

20 February 2023



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ASSESSING OPTIONS FORWARD WITH THE ENERGY CHARTER TREATY

Introduction

Civil Society Organisation, including CAN Europe, welcome the Commission's non-paper on the next steps regarding the membership of the EU and Euratom to the Energy Charter Treaty (ECT). In particular, we strongly agree with the Commission Services that the EU's withdrawal from the ECT is unavoidable and that a coordinated withdrawal of the EU and all Member States is by far the best option.

Why is an EU withdrawal unavoidable?

- **The ECT reform does not have enough political support:** The European Parliament has rejected the reform as insufficient and called on the Commission and Member States to initiate a coordinated withdrawal. Over 1 million citizens have signed a petition for withdrawal and seven of the EU's Member States have already decided to leave (France, Germany, the Netherlands, Poland, Spain, Luxembourg and Slovenia; Italy already left in 2016), including its major outward investors.
- **There is no plausible scenario for the reform to ever enter into force** if the EU remains a member. EU ratification requires the consent of the European Parliament and all EU Member States (see [this legal blog](#)), including those that want to leave or have left.
- **The ECT is an obstacle to sovereign climate and energy policies**, even if it were to be reformed. The French High Council on Climate has concluded that the ECT, "even in a modernised form, is not compatible with the pace of decarbonisation of the energy sector and the intensity of emissions reduction efforts needed by 2030, as reiterated by the IEA and assessed by the IPCC." Recently, investors have also started launching cases against policies adopted in response to the energy price crisis ([see for instance](#)).
- **It is generally accepted that the current version of the ECT is fundamentally incompatible with EU law** and the only way forward for the EU and the Member States to rectify this is a coordinated withdrawal.

Why is a coordinated withdrawal (option 1 in the non-paper) the best option?

- This approach is the **safest and most coherent**: Given the ongoing energy price crisis and accelerating climate change, states need full regulatory power to combat energy poverty and manage a swift and just energy transition. A coordinated withdrawal combined with an inter-se agreement to clarify the inapplicability of the ECT for intra-EU cases and to neutralise the sunset clause where required, would be the strongest safeguard against expensive ISDS claims. Over [65%](#) of ISDS cases under the ECT are intra-EU, which under option 1 would no longer be admissible. A scattered withdrawal (option 2 of the non-paper), however, would create many risks and undermine EU unity (more details below).
- **Most comprehensive**: The EU could open the door to non-EU contracting parties of the ECT to join the coordinated withdrawal and neutralise the sunset clause. This should include all EU accession candidates, as they would have to withdraw from the agreement once they become EU members, and close economic partners such as the UK and Switzerland.
- **Surest**: The European Parliament has already stated in its resolution from 24 November 2022 that it would consent to this option. Option 1 would be the most straightforward for EU institutions and Member States: the administrative burden would be minimal and the political consensus easy to build.

What are the risks and limitations of the other options?

Option 2

- **Politically undesirable**: Some Member States would remain a contracting party to the ECT, while others withdraw. This would undermine cohesion in EU external representation and within its internal market, and question EU's unity. It would create an unlevel playing field, potentially affecting the implementation of EU law across Member States facing different liability regimes.
- **Uncertainty if the ECT will ever be reformed**: Option 2 rests on the assumption that other non-EU contracting parties to the ECT would be willing to conclude and ratify the reform after the EU left but this is very questionable. The EU has been the main advocate of ECT reform so far, while Japan originally saw no need to reform any of the provisions of the current ECT. In the context of the EU Member States and the EU leaving the ECT, it is likely that non-EU contracting parties will show a diminished willingness to ratify the June 2022 compromise, casting a successful reform into doubt.

- **Huge legal uncertainties:** The application of partly the old and partly the new ECT in relation to different EU Member States would create a very complex legal situation. There would be considerable uncertainty about which aspects of the ECT MS or the EU are bound to. It would be a chaotic scenario with high legal uncertainty, very different to a clear coordinated withdrawal.
- **Uncertain political feasibility:** The European Parliament supports a coordinated withdrawal from the ECT, which it considers an obstacle to Member States' ability to fulfil their climate obligations and to regulate their energy systems in response to the current crises. It is highly questionable that it would authorise option 2.
- **Very long and burdensome procedure:** Option 2 requires individual acts authorising EU Member States to remain contracting parties to the ECT similar to Regulation (EU) No 1219/2012. Conditions like those in the Grandfathering regulation would have to be attached to these authorisations. In parallel, the reformed ECT would have to be ratified by $\frac{3}{4}$ of its contracting parties, which will at best take years with the uncertainties mentioned above. In the meantime, the unreformed treaty would continue to apply to remaining EU Member States.
- **All diplomatic and political efforts would fall on remaining Member States:** The Commission has made its position clear: it would only authorise Member States to remain a party within a reformed ECT. The responsibility of reforming the ECT and ensuring its swift ratification would fall only on those Member States, who decide to stay - including the diplomatic coordination amongst them, the outreach to non-EU ECT parties, and funding the ECT Secretariat. They would not enjoy the support of bigger EU countries or Commission services in this task. If they fail, they would have to withdraw anyway.

Option 3

- **A legal and political nightmare:** The reformed ECT would only enter into force once $\frac{3}{4}$ of contracting parties have ratified it. This process would at best take years but **chances of it ever happening are very small** given that non-EU Member States would be aware of the intention of the EU to leave once the reformed treaty enters into force. This would make the **EU hostage to the interests of foreign nations**.
- **Politically untenable:** At least seven Member States have already decided to withdraw, and several of them rejected the reform outcomes in November. The European Parliament has also made it clear that it rejects the reform outcomes as they are neither aligned with the European Green Deal nor with the EU's new approach on investment policy. The EP already demanded more far-reaching reforms of EU investment policy in last year's [own-initiative report on the future of EU investment policy](#), which got overwhelming support from across the political spectrum.
- **Far greater risk of ISDS cases:** Member States would expose themselves to a greater risk of arbitration cases due to expansion of the treaty's coverage to new untested technologies, such as CCS or hydrogen, on which policy frameworks and approaches

are still exploratory. EU governments should not tie their hands via the ECT if they are still testing what is the best approach to these technologies. The ECT is unnecessary to attract foreign investments into the EU, as made clear by the Commission.

- **Uncertain effect:** the main rationale for option 3 is that it would attempt to update the outdated investment and energy provisions of the ECT; but it is uncertain whether after a withdrawal the sunset clause would actually prolong the old or the modernised version of the ECT – probably the modernised version would only apply to disputes where both home and host state have ratified or provisionally applied the modernisation.

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