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The European Commission's Assessment of EU Withdrawal from the Energy Charter Treaty: Legal analysis or confidential strategy?

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'The polluter is paid!' – This is how one could summarise the outcome of latest arbitration award under an outdated legal framework protecting investments within the energy sector, the Energy Charter Treaty (ECT). Italy was asked to pay EUR 240 million to the English gas and oil company, Rockhopper.

Such awards put great pressure on the domestic right to regulate, in particular with regard to the necessity of adopting climate mitigation policies. This is why many social society organisations and certain national parliaments, including the Dutch parliament and the Polish parliament, plead for withdrawal of their respective states.

Since 2019, the Contracting Parties have been negotiating to modernise the ECT. On 24 June 2022, the ad hoc meeting of the Energy Charter Conference endorsed the outcome of the modernization negotiations and gave an 'agreement in principle'. The text, while having been leaked, has not yet officially been made publicly available

What is missing above all is an open public debate on the legal constraints and consequences of withdrawal from the ECT of the EU and its Member States. As we argue here, the European Commission, instead of facilitating such a debate, has done its part to silence it. However, entry into force does not just require the formal adoption of the modernised text at the adoption at the Energy Charter Conference. It will enter into force only between the Contracting Parties that have ratified them on the 90th day after deposit of the ratification instruments of at least three fourths, or 41, of the Contracting Parties. In light of the critical position of certain national parliaments and the European Parliament, as well as the negative experience in the ratification process of the EU-Canada Trade

Agreement (CETA), the executive secrecy and lack of public debate may come around to bite the Commission.

Article 47 ECT stipulates that withdrawal from the ECT is legally possible. It requires a written notification to the depository, which takes effect one year after that notification. Withdrawal puts an end to the participation of the withdrawing party or parties but without terminating the Treaty itself. The Treaty remains in force for and among the non-withdrawing parties.

The additional difficulty is that under the ECT, withdrawal triggers the so-called survival or sunset clause in Article 47(3) ECT, which continues the legal effects of the ECT for already made investments for another 20 years beyond the date of withdrawal. While 20 years is an unusually long period of time, such a clause is in compliance with international law. The parties to an international treaty are free to protect the effects of a treaty into the future.

In December 2020, the European Commission acknowledged that 'if the core EU objectives, including the alignment with the Paris Agreement, are not attained within a reasonable timeframe, the Commission may consider proposing other options, including the withdrawal from the Energy Charter Treaty'. As is by now publicly known, the Commission Legal Service provided on 28 January 2021, upon request from DG Trade, a legal opinion on questions relating to a possible withdrawal of the Union from the ECT.

We are currently working on a research project on the legal aspects of the legitimacy of the EU's climate transition. The Commission Legal Service's opinion discussing the EU's possible withdrawal from the ECT was highly relevant for our research. On the 17 February 2022, we therefore made a public access request to the European Commission, signed by our consortium principal investigator, Professor Kati Kulovesi, for the 'Commission legal opinion on leaving the Energy Charter Treaty' (GestDem 2022/1011 – Ares(2022)3103687).

In this post, we argue that the analysis of the legal conditions and consequences of withdrawal is an important element that the EU institutions must contribute to the public debate. In particular, the Commission Legal Service must allow public access to its legal analysis of the withdrawal scenario, also in response to the expressed wish of several political actors, national and European, to consider this as one viable option of how to deal with the threat of arbitration and the illegality of (certainly of) intra-EU arbitration under the ECT. Legal analysis is not, at least not comprehensively, protected by an exception of the Transparency Regulation 1049/2001. By withholding their legal analysis in its entirety, the Commission (Legal Service) hinders an informed public debate.

Delay as strategy to avoid public debate

Under Article 7 of Regulation 1049/2001, requests for public access are to be handled 'promptly'. Within 15 working days the institution must either grant access or provide the reasons for total or partial refusal. However, '[i]n exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit [...] may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given'.

In our case, the Commission extended the time limit first once, followed by a second extension on 31 March 2022, assuring us that 'we will do our outmost to come back to you with a reply as soon as possible'. At this point, we referred to Article 8(2) of Regulation 1049/2001 under which the time limit can be extended under strict conditions that were not applicable. For us, 'not being able to finalise' does not qualify as a detailed and justified reason for such an extension.

Finally, on 20 April 2022, the Commission informed us that the Legal Service had now assessed the request and indeed identified one document, a note by its Legal Service. However, we were denied access to it because the EU's possible withdrawal was considered 'highly sensitive both at a political and legal level'; 'all the more so as it pertains to the international relations of the EU'. Therefore, disclosure 'would negatively affect international relations by compromising the EU's position and the best outcome of the negotiations' as the opinion must remain 'confidential for as long as the negotiations on the ECT have not been concluded'. Moreover, the whole opinion fell under the protection of legal advice exception. Partial access could not be granted. Finally, the Legal Service argued, that they 'see no elements capable of showing the existence of an overriding public interest in disclosure of the documents'.

On 9 May 2022, we appealed the decision under Article 7(2) of Regulation 1049/2001 with reference to the case law of the ECJ, which has considered public access to legal opinions in the context of envisaged external agreements. The Court has stressed that (despite the absence of the public interest test in the international relations exception) the principle of transparency applies to decision-making in the field of EU international activity (Case C-350/12, *Council v In 't Veld*, para. 76). The Court has also considered the effect of the on-going procedure for concluding the international agreement and established that,

> *Indeed, the public interest in the transparency of the decision-making process would become meaningless if, as the Commission proposes, it were to be taken into account only in those cases where the decision-making process has come to an end.* (Case T-529/09, *Sophie in 't Veld v. Council*, para. 101; upheld on appeal)

The Court accepted the non-disclosure of elements that could reveal the strategic objectives pursued by the EU in the negotiations. However, the risk to international relations 'must be

reasonably foreseeable and must not be purely hypothetical' (para. 52). Such a risk could only be established for those elements of the legal opinion 'relating to the specific content of the agreement envisaged or the negotiating directives capable of revealing the strategic objectives pursued by the European Union in the negotiations' (Case T-529/09, para. 59)

We pointed out that the views presented by the Commission in relation to legal advice have been repeatedly rejected by the EU Courts, most recently in the budgetary conditionality case, where the ECJ repeated that: *'It is precisely openness in that regard which, by allowing divergences between various points of view to be openly debated, contributes to reducing doubts in the minds of citizens*' (para 59). Finally, we stressed that it was highly unlikely that the whole legal opinion could be covered by said exceptions.

While a confirmatory application is also to be settled within 15 working days, the deadline was extended twice (30 May and 21 June 2022) based on the reasoning: 'Unfortunately, we have not yet been able to gather all the elements we need to carry out a full analysis of your request in order to take a final decision' and 'due to on-going consultations concerning your request'.

Meanwhile, one day before the agreement in principle on the text of the modernised ECT, on 23 June 2022, the European Parliament passed a resolution on the future of EU international investment policy, stating that it

> [u]rges the Commission to ensure that a revised ECT protects the right of states to regulate, is in line with EU law and EU investment policy, that it *immediately prohibits fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels in line with their commitments under the Paris Agreement*, and that investment protection is only granted to real investors and not to purely financial or speculative investors;
>
> *calls on the Commission to publish its legal study analysing the potential effects of withdrawal*;
>
> calls on the Commission and Member States to *start preparing a coordinated exit from the ECT*, and an *agreement excluding the application of the sunset clause* between willing contracting parties with a view to formal submission to the Council and to Parliament in the event of the abovementioned negotiating objectives not being achieved by June 2022; (emphasis added)

Finally, on 17 August – exactly 6 months after our initial request – we finally received an answer to our request, basically granting access to none of the substantive content of the opinion. The Commission provided access to the subtitles of the opinion. Please see here the redacted document that we received.

To us, it is evident that delay has been invoked as institutional strategy, to avoid public debate and to delay a possible appeal to either the EU Courts or the European Ombudsman. The institutions invoke this strategy systematically. So far, the European Ombudsman has not seemed particularly concerned about it, even though it significantly hampers researchers' possibilities of accessing documents in a timely fashion. Access to legal analyses in the international relations context continues to remain limited, and has recently surfaced in the context of the EU-UK TCA and the reform of the Aarhus Regulation, with an appeal pending before the General Court.

Commission decision: No access to substantive legal analysis

The lengthy Commission decision extensively engages with issues of little importance and refuses to engage with the relevant issues.

First, the Commission informs us that, in addition to the legal note identified earlier, it had also needed to evaluate a separate opinion by the Council Legal Service relating to the 'Mauritius Convention', which had been annexed to the opinion we requested, but which we had never asked for. Yet, the Commission seems to have spent a great deal of time in consultations with the Council Secretariat concerning its possible disclosure. We received access to its introductory part.

According to the Commission, the document we had actually requested

> *describes and explains the legal requirements for the withdrawal of the European Union and EURATOM from the Energy Charter Treaty. The note elaborates on the possible effects of such a withdrawal on the Member States that are Contracting Parties to the Energy Charter Treaty, and on solutions to be possible envisaged in lieu of a withdrawal. Finally, the note reflects on the possible effects of a withdrawal of the Union (and its Member States) which could affect the Union's (and the Member States) position under the Energy Charter Treaty.*

To us, these issues – perhaps with the exception of the final one – concern procedural and legal questions, which have fairly little to do with strategic considerations, as indicated by the Court in its *In't Veld* ruling quoted above. After all, whatever the EU does, one would think, needs to comply with the law.

For the Commission, however, disclosure would

> *put in the public domain evolving and preparatory Commission and Council internal policy considerations on strategic directions to address the open issues currently under discussion, thus jeopardising the successful outcome of these ongoing negotiations. The disclosure of the documents would put in the public domain the EU's negotiating positions and related internal policy considerations.*

> *Moreover, this information could also be used by third countries to bring undue pressure on the Commission in support of their own interests, unduly limit the room for manoeuvre of the EU on the international stage, and jeopardise the EU's international position.*

In support of this, the Commission quotes the *In't Veld* ruling, equalling legal analysis to the EU position – which turns the rationale of the Court on its head. The EU position may be driven by specific strategic and political choices that indeed enjoy the status of an exception from public access to documents. However, an analysis of what the legal conditions of withdrawal are and which steps are legally necessary to withdraw under the ECT precisely are not generally covered by an exception. Legal analysis – if indeed objective – should not be driven by strategic choices.

Following this, the Commission spends one page asserting that the opinion indeed constitutes legal analysis. We do not question this but refuse to believe that any analysis just by being *legal* in substance would automatically need to be confidential. On the contrary, Regulation 1049/2001 sets up a presumption of disclosure for all EU documents, which can only be kept confidential if there is harm that is reasonably foreseeable and not purely hypothetical and – as is the case of most exceptions – if there is no overriding public interest justifying disclosure.

The Commission then spends two and a half pages explaining why the names of legal advisers cannot be disclosed as they are not public figures acting in their public capacity – as if their names were of any interest for the matter at hand.

However, the part that really matters is dealt with in one sentence: 'Nor have I been able to identify a public interest capable of overriding the public and private interests protected by Article 4(2) and Article 4(3) of Regulation (EC) No 1049/2001.' In light of the high interests at stake – the preservation of the planet, energy security, and public finances – the public interest seems to us more than obvious.

Conclusion

Until today, the Commission has not published the evaluation of the legal conditions and consequences of the EU's withdrawal from the ECT. It casts silence over this option and lobbies instead for adopting the modernised ECT, largely based on TINA (there-is-no-alternative) arguments, referring to the 20-year sunset clause in the current ECT but without mentioning the possibility of an immediate inter-se modification that could end the sunset clause between all withdrawing parties.

The Commission's strategy of delay in response to public access requests and of remaining silent about one of the viable options of how to move energy policy into the 21st century,

hinders an informed public discussion and opinion-formation by the involved actors and the broader public.

Withdrawing from the ECT in a concerted fashion and leaving behind an investment treaty that stands in the way of the necessary and partially already adopted climate policies at the EU and national level has been publicly demanded by several social society organisations, national parliaments, and – at least, conditionally – by the European Parliament. By silencing the debate on an option that considerable parts of public opinion desire, the Commission is paving the way for the ratification of the ECT to face similar problems as CETA.

Quick provisional application appears to be the preferred way forward of the Commission. This would require Member States to agree to the provisional application for the parts of the ECT that (also) fall under national competence, such as any changes to the scope of application of the controversial investor state dispute settlement (ISDS) mechanism that led to the Rockhopper award mentioned above. Relying on provisional application could temporarily bring about the effects of the controversial modernised text. However, this further forecloses public debate and postpones formal parliamentary approval through ratification. Hopefully, the parliaments will stick to their guns and require a quick termination the ECT with its outdated approach to investment and energy.