approval of the withdrawal of Euratom from the ECT³ (altogether “**Decisions 1638 and 1677**”).

Although the Decisions entered into force on the day of their adoption, their material effects started later given that, as Decisions 1638 and 1677 themselves acknowledge and the ECT requires, both organizations had to notify their respective withdrawals in writing to the Republic of Portugal as depositary of the ECT, which has also recently withdrawn from the very same ECT and will likewise cease to act in that capacity.⁴ This way, in accordance with Article 47(2) ECT, each withdrawal will take effect on June 28, 2025, that is, one year after the date of receipt of the withdrawals by the Portuguese Republic, as recognized in Recitals 9 of Decisions 1638 and 1677.

This notwithstanding, as usual, the very same Recitals 9 of Decisions 1638 and 1677 omit that, according to Article 47(3) ECT, the provisions of the ECT will continue to apply despite the withdrawals to investments made in the territory of the EU and Euratom, being the territory of the Member States of those organizations in application of Article 1(10) ECT, and with respect to measures adopted by the EU and Euratom within the exercise of their attributed competences. This ‘*sunset clause*’⁵ of the ECT operates with the interplay of two relevant dates:

- On one hand, the cutoff date for making investments eligible for protection under the ECT is June 28, 2025, i.e., the date the withdrawal will take effect; and,
- On the other hand, the end date for the protection of investments by the EU and Euratom is June 28, 2045, that is, 20 years after the withdrawal takes effect.

¹ See 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 OJEU L of June 5, 2024 (ELI: <http://data.europa.eu/eli/dec/2024/1638/oj>).

³ OJEU L of June 13, 2024 (ELI: <http://data.europa.eu/eli/dec/2024/1677/oj>).

⁴ See the legal flash prepared by Cuatrecasas, “Portugal formalizes its withdrawal from Energy Charter Treaty”, available at <https://www.cuatrecasas.com/resources/lf-en-662696b777f9c592408022.pdf?v1.74.0.20240418> (April 16, 2024).

⁵ The Energy Charter Secretariat has insisted on the importance of this provision, even analyzing its non-derogability under general international law; see <https://www.energycharter.org/media/news/article/sunset-clause-article-47-of-the-ect-in-relation-to-article-62-of-the-vienna-convention-on-the-law/> (November 3, 2022). The statement published by the Energy Charter Secretariat regarding the withdrawals by the EU and Euratom on July 12, 2024 insist on the application of the ECT for an additional 20 years following the entry into force of the withdrawals: see https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-5/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=251bd2158111616d7f4e8729b4728d6a.



In other words, the withdrawal from the TCE by the EU and Euratom shall only affect investments made from June 28, 2025 onwards, but not the current ones or those made up until that date.

Both withdrawals are explained given the failure by the two organizations and their Member States to agree on the approval of the modernization of the ECT, a process that commenced in 2019 to adapt the Treaty to the principles of the Paris Agreement, the requirements of sustainable development and the fight against climate change, as well as with modern standards of protection of foreign investments. It has been in this context that several Member States of the EU and Euratom have decided to unilaterally withdraw from the ECT,⁶ including Spain⁷ as well as Portugal. Even though the European Parliament voted in favor of a coordinated withdrawal from the ECT by all Member States,⁸ Decisions 1638 and 1677 leave the door open for Member States to continue being Contracting Parties of the ECT should they wish but subject to the approval of its modernization, so it is expected that they vote in favor or that they do not oppose to the adoption of that modernization within the next Energy Charter Conference.⁹

It is necessary to point out that those who have now denounced the ECT are the EU and Euratom as such, which were Contracting Parties to the Treaty, on an equal footing with their Member States, in accordance with the competences attributed to them. Given that there are Member States that have also denounced the ECT on their own behalf (such as Spain and Portugal), in the event of a dispute that is eligible for protection under the ECT, it will be more necessary than ever to precisely determine to whom the measures affecting an investment are attributed (to the EU, Euratom, or a Member State in the transposition of EU law, on one hand; or to a Member State in the exercise of its own competences, on the other hand) in order to establish until what date the ECT protects that investment against those measures.

Denial of advantages to investors from Russia and Belarus

Secondly, on July 1 and 2, 2024 the OJEU published, respectively, Council Decision (Euratom) 2024/1847 and Council Decision (EU) 2024/1852, of June 25, 2024¹⁰ (altogether, “**Decisions 1847 and 1852**”), whereby the EU and Euratom deny, in

⁶ Apart from Italy in 2016, the process of successive withdrawals from the ECT has featured France, Germany, Poland, Luxembourg, Slovenia, Portugal, Spain and the Netherlands (European part of the Kingdom), in addition to the United Kingdom after Brexit. See the most recent and successive statements labelled “Written notification of withdrawal from the Energy Charter Treaty” available at the website of the Energy Charter Secretariat, <https://www.energycharter.org/media/all-news>, of March 7, May 17, May 28 and July 12, 2024.

⁷ See the legal flash prepared by Cuatrecasas, “Spain withdraws from the Energy Charter Treaty”, available at <https://www.cuatrecasas.com/en/spain/energy-infrastructure/art/spain-withdraws-energy-charter-treaty> (May 14, 2024).

⁸ See “MEPs consent to the EU withdrawing from the Energy Charter Treaty”, available at <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20549/meps-consent-to-the-eu-withdrawing-from-the-energy-charter-treaty> (April 24, 2024).

⁹ The EU and Euratom have given instructions to their Member States in order not to prevent the adoption of the instruments of modernization of the ECT. See Council Decision (EU) 2024/1644 of May 30, 2024 on the position to be taken on behalf of the European Union in the Energy Charter Conference (OJEU L of June 6 2024; ELI: <http://data.europa.eu/eli/dec/2024/1644/oj>); and Council Decision (Euratom) 2024/1645 of May 30, 2024 on the position to be taken on behalf of Euratom in the Energy Charter Conference (OJEU L of June 6, 2024; ELI: <http://data.europa.eu/eli/dec/2024/1645/oj>).

¹⁰ OJEU L of July 1, 2024 (ELI: <http://data.europa.eu/eli/dec/2024/1847/oj>) and OJEU L of July 2, 2024 (ELI: <http://data.europa.eu/eli/dec/2024/1852/oj>).



accordance with Article 17 ECT, 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 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.

Decisions 1847 and 1852 have been taken within the context of the restrictive measures that the EU and Euratom have been adopting over the last years against Russia due to its repeated interventions in Ukraine (illegal annexation of Crimea and Sevastopol and deliberate destabilization of Ukraine in 2014, recognition of Donetsk and Luhansk and aggression of Russia against Ukraine in 2022), expanded to Belarus due to the country's involvement in the war of aggression of Russia against Ukraine.

Decisions 1847 and 1852 are to be explained because Article 17 ECT permits the Contracting Parties to deny the advantages of Part III thereof (very in particular, the rights of protection of investments included in Articles 10 and 13 on fair and equitable treatment and non-expropriation without compensation) when the investor or the investment are in practice controlled by nationals of third, non-Contracting States of the ECT, like Russia and Belarus. Decisions 1847 and 1852 cover the two aspects foreseen in Article 17 ECT:

- > On one hand, the EU and Euratom 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, or former Contracting Party, in which it is organized (Article 17(1) ECT). This is the case of mailbox companies devoted to holding shares without any activity in the Contracting State of the ECT in which it is constituted.
- > On the other hand, the EU and Euratom deny the advantages of Part III of the ECT any investment of an investor of the Russian Federation or of the Republic of Belarus as far as the EU and Euratom have adopted measures that prohibit transactions with investors from Russia and Belarus or if those measures would be violated or circumvented if the benefits of Part III of the ECT are accorded to investors from Russia or Belarus or to their investments (Article 17(2)(b) ECT).

With this denial, the EU and Euratom seek to prevent that, in accordance with the rights recognized in Part III of the ECT, the investors affected by the denial may challenge the effects of the restrictive measures adopted as a consequence of Russia's war of aggression against Ukraine.

For greater certainty of the scope of the denial, the EU and Euratom have agreed on a declaration annexed to both Decisions that constitutes the formal denial of the advantages. We note that 26 of the 27 EU Member States have adhered to this declaration, that is, all the



current¹¹ members (even if they have ceased to be Contracting States of the ECT) except for Hungary.

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¹¹ The United Kingdom made a similar declaration of denial of advantages on September 29, 2023. See [https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/20230929 - Letter from UK Dept for Business Trade to ECT Secretary General.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Occasional/20230929_-_Letter_from_UK_Dept_for_Business_Trade_to_ECT_Secretary_General.pdf).