



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 3 February 2012**

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**NOTE**

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from: General Secretariat of the Council  
to: Delegations

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No. Cion prop.: 13943/11 ENER 283 CODEC 1406

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Subject: Draft Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy

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Delegations will find in Annex the text of the draft Decision, amended in light of the discussions in the Energy Working Party and the written comments received.

Changes compared to the Commission proposal are indicated in **bold underlined**; deletions are marked with [].

*N.B. This version incorporates further linguistic and drafting improvements proposed by the Council Directorate for Quality of Legislation.*

The following delegations still maintain reservations or scrutiny reservations: AT, BE, BG, DE, FR, GR, IT, LU, NL, SE, UK.

Proposal for a

**DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

]]<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure<sup>3</sup>,

Whereas:

- (1) The European Council has asked Member States to inform **the Commission** from 1 January 2012 ]] on all their new and existing bilateral energy agreements with third countries. The Commission should make this information available to all other Member States in an appropriate form, having regard to the need for protection of commercially sensitive information.
- (2) Union law requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Member States should therefore avoid or eliminate any incompatibilities between Union law and international agreements concluded between Member States and third countries.

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<sup>1</sup> OJ C, p. . .

<sup>2</sup> **Note: the CoR has decided not to issue an opinion.**

<sup>3</sup> **Position of the European Parliament of ... [(OJ ...)] [not yet published in the Official Journal] and decision of the Council of ...**

- (3) The proper functioning of the internal energy market requires that the energy imported into the Union **[]** be fully governed by the rules establishing an internal energy market. An internal energy market that is not functioning properly puts the **Union []** in a vulnerable position with regard to security of energy supply. A high degree of transparency with regard to agreements between Member States and third countries in the field of energy would allow the Union to take coordinated action, in a spirit of solidarity, in order to ensure that such agreements **comply []** with Union legislation and effectively secure the supply of energy.
- (4) The new information exchange mechanism should only cover intergovernmental agreements **[] having** an impact on the internal market for energy or on the security of energy supply **in the Union** as these two issues are intrinsically linked. **In principle, agreements that are no longer in force or are no longer applied, do not have an impact on the internal market for energy or on the security of energy supply in the Union and are thus not covered by this information exchange mechanism. The new information exchange mechanism []** should comprise in particular all intergovernmental agreements which have an impact on the supply of gas, oil or electricity through fixed infrastructure or which have an impact on the amount of energy imported into the Union **[]**.
- (5) Intergovernmental agreements which **must []** be notified in their entirety to the Commission **[]** on the basis of other Union acts such as [Regulation (EU) No .../... of the European Parliament and of the Council of ... establishing transitional arrangements for bilateral investment agreements between Member States and third countries<sup>4</sup>] should be excluded from the information exchange mechanism established by this Decision.
- (6) The exemption from the notification obligation mentioned should not apply to intergovernmental agreements which must be submitted to the Commission in accordance with Article 13(6) of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply **[]**.<sup>5</sup> Such intergovernmental agreements with third countries which have an impact on the development and use of gas infrastructure and gas supplies should henceforth be notified according to the rules laid down in this Decision. To avoid duplication, a notification submitted in accordance with this Decision should be considered to fulfil the notification obligation set out in Regulation (EU) No 994/2010.

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<sup>4</sup> [COM 2010 (344) final, not yet adopted]

<sup>5</sup> OJ L 295, 12.11.2010, p. 1

- (6a) **Intergovernmental agreements [] concerning matters within the purview of the Euratom Treaty do not fall within the scope of this Decision.**
- (7) This Decision should not concern agreements between commercial entities []. Commercial operators negotiating commercial agreements with operators from third countries **should** [] nevertheless **have the possibility to** seek guidance from the Commission in order to avoid potential conflicts with Union law.
- (8) Member States should submit to the Commission all existing [] **intergovernmental agreements whether they have entered into force or are being applied provisionally** within the meaning of Article 25 of the Vienna Convention **on the Law of Treaties**, and all new intergovernmental agreements.
- (9) Member States should **have the option to** [] **inform** the Commission **of negotiations** with regard to new intergovernmental agreements or amendments to existing intergovernmental agreements. **In that case**, the Commission should be kept informed regularly on the ongoing negotiations. [] **Member States should have the possibility to** [] **invite the Commission to participate in the negotiations** as an observer []. **The Commission should also have the possibility to participate as an observer at its own request, subject to the approval of the Member State concerned.** Member States **should** also **have the possibility to** [] request the Commission to assist them during their negotiations with third countries.
- (10) **Where a** [] Member State which has negotiated **an** [] intergovernmental agreement **has informed it before the closure of negotiations and has submitted the draft intergovernmental agreement to it**, the Commission **should have the possibility to inform that Member State of its opinion on** the compatibility of the negotiated agreement with Union law [].
- (11) All final, ratified agreements covered by this Decision should be transmitted to the Commission in order to allow [] all other Member States **to be informed**.

(12) The Commission should make all received information available to all other Member States in electronic form. The Commission should respect requests from Member States to treat information **submitted** [] as confidential. Requests for confidentiality should however not restrict access of the Commission itself to confidential information as the Commission needs to have comprehensive information for its own assessment. The requests for confidentiality **should be** [] without prejudice to the right of access to documents as provided for in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents<sup>6</sup>.

**(12a) If a Member State considers an intergovernmental agreement to be confidential, it should provide a summary thereof to the Commission, to be shared with the other Member States.**

(13) A permanent exchange of information on intergovernmental agreements at Union level should allow to develop best practices. On the basis of those best practices the Commission should [] **develop** [] **optional** model clauses to be used [] in intergovernmental agreements between Member States and third countries. **The use of these model clauses should in principle avoid conflicts of intergovernmental agreements with Union law. Their use should be optional, and their content could be adapted to any particular circumstance.** []

(14) The improved mutual knowledge of existing and new intergovernmental agreements should allow for a better co-ordination in energy matters between the Member States themselves and between the Member States and the Commission. Such improved co-ordination should enable Member States to fully benefit from the political and economic weight of the Union.

(15) The mechanism for the exchange of information provided for in this Decision should be without prejudice to the application of the Union rules on infringements and competition.

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<sup>6</sup> OJ L 145, 31.5.2001, p. 43 []

**Note: according to Art. 4(5) of Regulation (EC) No 1049/2001 every Member State may request the Commission not to disclose a document originating from that Member State without prior agreement. Access to documents shall be refused where disclosure would undermine the protection of international relations (Art. 4(1) a) third indent of Reg. 1049/2001) or the protection of the commercial interests of a natural or legal person (Art. 4(2) first indent of Reg. 1049/2001).**

(16) Since the objective[] of this Decision, namely the exchange of information between Member States and the Commission with regard to intergovernmental agreements in the field of energy, cannot be sufficiently achieved by the Member States but can rather, by reason of the effects of this Decision, be better achieved at Union level, the Union may adopt this decision, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Decision does not go beyond what is necessary in order to achieve those objectives.

HAVE ADOPTED THIS DECISION:

*Article 1*

*Subject matter and scope*

1. This Decision establishes a mechanism for the exchange of information between Member States and the Commission with regard to intergovernmental agreements, **as defined in Article 2, in the field of energy []**.
2. **This Decision shall not apply to** intergovernmental agreements which are already in their entirety subject to other specific notification procedures under Union law, **excepting []** intergovernmental agreements which **must [] be communicated** to the Commission in accordance with Article 13(6) of Regulation (EU) No 994/2010<sup>7</sup> [].

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<sup>7</sup>

**Explanatory note:**

**Recital 6, Article 1(2) and Article 3(1) describe the following interplay between the present draft Decision and Regulation (EU) No 994/2010 on the security of gas supply:**

- **all existing intergovernmental agreements which have already been notified under Regulation 994/2010 concerning the measures to safeguard security of gas supply shall be considered as submitted for the purpose of this Decision (and therefore be treated accordingly).**
- **After the entry into force of this Decision, notifications under this Decision will replace notifications of international agreements under Article 13(6)(a) of Regulation 994/2010.**

## Article 2

### Definitions

For the purposes of this Decision the following definitions apply:

1. "intergovernmental agreement[]" means any legally binding agreement[] between **one or more** Member States[] and **one or more** third countries [] **having** an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union. **However, where such agreement also covers other issues, only the provisions of that agreement that relate to energy, including general provisions applicable to those energy-related provisions, shall constitute an "intergovernmental agreement" for the purposes of this Decision;**
2. "existing intergovernmental agreement[]" means **an** intergovernmental agreement[] which has entered into force, **or is applied provisionally,** prior to the entry into force of this Decision.

## Article 3

### *Exchange of information between the Commission and Member States*

1. Member States shall submit **to the Commission at the latest three months after the entry into force of this Decision** all existing [] intergovernmental agreements [], including their annexes [] **and all amendments to those agreements. Furthermore, where these agreements refer explicitly to other texts, Member States shall submit those other texts [] insofar as they contain elements which impact on the functioning of the internal market for energy or on the security of energy supply in the Union. However, agreements between commercial entities do not fall under this obligation.**

**The initial assessment as to whether an existing intergovernmental agreement, or another text to which an existing intergovernmental agreement refers to explicitly, has an impact on the internal market for energy or the security of supply in the Union is the responsibility of Member States; in doubt, a Member State may consult the Commission.**

Existing  intergovernmental agreements which have already been communicated **to the Commission** in accordance with **Article 13(6) of Regulation (EU) No 994/2010**  at the date of entry into force of this Decision **and**  which are fulfilling the requirements of this paragraph, shall be considered as **having been submitted** for the purposes of this Decision <sup>8</sup>.

- 1a.** By  three months after the entry into force of this Decision Member States shall  inform the Commission whether any part of the existing  intergovernmental agreements communicated in accordance with **Article 13(6)(a) of Regulation (EU) No 994/2010**, is to be regarded as confidential and whether the information provided can be shared with other Member States.
  
2.  Before  or during  negotiations with a third country on **an  intergovernmental agreement** or  on the amendment of an existing intergovernmental agreement , a  Member State may  inform the Commission in writing of  **the objectives of the negotiations, the provisions to be addressed in the negotiations and any other relevant information** .  In such case,  the Member State concerned shall keep the Commission informed regularly of the ongoing negotiations. **Furthermore, the Member State concerned shall indicate to the Commission whether this information may be shared with all other Member States.**
  
3. Upon ratification of an intergovernmental agreement or of an amendment to an intergovernmental agreement, the Member State concerned shall submit **to the Commission** the agreement or the amendment  to the agreement, including its  annexes. **Furthermore, where these agreements refer explicitly to other texts, Member States shall submit those other texts**  insofar as they contain elements which impact on the functioning of the internal market for energy or on the security of energy supply in the Union. However, agreements between commercial entities do not fall under this obligation.

**The initial assessment as to whether an intergovernmental agreement, or another text to which an intergovernmental agreement refers to explicitly, has an impact on the internal market for energy or the security of supply in the Union is the responsibility of Member States; in case of doubt, a Member State may consult the Commission.**

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<sup>8</sup> Note: see also new paragraph (1bis).



4. **Without prejudice to Article 3a**, the Commission shall make the documents **which it has received under paragraphs 1, 1a and 3** [] accessible in electronic form to all other Member States.
5. **However, if a Member State [] instructs the Commission, in accordance with Article 3a, not to make an existing intergovernmental agreement, an amendment thereto or a new intergovernmental agreement [] accessible to other Member States, it [] shall make available a summary of the information submitted. Such summary shall [] contain at least the following information: the subject matter, the aim and the scope of the intergovernmental agreement, its duration and its contracting parties as well as information on its main elements. The Commission shall make the summary accessible in electronic form to all other Member States.**

*Article 3a*  
*Confidentiality*

- 1.** When providing information to the Commission in accordance with Article 3(1) to (4), a [] Member State may indicate whether any part of the information [] is to be regarded as confidential and whether the information provided can be shared with other Member States. The Commission shall respect these indications.
- 2.** Requests for confidentiality **under this Article shall []** not restrict access of the Commission itself to confidential information.

*Article 4*  
*Assistance from the Commission*

**Where []** a Member State informs the Commission pursuant to Article 3(2) of [] negotiations **with a third country on an [] intergovernmental agreement or on the [] amendment of** an existing intergovernmental agreement [], [] **that []** Member State may request the assistance of the Commission in **those** negotiations [].

**On request of the Member State concerned, or on request of the Commission and with the written approval of [] the Member State concerned, the Commission may participate as an observer in the negotiations.**

## Article 5

### *Compatibility assessment*

1. When negotiating an intergovernmental agreement or an amendment to an existing intergovernmental agreement, Member States may  inform the Commission thereof before the closure of the negotiations and submit the draft agreement or amendment concerned  to it. Where the Commission is thus informed, it may  until four weeks from the date of reception of the draft  agreement or amendment concerned , including its annexes, from the Member State concerned,  inform that Member State  of doubts on the compatibility of the negotiated agreement with Union law . In the absence of a response from the Commission within that period, the Commission shall be deemed not to have raised doubts.
2. In case the Commission raises such doubts, it  shall inform the Member State concerned of its opinion on the compatibility of the draft agreement or amendment concerned with Union law within 10 weeks from its date of reception. With the approval of  the Member State concerned, the examination period may  be extended .  In the absence of  an opinion from  the Commission within the examination period, the Commission shall be deemed not to have raised objections.

## Article 6

### *Coordination among Member States*

- The Commission shall facilitate the coordination among Member States with a  view to:
- (a) review developments in relation to intergovernmental agreements;
  - (b) identify common problems in relation to intergovernmental agreements and to consider appropriate action to address these problems;
  - (c) on the basis of best practice **and in consultation with the Member States**, develop **optional,** <sup>9</sup>  model clauses **that if applied would**  ensure full compliance of future intergovernmental agreements with Union energy legislation.

<sup>10</sup>

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<sup>9</sup> **Note: See new text in recital 13**

<sup>10</sup> **Note: Article 7 has been transferred to the new Article 3a.**

*Article 8*

***Review***

1. **By** four years after its entry into force, the Commission shall submit a report on the application of this Decision to the European Parliament, the Council and the European Economic and Social Committee.
2. The report shall in particular assess **[ ] the extent to which** this Decision **[ ] promotes** compliance of intergovernmental agreements with Union law and a high level of coordination between Member States with regard to intergovernmental agreements.

*Article 9*

***Entry into force***

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 10*

***Addressees***

This Decision is addressed to the Member States.

Done at [ ] ... ,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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