

EU/Euratom Agreement on the interpretation and application of the Energy Charter Treaty: adoption by Euratom

2024/0146(NLE) - 02/07/2024 - Legislative proposal

PURPOSE: to adopt 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.

PROPOSED ACT: Council Decision.

ROLE OF THE EUROPEAN PARLIAMENT: the Council adopts the act after consulting the European Parliament but without being obliged to follow its opinion.

BACKGROUND: 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 ECT, together with Euratom, 22 EU Member States (as of 19 June 2024), as well as Japan, Switzerland, Turkey and most countries from the Western Balkans and the former USSR, with the exception of Russia and Belarus.

In *Republic of Moldova v Komstroy*, C741/19, the Court of Justice of the European Union (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 purportedly based on Article 26(2)(c) ECT. According to the CJEU, any such arbitral award must be regarded as incompatible with EU law. Such an award cannot therefore produce any effect and thus cannot be enforced in order to pay the compensation awarded by it.

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.

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.

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

CONTENT: the Commission proposal calls for the adoption 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.

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.

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.