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COVER NOTE

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Delegations will find attached document COM(2022) 293 final.

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EUROPEAN
COMMISSION

Brussels, 13.6.2022
COM(2022) 293 final

2022/0191 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union at the Extraordinary
Conference of the Energy Charter Treaty on 24th June 2022**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be adopted on the Union's behalf in the Extraordinary Conference of the Energy Charter Treaty on 24th June 2022 in Brussels with several acts to be adopted related to the following: (i) amendment of the Rules of Procedure of the Energy Charter Conference, (ii) withdrawal of Russian Federation's Status as an Observer to the Conference, and (iii) suspension of the provisional application of the ECT in relation to Belarus and suspension of Belarus as an Observer to the Energy Charter Treaty (hereafter 'ECT').

2. CONTEXT OF THE PROPOSAL

2.1. The Energy Charter Treaty (ECT)

The ECT is a multilateral trade and investment agreement applicable to the energy sector, signed by the EU in December 1994 and entered into force in April 1998. The Treaty consists of provisions on protection of investments, trade in energy materials and products, transit and dispute settlement. The ECT also sets up a framework for international cooperation between 55 Contracting Parties (including the EU and EURATOM, 27 EU Member States¹, Japan, Switzerland, Turkey, most countries of the former USSR, except for the Russian Federation² and some countries in the Western Balkans).

The ECT was originally set up as a framework for international cooperation between European countries and other industrialised countries with the aim of developing the energy potential of Central and Eastern European countries and of ensuring the security of energy supply for the EU.

The key provisions of the Treaty concern the protection of investment, trade in energy materials and products, transit and dispute settlement.

All states or Regional Economic Integration Organisations who have signed or acceded to the Treaty are members of the Conference, which meets on a regular basis to discuss issues affecting energy cooperation among the Treaty's signatories, to review the implementation of the provisions of the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects, and to consider possible new instruments and joint activities within the Energy Charter framework.

The Energy Charter Conference ensures that the objectives set out in the ECT are attained. It facilitates in accordance with this Treaty and the Protocols the coordination of appropriate general measures to carry out the principles of the Charter.

¹ Italy was a Contracting Party but withdrew in 2015. Officially, the Italian government explained its decision with cutting the costs of its membership in international organisations due to budget restrictions.

² The Russian Federation signed the ECT, but took the formal decision not to ratify it.

Each Party has one vote and the Energy Charter Conference acts by different voting rules depending on the subject matter.

The present proposal for a decision under Article 218 (9) TFEU concerns the position to be taken on the Union's behalf to the envisaged acts in the Energy Charter Conference.

2.2. Position to be adopted on the Union's behalf

2.2.1. Amendment of the Rules of Procedure of the Energy Charter Conference

At the meeting on 7 April 2022, the ECT Management Committee recommended the Conference to consider the approval of the amendment to the Rules of Procedure to provide for the potential withdrawal or suspension of the observer status of a state or international organisation under certain circumstances. Article 36 (“Voting”) of the ECT applies only to decisions provided in the Treaty, while the Observer status to the Energy Charter Conference is partly regulated in the Rules of Procedure of the Energy Charter Conference. Thus, it is suggested to add the following wording to the proposed new subparagraph (e) to cover the case of potential withdrawal or suspension of an observer and clarify the respective voting rules:

’III. OBSERVERS

Rule 7

A. General rules

“[...] (e) The Conference may, by consensus, suspend or withdraw the Observer status of a country or international organisation in case of

persistent or serious breach of the principles of the European Energy Charter or the International Energy Charter, whichever was signed by that country or international organisation, or

persistent failure to comply with financial obligations it may have towards the International Energy Charter.

If consensus cannot be reached, the decision of the Conference under this subparagraph shall be taken by a three-fourths majority of the Contracting Parties Present and Voting at the meeting of the Conference, as far as they represent a simple majority of the Contracting Parties.’”

The Working Group on Governance Issues on 16 May 2002 recommended to put forward for Conference’s approval by correspondence by 5 June the above proposed amendment (CC 742) taking into consideration the conclusions of the Management Committee (Message 1952)].

This Energy Charter Conference decision adapts the recommendations made by the Management Committee and the Working Group on Governance Issues on 7 April 2022 and 16 May 2022 respectively on amending Rule 7 of the Rules of Procedure.

According to Section VIII of the Final Act of the European Energy Charter Conference, the Energy Charter Conference is responsible for making decisions on requests to sign the 1991 political declaration. Decisions on this matter have so far been taken by consensus.

In view of the above, the position to be taken on behalf of the Union in the Energy Charter Conference should be to confirm the amendment.

2.2.2. Withdrawal of Russian Federation's status as an Observer to the Conference

The EU should support the withdrawal of the observer status of the Russian Federation based on the approval of the amended procedural Rule 7 justified on both of its grounds (violation of principles and failure to comply with any financial obligation).

2.2.3. Suspension of the provisional application of the ECT in relation to Belarus

During its meeting on 28 April and 2 June 2022, the Management Committee continued the discussion on the suspension of the provisional application of the Energy Charter Treaty (ECT), as requested by Ukraine.

The action of the Belarus allowing Russia to use its territory to facilitate the aggression against Ukraine's nuclear power plants together with its radioactive waste storage facilities, gas transportation system, coal mines, hydropower plants and oil refineries and deposits can be considered a material breach ("the violation of a provision essential to the accomplishment of the object or purpose of the treaty" [Article 60.3.b of Vienna Convention on the Law of the Treaties, VCLT]) of Articles 3, 7, 18 and 19 of the ECT.

The Contracting Parties represented in the Energy Charter Conference will be invited to decide (i) to suspend the provisional application of the ECT in relation to Belarus, (ii) to request the Energy Charter Secretariat to inform the Depositary and Belarus formally and (iii) to suspend the Observer status of Belarus.

The EU should support to suspend the provisional application of the ECT in relation to Belarus, and request Energy Charter Secretariat to formally inform the Depositary and Belarus. The EU should also support to suspend the observer status of Belarus.

3. LEGAL BASIS

3.1. Procedural legal basis

3.1.1. Principles

Article 218 (9) 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*’³.

3.1.2. Application to the present case

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

The envisaged acts, which the Energy Charter Conference of the Energy Charter Treaty are called upon to adopt, constitute acts having legal effects. The amendment of voting issues of the Energy Charter Conference has binding force at least on the institutions of the Energy Charter Treaty.

Also the withdrawal of Russian Federation’s status as an Observer as well as the suspension of the provisional application of the ECT in relation to Belarus have legally binding effects and therefore apply to Article 218 (9) TFEU, because they have an influence on the concrete composition of the Energy Charter Treaty.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

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

3.2. Substantive legal basis

3.2.1. 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

³ 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.

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.

3.2.2. Application to the present case

The main objective and content of the envisaged acts relate to energy.

Therefore, the substantive legal basis of the proposed decision is Article 194 TFEU.

3.3. Conclusion

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

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union at the Extraordinary
Conference of the Energy Charter Treaty on 24th June 2022**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Energy Charter Treaty ('the Agreement') was concluded by the Union by Decision 98/181/EC, ECSC, Euratom and entered into force in 1998.
- (2) Pursuant to Articles 34 of the Agreement, the Energy Charter Conference ensures that the objectives set out in the ECT are attained. It facilitate in accordance with this Treaty and the Protocols the coordination of appropriate general measures to carry out the principles of the Charter.
- (3) The Energy Charter Conference, during its Extraordinary meeting on 24th of June 2022, is to adopt: (i) amendment of the Rules of Procedure of the Energy Charter Conference, (ii) withdrawal of Russian Federation's Status as an Observer to the Conference, and (iii) suspension the provisional application of the ECT in relation to Belarus and the suspension as observer to the ECT.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Extraordinary Energy Charter Conference meeting of the Energy Charter Treaty on 24th June 2022 in Brussels shall be the following:

to confirm the proposed amendment of the Rule 7.

to approve the withdrawal of the observer status of the Russian Federation based on the approval of the amended procedural Rule 7 justified on both of its grounds (violation of principles and failure to comply with any financial obligation).

to approve the suspension of the provisional application of the ECT in relation to Belarus and Belarus' observer status.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President