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THE EUROPEAN PARLIAMENT

THE COUNCIL

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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: DECISION OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL establishing an information exchange mechanism with regard
to intergovernmental agreements between Member States and third
countries in the field of energy
COMMON GUIDELINES
Consultation deadline for Croatia: 3.10.2012

DECISION No .../2012/EU
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

**establishing 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 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,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure²,

¹ OJ C 68, 6.3.2012, p. 65.

² Position of the European Parliament of 13 September 2012. (not yet published in the Official Journal) and decision of the Council of

Whereas:

- (1) The European Council has asked Member States to inform the Commission as from 1 January 2012 of all their new and existing bilateral agreements with third countries in the field of energy. 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) Article 4 of the Treaty on European Union 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 Union institutions. Member States should therefore avoid or eliminate any incompatibility between Union law and international agreements concluded between Member States and third countries.

- (3) The proper functioning of the internal energy market requires that the energy imported into the Union be fully governed by the rules establishing the internal energy market. An internal energy market that does not function properly puts the Union in a vulnerable and disadvantageous position with regard to the security of energy supply, and undermines 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 the spirit of solidarity, in order to ensure that such agreements comply with Union law and effectively secure energy supply. Such transparency would also be of benefit in achieving both closer intra-Union 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) A new information exchange mechanism should therefore be established. It should cover only intergovernmental agreements having an impact on the internal energy market 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 explicitly, has an impact on the internal energy market or the security of energy supply in the Union should be the responsibility of Member States; in cases 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 energy market or on the security of energy supply in the Union and should therefore not be covered by this information exchange mechanism. The 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 should be excluded from the information exchange mechanism. However, that exemption should not apply to intergovernmental agreements with third countries which have an impact on the development and use of gas infrastructure and gas supplies and which must be communicated 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 agreements should 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 obligation set out in Article 13(6)(a) of Regulation (EU) No 994/2010.
- (6) Intergovernmental agreements concerning matters within the purview of the Treaty establishing the European Atomic Energy Community should not be covered by this Decision.

¹ OJ L 295, 12.11.2010, p. 1.

- (7) This Decision does not create obligations as regards agreements between commercial entities. However, it does not prevent Member States from communicating to the Commission, on a voluntary basis, commercial agreements that are referred to explicitly in intergovernmental agreements. Furthermore, as it is possible that commercial agreements 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 intergovernmental 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 in Member States' approaches to such agreements, to compliance with Union law and to the security of energy supply in the Union. Therefore, Member States should have the option of informing the Commission of negotiations with regard to new intergovernmental agreements or amendments to existing intergovernmental agreements. Where Member States choose that option, the Commission should be kept informed regularly of the progress of the 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. In that case, the Commission should have the possibility to provide advice on how to avoid incompatibility with Union law, and to draw attention to the Union's energy policy objectives and the principle of solidarity between Member States.

- (10) 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 suitable solution to eliminate the incompatibility identified.

- (11) In order to ensure more transparency and to avoid potential conflicts with Union law, Member States should have the option of informing the Commission of a new intergovernmental agreement with a third country before or during the negotiations thereof. Where a Member State, which has negotiated an intergovernmental agreement, has informed the Commission before the closure of negotiations accordingly 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. The Commission has the right to launch infringement proceedings in accordance with Article 258 of the Treaty on the Functioning of the European Union (TFEU), where it considers that a Member State has failed to fulfil its obligations under the TFEU.
- (12) All final, ratified intergovernmental agreements covered by this Decision should be transmitted to the Commission in order to enable all other Member States to be informed.

- (13) The Commission should make all information it receives available to all other Member States in secure electronic form. The Commission should respect requests from Member States to treat information submitted to it 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. 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 documents¹.
- (14) If a Member State considers an intergovernmental agreement to be confidential, it should provide the Commission with a summary of it for the purposes of sharing this summary with the other Member States.

¹ OJ L 145, 31.5.2001, p. 43.

- (15) A permanent exchange of information on intergovernmental agreements at Union level should enable best practices to be developed. On the basis of those best practices, the Commission, where appropriate in cooperation with the European External Action Service (EEAS) as regards the Union's external policies, should develop optional model clauses to be used in intergovernmental agreements between Member States and third countries. The use of such model clauses should aim to avoid conflicts of intergovernmental agreements with Union law, in particular competition law and internal energy market rules, and conflicts with international agreements concluded by the Union. Their use should be optional, and it should be possible to adapt their content to any particular circumstance.
- (16) Given the existence of the internal energy market and the objectives of the Union energy policy, Member States should take due account of those objectives when negotiating intergovernmental agreements in the field of energy that have an impact on the Union energy policy.
- (17) The improved mutual knowledge of existing and new intergovernmental agreements should allow for better coordination in energy matters between the Member States and between the Member States and the Commission. Such improved coordination should enable Member States to benefit fully from the political and economic weight of the Union and enable the Commission to propose solutions for problems identified in the area of intergovernmental agreements.

- (18) The Commission should facilitate and encourage coordination between 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.
- (19) The information exchange mechanism, 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.
- (20) The Commission should assess 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.

- (21) 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 measures, 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 this objective,

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 in the field of energy as defined in Article 2, in order to optimise the functioning of the internal energy 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.

Notwithstanding the first subparagraph, this Decision shall apply to intergovernmental agreements which are to be communicated to the Commission pursuant to Article 13(6)(a) 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 energy market or on the security of energy supply in the Union; however, where such a legally binding agreement also covers other issues, only those provisions that relate to energy, including general provisions applicable to those energy-related provisions, shall constitute an "intergovernmental agreement";
- (2) "existing intergovernmental agreement" means an intergovernmental agreement which entered into force or is applied provisionally prior to the entry into force of this Decision.

Article 3

Exchange of information between Member States and the Commission

1. By ...* Member States shall submit to the Commission all existing intergovernmental agreements, including annexes and amendments to those agreements. Where those existing intergovernmental agreements refer explicitly to other texts, Member States shall also submit to the Commission those other texts, insofar as they contain elements which have an impact on the functioning of the internal energy market or on the security of energy supply in the Union. However, that obligation does not apply in respect of agreements between commercial entities.

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 shall be considered as having been submitted for the purposes of this paragraph, provided that that communication meets the requirements of the first subparagraph. By ...* Member States shall inform the Commission whether any part of such intergovernmental agreements is to be regarded as confidential and whether the information provided may be shared with other Member States.

* OJ: Please insert the date: three months after the entry into force of this Decision.

Where, pursuant to this paragraph, a Member State submits existing intergovernmental agreements also falling within the scope of Article 13(6)(a) of Regulation (EU) No 994/2010 to the Commission, it shall be considered having complied with the communication obligation set out in that Article.

2. Where following its first assessment, the Commission has doubts as to the compatibility with Union law of agreements submitted to it under paragraph 1, in particular with Union competition law and internal energy market legislation, the Commission shall inform the Member States concerned accordingly within 9 months following the submission of those agreements.
3. 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, and the provisions to be addressed in, the negotiations and may communicate any other relevant information to the Commission. Where the Member State gives the Commission such notice of negotiations, the Member State concerned shall keep the Commission regularly informed of the progress of the negotiations.

The Member State concerned shall indicate to the Commission whether information submitted under the first subparagraph may be shared with all other Member States. Where the Member State concerned has indicated that the information may be shared, the Commission shall make the information received accessible to all Member States in secure electronic form, with the exception of any confidential parts identified in accordance with Article 4.

4. Where a Member State gives the Commission notice of negotiations as provided for in paragraph 3, the Commission may provide it with advice on how to avoid incompatibility of the intergovernmental agreement or of the amendment to an existing intergovernmental agreement under negotiation with Union law.
5. Upon ratification of an intergovernmental agreement or of an amendment to an intergovernmental agreement, the Member State concerned shall submit the intergovernmental agreement or the amendment, including any annexes to the agreement or the amendment, to the Commission.

Where the intergovernmental agreement or the amendment to the intergovernmental agreement refers explicitly to other texts, Member States shall also submit those other texts insofar as they contain elements which have an impact on the functioning of the internal energy market or on the security of energy supply in the Union. However, that obligation does not apply in respect of agreements between commercial entities.

6. Without prejudice to paragraph 7 of this Article and Article 4, the Commission shall make the documents which it has received under paragraphs 1 and 5 accessible in secure electronic form to all other Member States.
7. Where a Member State instructs the Commission, in accordance with Article 4, not to make an existing intergovernmental agreement, an amendment to an existing intergovernmental agreement or a new intergovernmental agreement accessible to other Member States, it shall make available a summary of the information submitted. That summary shall contain at least the following information regarding the agreement or amendment in question:
- (a) the subject matter;
 - (b) the aim and the scope;
 - (c) the duration;
 - (d) the contracting parties; and
 - (e) information on the main elements.

The Commission shall make the summaries accessible in electronic form to all other Member States.

Article 4
Confidentiality

1. When providing information to the Commission in accordance with Article 3(1) to (6), a Member State may indicate whether any part of the information, be it commercial or other information the 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 those 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 which it is absolutely necessary to have the information available.

Article 5
Assistance from the Commission

Where a Member State gives the Commission notice of negotiations pursuant to Article 3(3), that Member State may request the assistance of the Commission in those negotiations.

At the request of the Member State concerned, or at the request of the Commission and with the written approval of the Member State concerned, the Commission may participate in the negotiations as an observer.

Where the Commission participates in the negotiations as an observer, it may provide the Member State concerned with advice on how to avoid incompatibility of the intergovernmental agreement or amendment under negotiation with Union law.

Article 6

Compatibility assessment

1. Where a Member State is negotiating an intergovernmental agreement or an amendment to an existing intergovernmental agreement and it has been unable, on the basis of its own assessment, to reach a firm conclusion as to the compatibility of the intergovernmental agreement or amendment under negotiation with Union law, it shall inform the Commission thereof before the closure of the negotiations and submit the draft agreement or amendment together with any annexes to it.

2. The Commission shall, within four weeks from the date of receipt of the draft agreement or amendment, including annexes thereto, inform the Member State concerned of any doubts it may have as to the compatibility of the draft intergovernmental agreement or amendment with Union law. In the absence of a response from the Commission within that period, the Commission shall be deemed not to have any doubts.
3. Where the Commission informs the Member State concerned pursuant to paragraph 2 that it has 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 the date of receipt referred to in paragraph 2 (the examination period). 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 any objections.
4. The time periods referred to in paragraphs 1 and 2 shall be shortened in agreement with the Commission if circumstances so warrant.

Article 7
Coordination among Member States

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

- (a) reviewing developments in relation to intergovernmental agreements and striving for consistency and coherence in the Union's external energy relations with producer, transit, and consumer countries;
- (b) identifying common problems in relation to intergovernmental agreements and considering appropriate action to address those problems, and, where appropriate, proposing solutions;
- (c) on the basis of best practice and in consultation with the Member States, developing optional model clauses, which, if applied, would significantly improve compliance of future intergovernmental agreements with Union law;
- (d) supporting, 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 the impact that this Decision has on Member States' negotiations with third countries and whether the scope of this Decision and the procedures it lays down are appropriate.
3. After submission of the first report referred to in paragraph 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
