

# EU withdrawal from the Energy Charter Treaty

## SUMMARY

On 7 July 2023, the European Commission published a proposal for a Council decision on the withdrawal of the Union from the Energy Charter Treaty (ECT) – a multilateral agreement that regulates energy investment. This comes after a previous proposal to modernise the ECT did not gather the required majority among Member States. The lack of an EU position de facto blocks the ECT modernisation process. Due to many concerns over the protection of fossil fuel investments and amid the lack of prospects for change, several countries have announced their intention to withdraw unilaterally. France, Germany and Poland are due to leave the ECT by the end of 2023 and Luxembourg by mid-2024. Additionally, the Netherlands, Slovenia, Spain and, more recently, Denmark, Ireland and Portugal have announced their intention to leave unilaterally.

The Commission now proposes a coordinated withdrawal by the Union and its Member States, as it considers the Treaty to be no longer compatible with the EU's climate goals under the European Green Deal and the Paris Agreement, predominantly due to concerns over continued fossil fuel investments. Another concern relates to the specifics of the investor-state dispute settlement mechanism. The rulings of international arbitration tribunals are rarely in the public domain, with few opportunities for legal redress and oversight; the majority of cases have been launched against EU Member States, often by investors headquartered in the EU. The Court of Justice of the European Union (CJEU) judgment from September 2021 found it to be contrary to EU law, as it excluded the CJEU from jurisdiction over intra-EU disputes in its areas of competence.

A qualified majority of Member States need to back the Commission proposal to withdraw. The procedure requires that the Commission notify the ECT secretariat about the withdrawal of the EU as a whole and that each country does so on its own account. However, some countries have already signalled that they prefer to stay within the ECT.

The European Parliament will be asked to give its consent to the EU withdrawal and has already announced in a resolution that there is a required majority to approve the withdrawal. Due to the sunset clause, the parties are bound by the ECT provisions for 20 years after the withdrawal.



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## Introduction

The [Energy Charter Treaty](#) (ECT) is a multilateral agreement that provides a binding framework for energy cooperation between its [53 contracting parties](#), which consist of 51 member countries plus the EU and Euratom. The ECT was signed in December 1994 and has been in force since April 1998. It is complemented by the [European Energy Charter](#) (1991) and the [International Energy Charter](#) (2015), which are non-binding political declarations setting out the goals of the Energy Charter process. Some countries have signed one or both of these political declarations but not ratified the ECT. By the fact of signing one of the political declarations, a party becomes an observer to the [Energy Charter Conference](#). It is an inter-governmental organisation consisting of members (those who ratified the ECT) and observers (signatories of political declarations) and is a governing and decision-making body for the Energy Charter process. The Energy Charter secretariat is based in Brussels.

The ECT covers the full process of energy investment, production, supply and consumption. It was born in a geopolitical context after the fall of the Soviet Union (USSR), when many Western countries and their companies wanted to invest in modernising the energy sectors of central and eastern Europe, but were concerned about the legal protection of their investments. The ECT's sunset clause requires signatory states who wish to exit to comply with its provisions for 20 years after withdrawal.

### Energy Charter Treaty provisions

The ECT aims to establish a multilateral framework for energy cooperation while promoting energy security through support to competitive energy markets. The Treaty, with its 50 articles, focuses on four areas: the protection of foreign investments and protection against key non-commercial risks; non-discriminatory treatment in energy trade and provisions to ensure reliable cross-border energy transit flows through pipelines, grids and other means of transportation; resolution of disputes between member states and foreign investors, involving the use of international arbitration mechanisms; and the promotion of energy efficiency and environmental protection.

A [study](#) conducted for the European Parliament's Legal Affairs (JURI) Committee explains that exit from the ECT is subject to two sectional sunset clauses introduced into the treaty in order to achieve long-lasting cooperation. A first sectional sunset clause in Article 47.2 extends the validity of the treaty for one year after the date on which the notification of the withdrawal is received. After this time, the treaty automatically expires and does not apply to new investments. A second sectional sunset clause in Article 47.3 extends the validity of the provisions applying to existing investments for 20 years from the date on which the withdrawal takes effect. The combination of both sunset clauses shows that after unilaterally leaving the treaty, the party is bound by the provisions of the ECT regarding existing investments for 21 years from the notification date. By way of example, in this period the countries 'shall in no way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of an investment'.

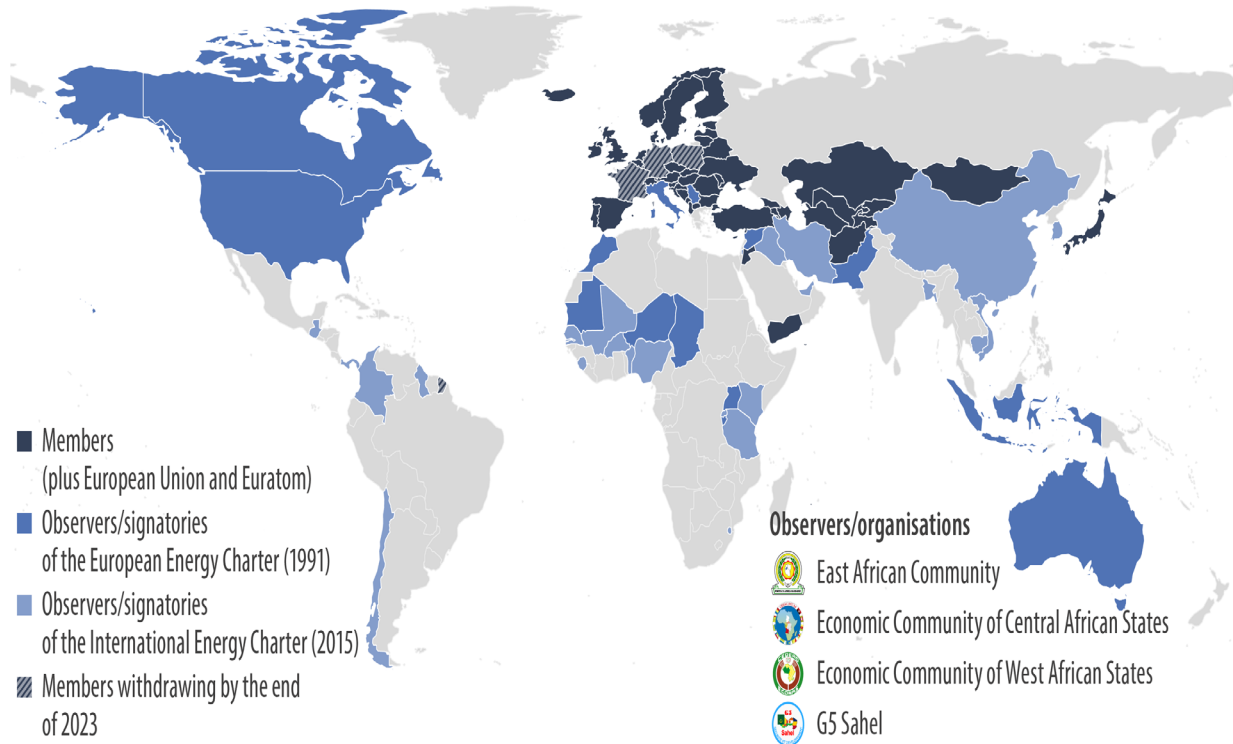
## The European Union and the ECT

The EU and its Member States are original contracting parties to the ECT, and still account for over half of its members. Except for Italy, which [withdrew](#) in 2016, all EU Member States are currently party to it. Four EU countries have formally notified their withdrawal: France is due to leave the ECT on 8 December 2023, Germany on 20 December 2023, Poland on 29 December 2023 and Luxembourg on 17 June 2024. Other European countries that have ratified the treaty include Western Balkan and EFTA/EEA countries, as well as the United Kingdom. The rest of the contracting parties are energy-producing and transit countries in the former USSR, which developed strong energy supply chains to western Europe during the Cold War.

Russia was an original contracting party, but never ratified the ECT and ultimately withdrew in 2009. The country was an observer, as a signatory of the 1991 European Energy Charter, but this status [was revoked](#) in June 2022 because of its war of aggression against Ukraine. At the same meeting,

the Energy Charter Conference suspended the membership and observer status of Belarus because of the breach of [Article 18](#) of the ECT due to the country's involvement in Russia's aggression against Ukraine. Japan remains an important and active contracting party, yet few other countries in Asia, Africa, America or the Middle East have ratified the ECT.

Figure 1 – Members and observers of the Energy Charter Process



Source: Energy Charter [website](#).

## EU concerns about the ECT

Over the years, the EU has repeatedly raised concerns about the ECT provisions relating to investment protection, which allow companies headquartered in any member state to sue the government of another member if it harms their existing energy investments. The rulings of international arbitration tribunals are rarely in the public domain, and there is little awareness about the real costs involved (e.g. legal fees, damages awarded). Moreover, there are few opportunities for legal redress and oversight of arbitration decisions via national courts and the Court of Justice of the European Union (CJEU). The ECT secretariat is not informed automatically about arbitration cases that draw on the ECT, and instead monitors the process independently. It has compiled a [database](#) of 150 known arbitration cases.

The other concern is that the majority of cases have been launched against EU Member States, often by investors headquartered in Europe. A [CJEU judgment](#) in September 2021 found that this was against EU law, because it excluded the CJEU from ultimate jurisdiction over intra-EU disputes in its areas of competence. Additionally, the EU believes the treaty is no longer compatible with the EU's climate goals under the European Green Deal and the Paris Agreement, due to concerns over continued fossil fuel investments. One example from April 2021 that turned public opinion against the ECT was when German energy companies RWE and Uniper [sued](#) the Netherlands for €2.4 billion for passing a law banning coal-fired power plants after 2030.

## ECT modernisation process

In light of the growing legal and political concerns about the ECT, a [modernisation](#) process driven by the EU and its Member States was initiated, focusing on investment protection standards, limiting the protection granted to fossil fuels and fostering sustainable development. In July 2019,

the Council gave the Commission a mandate to negotiate a profound modernisation of the ECT. In May 2020, the EU submitted its [proposal for the modernisation](#) of the ECT to the Energy Charter secretariat, focusing on regulatory improvements rather than radical change. A [supplementary proposal](#) of February 2021 added a 'fossil fuel carve-out' (i.e. exclusion of fossil fuel investment protection) and a 'sunset clause' lasting until 2040 for future ECT-related disputes concerning fossil fuel investments.

Negotiations started in July 2020, and after 15 rounds the parties reached an '[agreement in principle](#)'. The proposed text included a clause which would end arbitration cases between investors and member countries that are both located in the EU. The proposal aimed to allow parties not to grant investment protection to new fossil fuel-related investments and to phase out protection for existing investments. This phasing out of protection would happen within a shorter timeframe than in the scenario of a withdrawal from the ECT. The proposal envisaged phasing out existing fossil fuel investments after 10 years (instead of 20 years under current rules) and exclusion of new investment after 9 months.

In October 2022, the Commission published a [proposal](#) for a Council decision to modernise the ECT, but this proposal failed to gather the [required majority](#) in the Council. Some Member States felt the modernisation proposal does not go far enough to meet their climate ambitions. The disagreements mainly concerned environmental issues and the investor-state dispute settlement mechanism; as a result, the EU has blocked the ECT modernisation process.

Several EU countries have announced their intention to unilaterally withdraw from the ECT. Germany, France, Poland and Luxembourg have officially notified the ECT of their withdrawal, and the Netherlands, Slovenia and Spain have announced their intention to do so. More recently, Denmark, Ireland, Portugal and, among non-EU countries, the UK have announced their intention to withdraw unilaterally.

## Ongoing procedure

On 7 July 2023, the Commission published a [proposal](#) for a Council decision on the withdrawal of the Union from the ECT and withdrew its previous proposal to modernise the treaty. In the new proposal, the Commission stated that remaining a contracting party to the unmodernised ECT is not an option for the EU or its Member States because the current treaty – especially the parts on investment protection – is at odds with the EU's energy and climate goals as well as the EU's investment policy. The unmodernised ECT is incompatible with the principle of autonomy of Union law, while the protection granted to fossil fuels does not fit with EU objectives as defined in the European Green Deal, the REPowerEU plan or the Climate Law. The ECT Secretary-General, in his [statement](#) following the Commission proposal, asked the EU Member States to adopt a decision not to object to modernisation of the ECT, as the lack of a common EU position was an impediment to approving the 'agreement in principle' from June 2022.

The Parliament will be required to give its consent to the withdrawal by an [absolute majority](#). The issue [has been assigned](#) to the Industry, Research and Energy (ITRE) Committee, with the International Trade (INTA) Committee giving an opinion. In the Council, the [Working Party on Energy](#) deals with the ECT, with the participation of delegates from the [Trade Policy Committee](#) (Experts Services and Investment). A qualified majority of Member States need to back the Commission proposal; discussions in the Council are ongoing.

The [procedure](#) requires that the Commission notify the ECT secretariat of the withdrawal of the EU as a whole (it would need to do the same on behalf of Euratom). It is also necessary that each Member State notify the secretariat of its own withdrawal. The procedure is not clear in a scenario in which the EU agrees by qualified majority and notifies its joint withdrawal and some EU Member States refuse to give notice on their own account. In this case, the Commission could take legal action against a Member State. According to [press accounts](#), some countries (Cyprus, Greece, Hungary and Slovakia) have already signalled their hesitancy towards leaving the ECT themselves.

## European Commission's position

The Commission [believes](#) that the current legal uncertainty risks damaging the EU's relations with non-EU contracting parties to the ECT. From a legal and policy point of view, a coordinated withdrawal of the EU, Euratom and all remaining Member States is the best solution. As most provisions of the ECT fall under exclusive Union competence, Member States cannot remain parties to it unless they are empowered by a legal act adopted by the EU. The Commission states that the EU and its Member States need to have a coordinated approach when pursuing investment, climate and environmental policies.

## European Parliament's position

The European Parliament, in its November 2022 [resolution](#) on the outcome of the modernisation of the Energy Charter Treaty, considers the current treaty to be an outdated instrument that no longer serves the interests of the European Union, especially with regard to the objective of becoming climate neutral by 2050. It underlines that the proposal for a modernised ECT is not in line with the Paris Agreement, the EU Climate Law or the European Green Deal. The Parliament urged the Commission and the Member States to start preparing a coordinated exit from the ECT and indicated that it will support the EU's exit from the ECT when requested to give its consent.

## Outlook

The withdrawal of the EU from the ECT is highly likely but its timing cannot be predicted at this point. The European Parliament organised a [debate](#) on the next steps regarding the ECT on 4 October 2023. Meanwhile, discussions in the Council are ongoing.

Most Member States agree that the EU should leave the ECT. The biggest [supporters](#) of the coordinated withdrawal of the EU and its Member States are countries that abstained when the proposal for a Council decision on ECT modernisation was voted in October 2022, namely France, Germany and the Netherlands. The fourth country to have abstained was Spain. All the countries forming the blocking minority have already notified their withdrawal or signalled their intention to leave the ECT.

Some Member States would have preferred to be given an option to stay within the modernised treaty. Such a proposal, combining withdrawal of the Union with allowing Member States to remain part of the modernised ECT, [was discussed](#) under the Swedish Presidency. It would require a second Council decision authorising those Member States not to oppose approval of the modernisation package, but the Commission excluded such an option for legal reasons. Any movement within the Council on the draft Council decision on a coordinated EU withdrawal would be conditional on the Commission's openness to allowing interested countries to approve ECT modernisation. The European Parliament has already publicly [stated](#) that there is a majority inside the House to consent to the EU's withdrawal.

Two uncertainties remain. The first is the course of action taken by those Member States which prefer to stay within the ECT in a scenario in which a qualified majority can be found for EU withdrawal within the Council. It is possible that the threat of legal action by the Commission would be enough to deter the unwilling Member States from not joining the coordinated withdrawal. The second is a sunset clause; ECT signatories remain bound by a 20-year sunset clause, meaning that they can be taken to court long after withdrawing from the treaty. [Some commentators](#) think it would make more sense to first approve the modernisation of the ECT and then leave, as the proposal for a modernised treaty envisages a sunset clause of 10 years. For a long time, that was also the position of the Commission, but this course of action proved impossible due to the lack of support from Member States for the modernisation proposal. The Parliament also expressed its criticism of the modernisation proposal in its November 2022 resolution. Other [experts](#) point out that if the EU leaves all at once, the political vacuum may be filled by other ambitious states, as Turkey or even China may find the South Caucasus and Central Asia an interesting area in which to pursue their interest in energy policy.

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