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NOTE

from:	General Secretariat of the Council
to:	Delegations
No. Cion prop.:	13943/11 ENER 283 CODEC 1406
Subject:	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 - <i>Provisional text of the Council compromise offer</i>

Delegations will find in Annex the consolidated text as resulting from the last informal trialogue meeting on 9 May. Compared to the mandate for the Presidency as given by the Committee on 4 May¹ this text contains the following proposed technical drafting changes:

- as requested by the Commission in Coreper, and as provisionally agreed by Coreper, a change in the text of recital 15;
- below the title of the draft Decision, the mention "*(Text with EEA relevance)*" was added;
- a change in the text of recital 10, to align the text with Article 5 and remove an apparent contradiction between the first and second sentence of this recital.²

All these text changes are underlined.

¹ As reflected in doc. 9137/12, complemented by a change in recital 7 as proposed by LT.

² Note: this modification follows the same logic as the change in recital 7: since the *ex ante* information to the Commission is voluntary, there is no need to restrict this option.

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

(Text with EEA relevance)

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 Committee¹,

²,

Acting in accordance with the ordinary legislative procedure³,

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.

¹ OJ C, p. . .

² Note: the CoR has decided not to issue an opinion.

³ 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 and disadvantageous position with regard to security of energy supply, and would undermine its potential benefits to European consumers and industry. 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. This transparency would also benefit closer intra-EU cooperation in the field of external energy relations, and the Union's long-term policy objectives relating to energy, climate and security of energy supply.
- (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. 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 energy supply in the Union should be the responsibility of Member States; in case of doubt, a Member State should consult the Commission. 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 countries¹] should be excluded from the information exchange mechanism established by this Decision.

¹ [COM 2010 (344) final, not yet adopted]

- (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)(a) 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 supply¹. 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 Article 13 (6) (a) of Regulation (EU) No 994/2010.
- (6a) Intergovernmental agreements concerning matters within the purview of the Euratom Treaty do not fall within the scope of this Decision.
- (7) This Decision does not create obligations as regards agreements between commercial entities. However, it does not prevent Member States from sharing on a voluntary basis with the Commission commercial agreements that are referred to explicitly by intergovernmental agreements. Furthermore, as commercial agreements could contain regulatory provisions, commercial operators negotiating commercial agreements with operators from third countries should 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) More transparency with regard to future agreements that will be negotiated or that are being negotiated between Member States and third countries in the field of energy could contribute to consistency between Member States, compliance with Union legislation or the security of energy supply of the Union. Therefore, 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.

¹ OJ L 295, 12.11.2010, p. 1

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. In that case, the Commission should have the possibility to provide advice on how to avoid incompatibilities with Union law, and to draw attention to the Union's energy policy objectives and the principle of solidarity between Member States.

- (9a) The Commission should assess the compatibility of existing intergovernmental agreements with Union law. In the event of incompatibility, Member States should take all necessary steps to find a proportionate solution to eliminate the incompatibility identified.
- (10) In order to ensure more transparency and avoid potential conflicts with Union law, Member States should have the option of informing the Commission, before the conclusion of a new intergovernmental agreement with a third country, of the envisaged [] intergovernmental agreement. Where a Member State which has negotiated an intergovernmental agreement has thus informed it before the closure of negotiations and has submitted the draft intergovernmental agreement to it, the Commission should inform that Member State of its opinion on the compatibility of the negotiated agreement with Union law. The Commission, in accordance with Article 258 of the Treaty, has the right to launch an infringement proceeding where the Commission considers that a Member State has breached its obligations under the Treaty.
- (11) All final, ratified intergovernmental 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 secure 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 Commission should be responsible for guaranteeing the application of the confidentiality clause and its legal consequences. 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.

- (12a) If a Member State considers an intergovernmental agreement to be confidential, it should provide a summary thereof to the Commission for the purpose of sharing this summary 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, where appropriate in cooperation with the EEAS as regards Union's external policies, should develop optional model clauses to be used in intergovernmental agreements between Member States and third countries. The use of these model clauses should aim at avoiding conflicts of intergovernmental agreements with Union law, in particular competition law and internal energy market rules, or with international agreements concluded by the Union. Their use should be optional, and their content could be adapted to any particular circumstance.
- (13a) Given the existence of an internal market for energy and the objectives of the EU energy policy, Member States should take due account of this common energy strategy and its objectives when negotiating intergovernmental energy agreements that impact on the EU energy policy.
- (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 and allow the Commission to propose solutions for problems identified in the area of intergovernmental agreements.
- The Commission should facilitate and encourage the coordination among Member States with a view to enhancing the overall strategic role of the Union through a strong and effective coordinated approach to producer, transit, and consumer countries.
- (15) The mechanism for the exchange of information provided for in this Decision, including assessments to be made by the Member States in implementing it, is [] without prejudice to the application of the Union rules on infringements, state aid and competition.
- (15a) The Commission should assess, no later than 1 January 2016, whether this Decision is sufficient and effective in ensuring compliance of intergovernmental agreements with Union law and a high level of coordination between Member States with regard to intergovernmental agreements in the field of energy.

- (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.

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 in order to optimise the functioning of the internal market .
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 shall be communicated to the Commission in accordance with Article 13(6) of Regulation (EU) No 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.

Existing intergovernmental agreements which have already been communicated to the Commission in accordance with Article 13(6)(a) 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.

A notification submitted in accordance with this Decision shall be considered as fulfilling the notification obligation set out in Article 13(6)(a) of the Regulation (EU) No 994/2010. Within 9 months following the submission of the existing intergovernmental agreements in their entirety, including their annexes and other texts they refer to explicitly and all amendments thereto, the Commission shall inform the Member States concerned if its first assessment has led to doubts on the compatibility with Union law, in particular with EU competition law and internal energy market legislation.

- 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. In case the Commission is thus informed, it may provide the negotiating Member State with advice on how to avoid incompatibility between the negotiated intergovernmental agreement and Union law.

Furthermore, the Member State concerned shall indicate to the Commission whether this information may be shared with all other Member States; in case the information may be shared, the Commission shall make the received information accessible to all Member States in secure electronic form, with the exception of confidential parts identified according to Article 3a.

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.
4. Without prejudice to Article 3a, the Commission shall make the documents which it has received under paragraphs 1, 1a and 3 accessible in secure 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, commercial or other information disclosure of which could harm the activities of the parties involved, 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. The Commission shall ensure that access to the confidential information is strictly limited to the Commission services for whom it is absolutely necessary to have the information available.

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.

In case the Commission is thus participating as an observer, it may provide the negotiating Member State with advice on how to avoid incompatibility between the negotiated intergovernmental agreement and Union law.

Article 5

Compatibility assessment

1. When negotiating an intergovernmental agreement or an amendment to an existing intergovernmental agreement and if on the basis of their own assessment Member States have been unable to reach a firm conclusion on the compatibility of the negotiated agreement with Union law, Member States shall 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 shall 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 any doubts it may have 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.
3. As regards the time periods referred to in paragraphs (1) and (2), these shall be shortened in agreement with the Commission if circumstances warrant this.

Article 6

Coordination among Member States

The Commission shall facilitate and encourage the coordination among Member States with a view to:

- a) review developments in relation to intergovernmental agreements and strive for consistency and coherence in the Union's external energy relations with producer, transit, and consumer countries;
- b) identify common problems in relation to intergovernmental agreements and to consider appropriate action to address these problems, and, where appropriate, propose solutions;
- c) on the basis of best practice and in consultation with the Member States, develop optional, model clauses that if applied would significantly improve compliance of future intergovernmental agreements with Union energy legislation;
- ca) support where appropriate the development of multilateral intergovernmental agreements involving several Member States or the Union as a whole.

Article 8

Reporting and review

1. By 1 January 2016, 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. It shall also assess whether the scope of this Decision and the procedures it lays down are appropriate and the impact that these provisions have had on Member States' negotiations with third countries.
3. After the submission of the first report referred to in point 1 of this Article, the Commission shall report every three years to the European Parliament and the Council on the information received pursuant to Article 3, having due regard to the confidentiality provisions of this Decision.

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
