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## PROPOSAL

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	16 February 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2016) 53 final
Subject:	Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU

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Delegations will find attached document COM(2016) 53 final.

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Brussels, 16.2.2016  
COM(2016) 53 final

2016/0031 (COD)

Proposal for a

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

**on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU**

(Text with EEA relevance)

{SWD(2016) 27 final}

{SWD(2016) 28 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### **Reasons for and objectives of the proposal**

The Energy Union Strategy (COM (2015)80) indicates that: *"an important element in ensuring energy (and in particular gas) security is full compliance of agreements related to the buying of energy from third countries with EU law"*. In the same spirit, the European Council in its conclusions of 19 March 2015 also called for "full compliance with EU law of all agreements related to the buying of gas from external suppliers, notably by reinforcing transparency of such agreements and compatibility with EU energy security provisions".

An information exchange mechanism with regard to intergovernmental agreements (IGAs) between Member States and third countries in the field of energy was established by a Decision adopted by the Parliament and Council on 25 October 2012, which entered into force on 17 November 2012 (the IGA Decision)<sup>1</sup>. The main feature of this mechanism is that the Commission carries out compliance checks of IGAs after a Member State and a third country have concluded such agreements.

Since 2012, the Commission has gained significant experience in the implementation of this mechanism. In general, as analysed in the Impact Assessment on the revision of the IGA Decision and in the report to the European Parliament and to the Council on the application of the IGA Decision, the Commission's assessment is that while the current system is useful for receiving information on existing IGAs and for identifying problems posed by them in terms of their compatibility with EU law, it is not sufficient to solve such incompatibilities. In particular, as stated in the Energy Union Strategy: *"in practice, we have seen that renegotiating such agreements is very difficult. The positions of the signatories have already been fixed, which creates political pressure not to change any aspect of the agreement"*.

Therefore, Commission's involvement before a Member State and a third country have concluded such agreements would provide an essential added value by resolving potential conflicts between obligations of Member States under international treaty law and EU law.

In this context the revision of the IGA Decision has two main objectives:

- (1) Ensure the compliance of IGAs with EU law to ensure the proper functioning of the internal market and enhance the EU's energy security; and
- (2) Enhance the transparency of IGAs in order to increase the cost effectiveness of the EU's energy supply and solidarity between Member States.

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<sup>1</sup> Decision 994/2012/EU establishing an information exchange mechanism with regard to intergovernmental agreements (IGAs) between Member States and third countries in the field of energy

## **Consistency with existing policy provisions in the policy area**

This proposal is consistent with a number of measures adopted at EU level to improve the functioning of the EU energy market and to increase the EU's energy security.

The review of the current IGA Decision forms part of the deliverables of the Energy Union Strategy adopted in February 2015, which sets the overall context and governance structure for a renewed EU energy policy.

The Energy Union Strategy foresees in its Action Plan a number of actions to increase the energy security of the EU. This proposal should therefore be seen in the context of other initiatives including the revision of the Security of Gas Supply Regulation<sup>2</sup>. The IGA Decision is closely linked to the Security of Gas Supply Regulation, but the scope of the information exchange mechanism it establishes is wider. The IGA Decision defines IGAs as "*legally binding agreements 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 supply in the Union*". The IGA Decision thus applies to all energy commodity related supply and infrastructure IGAs, in particular gas, oil and electricity. Only IGAs concerning matters within the purview of the Euratom Treaty are not covered. For these IGAs Article 103 of the Euratom Treaty provides for a specific ex-ante procedure.

The scope of the IGA Decision excludes commercial contracts between commercial entities<sup>3</sup>. This proposal does not extend the scope of the IGA decision to commercial contracts related to IGAs since, as indicated in the Energy Union Strategy, this issue is covered, for commercial gas supply contracts, by the proposal for a review of the Security of Gas Supply Regulation.

## **Consistency with other Union policies**

The proposal does not only contribute to the EU energy policy. By ensuring compliance of IGAs with EU law, it also contributes to policies in other areas of Union law such as internal market, competition and public procurement.

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

### **Legal basis**

The objectives of this proposal, mentioned above, are in line with the following EU Treaty goals:

- To ensure security of energy supply in the Union (Article 194(1) (b) TFEU);

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<sup>2</sup> Regulation of the European Parliament and of the Council, concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (ref XXX)

<sup>3</sup> Recital 7 of the IGA Decision stresses that this Decision does not create obligations as regards agreements between commercial entities. This recital makes also clear that Member States may, on a voluntary basis, communicate to the Commission commercial agreements that are explicitly referred to in IGAs.

- To establish a functioning internal energy market, in the spirit of solidarity between the Member States (Article 3(3) TEU; Article 194(1) TFEU).

Article 194 TFEU is therefore the legal basis for the proposed revised IGA Decision, as it was for the current IGA Decision adopted by the Parliament and Council on 25 October 2012.

### **Subsidiarity (for non-exclusive competence)**

Necessity of EU action: The legal basis for the revision of the IGA Decision is Article 194 TFEU. The IGA Decision was adopted in 2012 on this basis, respecting the subsidiarity principle. However, the introduction of an obligatory ex-ante check by the Commission would change the IGA Decision. This change would represent a shift of tasks from Member States to the EU. As explained above, experience shows that assessment by Member States is not sufficient and satisfactory to ensure compliance of IGAs with EU law and creates legal uncertainty. The Commission's ex-ante involvement would provide an essential added value for resolving problems (notably conflicts between obligations of Member States under international treaty law and EU law).

EU added-value: The progressive integration of energy infrastructure and markets, the common reliance on external suppliers, the need to ensure solidarity in times of crisis, all imply that fundamental political decisions on energy should not be taken exclusively at national level without involvement of neighbouring countries and the EU. The IGA Decision stands at the cross-roads of the external dimension (as it involves agreements with third countries) and of the internal market (as non-compliant provisions such as destination clauses have a negative impact on the free flow of energy products within the internal market). There is therefore a clear added value to reinforce the cooperation and transparency at EU level in the framework of this proposal.

### **Proportionality**

The objectives of this proposal are to:

(1) Ensure the compliance of IGAs with Union law to ensure the proper functioning of the internal market and enhance the EU's energy security; and

(2) Enhance the transparency of IGAs to increase the cost effectiveness of the EU's energy supply and solidarity between Member States.

To reach these objectives it is proposed essentially a mix of optional model clauses and an ex-ante assessment of the IGAs before their signature. As explained in the Impact Assessment on the revision of the IGA Decision, keeping the current system would not be efficient. In particular, none of the IGAs identified by the Commission as problematic has been terminated so far.

Similarly, the Impact Assessment concludes that the option of developing mandatory model clauses could help Member States avoiding incompatibility with Union law but that the wide range of situations and business models under the scope of the IGA Decision will, however, not allow developing model clauses precise enough in order to provide legal certainty and substitute an in-depth ex-ante assessment of a final draft text. Furthermore, depending on the

position and bargaining power of the third country, Member States might not succeed in including particular model clauses in an IGA.

The Impact Assessment therefore concluded that the compulsory ex-ante control option is the least stringent approach to avoid non-compliant IGAs.

### **Choice of the instrument**

The existing legislation in the area is the IGA Decision. This proposal aims at reinforcing and enhancing measures and procedures provided for in the existing Decision. Therefore it was appropriate to choose a Decision as an instrument. Given the amount and scope of the new elements, the draft Decision proposes a repeal and replacement of the current Decision No 994/2012/EU instead of a modification of the current provisions.

## **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

### **Ex-post evaluations/fitness checks of existing legislation**

This proposal builds on the experience that the Commission has gained on the implementation of the IGA Decision since it entered into force on 17 November 2012 and which has been analysed in the evaluation report annexed to the Impact Assessment on the revision of the IGA Decision and in the Report to the European Parliament and to the Council on the application of the current IGA Decision.

These reports conclude, as regards the effectiveness of the IGA Decision, that its current provisions (in particular the *ex-post* nature of the compatibility check set out therein) have not resulted in the transformation of concluded non-compliant IGAs into compliant ones and have not directly impacted Member States' negotiations with third countries. In particular, no draft IGA has ever been submitted to the Commission on a voluntary basis for an ex-ante check. Therefore the IGA Decision in its present form is not considered effective.

They also conclude that overall the costs associated with the current IGA Decision are justified by the benefits it provides as it safeguards the functioning of the internal energy market and contributes to security of supply. However, the IGA Decision could be more efficient if the compatibility checks it establishes were done *ex-ante* (instead of *ex-post* as at present). This would considerably enhance legal certainty and avoid costs for both Member States and the Commission.

Furthermore, these reports make clear that IGAs will continue to play a key role in the EU's energy sector. The IGA Decision is therefore relevant but needs to adapt to the changing nature of energy supplies and routes. They also underline that there is a clear EU-added value to the IGA Decision, as it reinforces cooperation and transparency at EU level and contributes to security of supply and the functioning of the internal energy market.

Overall, therefore, these reports conclude that the procedures laid down by the current IGA Decision are not fully appropriate, with the main procedural issue in this regard being the *ex-*

*post* nature of the compatibility check under the current system, which was the result of tough inter-institutional negotiations when the IGA Decision was adopted in 2012.

This proposal addresses the detected deficiencies.

### **Stakeholder consultations**

A public consultation was organized between 28 July and 22 October 2015. The Commission received some 25 responses from stakeholders, including Member States and several associations (regulatory and industry), and the level of response to the consultation can be considered satisfactory.

All respondents underlined the importance of IGAs to security of energy supply and the proper functioning of the internal energy market. As regards the need to strengthen the system established by the IGA Decision and the way in which this could best be done, opinions among the respondent were divided:

A full report on the outcome of this public consultation is annexed to the Impact Assessment on the revision of the IGA Decision and the non-confidential answers published on the Commission's website<sup>4</sup>.

### **Collection and use of expertise**

Information related to the implementation of the IGA Decision is partly confidential, both due to some of the provisions of the IGA Decision itself (Article 4 – Confidentiality) or due to certain exceptions set out in Regulation 1049/2001<sup>5</sup> on public access to European Parliament, Council and Commission documents (Article 4 (1) (a), 3<sup>rd</sup> indent - Protection of international relations, Article 4 (5) - Request by a Member State not to disclose a document originating from that Member State without its prior agreement or Article 4 (2), 2<sup>nd</sup> indent - Protection of court proceedings and legal advice). *Inter alia* for these confidentiality reasons, it was decided not to develop an external study on the implementation of the current IGA Decision.

### **Impact assessment**

All proposed measures were supported by the Impact Assessment. The positive opinion of the Regulatory Scrutiny Board was delivered on 4 December 2015.

Five policy options have been considered in the Impact Assessment:

Option 1: Baseline: The IGA Decision remains unchanged but the infringement policy is strengthened

Option 2: Model clauses for inclusion in IGAs which do not infringe EU law/guidelines

Option 3: Obligatory *ex-ante* assessment of IGAs by the Commission

Option 4: Obligatory participation of the Commission as an observer in IGAs negotiations

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<sup>4</sup> <https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmental-agreements-decision>

<sup>5</sup> OJ L 145, 31.5.2001, p.43

Option 5: Commission to negotiate EU agreements in the field of energy

The Impact Assessment concluded that the most cost effective, efficient and proportionate option was option 3.

### **Regulatory fitness and simplification**

The proposal will cause a limited increase in administrative burden.

### **Fundamental rights**

Not applicable

## **4. BUDGETARY IMPLICATIONS**

The proposal does not have implications on the EU budget.

## **5. OTHER ELEMENTS**

### **Implementation plans and monitoring, evaluation and reporting arrangements**

The IGA Decision contains a review clause in its Article 8. This article requires the Commission to prepare a report by 1 January 2016 and every three years thereafter.

In addition to the evaluation report in annex to the Impact Assessment on the revision of the IGA decision, a first report to the European Parliament and to the Council accompanies this proposal for a review of the IGA Decision.

For the future, the Commission intends to produce, as requested in Article 8 of the IGA Decision, a subsequent report by 1 January 2020.

Finally, the Commission, in its role as guardian of the Treaties, will pursue when necessary the procedure set out in Article 258 of the Treaty in the event any Member State fails to respect its duties concerning the implementation and application of Union law.

### **Explanatory documents (for directives)**

Not applicable.

### **Detailed explanation of the specific provisions of the proposal**

The revised Decision contains the following elements:

1. Notification obligations with regard to intergovernmental agreements:



- Obligation of Member State to inform the Commission of its intent to enter into negotiations with third country regarding conclusion of new intergovernmental agreements or amending existing ones;
- Commission should be kept informed once such notice of negotiation is given;
- Commission services may provide Member State with advice on how to avoid incompatibility of the intergovernmental agreement with Union law or Union policy positions adopted in Council or European Council conclusions where Member State gives Commission notice of negotiations;
- Obligation of Member State to notify to Commission a draft intergovernmental agreement or amendment with all accompanying documents as soon as agreement has been reached in the negotiations by the parties on all main elements, for Commission's ex-ante assessment;
- Obligation of Member State to notify to Commission intergovernmental agreement or amendments with all accompanying documents upon ratification;
- Obligation of Member State to notify to Commission all existing intergovernmental agreements or amendments with all accompanying documents;
- Agreements between undertakings are not covered by notification obligations, but may be submitted on voluntary basis;
- Obligation of Commission to share information and documents it has received with other Member States in accordance with confidentiality provisions.

## 2. Assessment by the Commission:

- Obligation of Commission to perform ex-ante assessment of draft intergovernmental agreements or amendments and to inform Member State of possible doubts it may have as to the compatibility with Union law, in particular with internal energy market legislation and Union competition law within six weeks;
- Obligation of Commission to inform Member State of its opinion on compatibility of intergovernmental agreement or amendment with Union law within 12 weeks of date of notification;
- Member State shall not conclude proposed intergovernmental agreement or amendment until Commission informed Member State of any doubts and its opinion. When concluding the proposed intergovernmental agreement or amendment, Member State shall take utmost account of Commission's opinion;
- Obligation of Commission to perform ex-post assessment of existing intergovernmental agreements or amendments and to inform Member States in case of doubts as to the compatibility of these agreements with Union law within nine months of notification.

3. Notification obligations and assessment by the Commission with respect to non-binding instruments:
- Obligation of Member State to submit to Commission existing and future non-binding instruments with all accompanying documents;
  - Commission may perform ex-post assessment of submitted non-binding instruments and inform Member State accordingly if it considers measures implementing the non-binding instrument could conflict with Union law;
  - Obligation of Commission to share documents it has received with other Member States in accordance with confidentiality provisions.

Proposal for a

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

**on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU**

(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 (2) 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>6</sup>,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,<sup>7</sup>

Whereas:

- (1) 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 security of energy supply, and undermines its potential benefits to European consumers and industry.
- (2) The objective of the Energy Union Strategy, as adopted by the Commission on 25 February 2015<sup>8</sup>, is to give consumers secure, sustainable, competitive and affordable energy. More precisely, the Energy Union Strategy emphasizes that full compliance of agreements related to the buying of energy from third countries with Union law is an important element in ensuring energy security, building on the analysis already carried out in the European Energy Security Strategy of May 2014<sup>9</sup>. In the same spirit, the European Council in its conclusions of 19 March 2015 called for full compliance with Union law of all agreements related to the buying of gas from external suppliers,

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<sup>6</sup> OJ C , , p. .

<sup>7</sup> OJ C , , p. .

<sup>8</sup> COM(2015)80

<sup>9</sup> COM (2014)330

notably by reinforcing transparency of such agreements and compatibility with Union energy security provisions.

- (3) Decision No 994/2012/EU of the European Parliament and of the Council<sup>10</sup> was useful for receiving information on existing intergovernmental agreements and for identifying problems posed by them in terms of their compatibility with Union law.
- (4) However, Decision No 994/2012/EU proved ineffective in terms of ensuring compliance of intergovernmental agreements with Union law. That Decision mainly relied on the assessment of intergovernmental agreements by the Commission after they were concluded by the Member States with a third country. Experience gained in the implementation of the Decision 994/2012/EU demonstrated that such an ex-post assessment does not fully exploit the potential for ensuring compliance of intergovernmental agreement with Union law. In particular, intergovernmental agreements often contain no appropriate termination or adaptation clauses which would allow Member States to bring the intergovernmental agreement in compliance with Union law within a reasonable period of time. Furthermore, the positions of the signatories have already been fixed, which creates political pressure not to change any aspect of the agreement.
- (5) In order to avoid any incompliance with Union law and enhance transparency, Member States should inform the Commission of their intent to enter into negotiations with regard to new intergovernmental agreements or amendments to existing intergovernmental agreements as soon as possible. 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.
- (6) During the negotiations the Commission should have the possibility to advice on how to avoid incompatibility with Union law. In particular, the Commission could develop, together with Member States, optional model clauses or guidelines. The Commission should have the possibility to draw attention to the Union's energy policy objectives and the principle of solidarity between Member States and Union policy positions adopted in Council or European Council conclusions.
- (7) In order to ensure compliance with Union law, Member States should notify the draft intergovernmental agreement to the Commission before it becomes legally binding for the parties (ex-ante). In a spirit of cooperation, the Commission should support the Member State in identifying compliance issues of the draft intergovernmental agreement or amendment. The respective Member State would then be better prepared to conclude a Union law compliant agreement. The Commission should have sufficient time for such an assessment in order to provide for as much legal certainty as possible while avoiding undue delays. In order to fully benefit from the Commission's support Member States should refrain from concluding an intergovernmental agreement until the Commission has informed the Member State of its assessment. The Member States should take all necessary steps to find a suitable solution to eliminate the incompatibility identified.
- (8) In light of the Energy Union Strategy, transparency with regard to past and future intergovernmental agreements continues to be of utmost importance. Therefore, Member States should continue notifying to the Commission existing and future

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<sup>10</sup> OJ L 299, 27.10.2012, p. 13.

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 new intergovernmental agreements.

- (9) The Commission should assess the compatibility with Union law of intergovernmental agreements that entered into force or are applied provisionally prior to the entry into force of this Decision and inform the Member States accordingly. In the event of incompatibility, Member States should take all necessary steps to find a suitable solution to eliminate the incompatibility identified.
- (10) This Decision should only apply to intergovernmental agreements that have an impact on the internal energy market or the security of energy supply in the Union. In case of doubt, Member States 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 Decision.
- (11) Member States establish relations to third countries not only by concluding intergovernmental agreements, but also in the form of non-binding instruments. Even if legally non-binding, such instruments can be used to set out a detailed framework for energy infrastructure and energy supply. In this respect non-binding instruments can have similar impacts on the internal energy market as intergovernmental agreements as their implementation might result in a violation of Union law. In order to ensure greater transparency regarding all measures applied by Member States that can have an impact on the internal energy market and energy security, Member States should therefore submit to the Commission, ex post, also the respective non-binding instruments. The Commission should assess the submitted non-binding instruments and, if appropriate, inform the Member State accordingly.
- (12) Intergovernmental agreements or non-binding instruments which need to be notified in their entirety to the Commission on the basis of other Union acts or concern matters such as within the purview of the Treaty establishing the European Atomic Energy Community should not be covered by this Decision.
- (13) This Decision should not create obligations as regards agreements between undertakings. However, Member States should be free to communicate to the Commission, on a voluntary basis, such agreements that are referred to explicitly in intergovernmental agreements or non-binding instruments.
- (14) The Commission should make 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 assessments. 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<sup>11</sup>.

- (15) 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 that summary with the other Member States.
- (16) 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 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 internal energy market rules and competition law, 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.
- (17) The improved mutual knowledge of existing and new intergovernmental agreements and non-binding instruments should allow for better coordination in energy matters between Member States and between 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) Since the objective of this Decision, namely the exchange of information between Member States and the Commission with regard to intergovernmental agreements and non-binding instruments in the field of energy, cannot be sufficiently achieved by the Member States but can rather, by reason of the effects of this Decision, applicable in all Member States, 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.
- (20) The provisions of this Decision should be without prejudice to the application of the Union rules on infringements, State aid and competition. In particular, 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.
- (21) In 2020, the Commission should assess whether this Decision is sufficient and effective in ensuring compliance of intergovernmental agreements with Union law and

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<sup>11</sup> 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 (OJ L 299, 27.10.2001, p. 13).

that a high level of coordination exists between Member States with regard to intergovernmental agreements in the field of energy.

(22) Decision No 994/2012/EU should be repealed.

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 and non-binding instruments 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 and non-binding instruments which are already, in their entirety, subject to other specific notification procedures under Union law.

### *Article 2*

#### **Definitions**

For the purposes of this Decision the following definitions shall 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, are deemed to 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;
- (3) 'non-binding instrument' means a legally non-binding arrangement between one or more Member States and one or more third countries, such as a memorandum of understanding, joint declaration, ministerial joint declaration, joint action or joint code of conduct, which contains interpretation of Union law, sets the conditions for energy supply (such as volumes and prices) or the development of energy infrastructures;
- (4) 'existing non-binding instrument' means a non-binding instrument signed or otherwise agreed prior to the entry into force of this Decision.

### *Article 3*

#### **Notification obligations with respect to intergovernmental agreements**

1. When a Member State intends to enter into negotiations with a third country in order to amend an existing intergovernmental agreement or to conclude a new intergovernmental agreement, the Member State shall inform the Commission in writing of its intention at the earliest possible moment before the envisaged opening of the negotiations.

Where the Member State gives the Commission such notice of negotiations, the Member State concerned should keep the Commission regularly informed of the progress of the negotiations.

2. As soon as an agreement has been reached by the parties on all the main elements of a draft intergovernmental agreement or an amendment to an existing intergovernmental agreement, but before the closure of formal negotiations, the Member State concerned shall notify to the Commission this draft agreement or amendment together with any annexes thereto for ex-ante assessment in accordance with Article 5.

Where the draft intergovernmental agreement or amendment to an existing intergovernmental agreement refers explicitly to other texts, the respective Member State shall also submit those other texts in so far as they contain elements which may have an impact on the functioning of the internal energy market or on the security of energy supply in the Union.

3. Upon ratification of an intergovernmental agreement or of an amendment to an intergovernmental agreement, the Member State concerned shall notify the intergovernmental agreement or the amendment, including any annexes thereto, to the Commission.

Where the ratified intergovernmental agreement or amendment to the intergovernmental agreement refers explicitly to other texts, the Member State concerned shall also submit those other texts in so far as they contain elements which may have an impact on the functioning of the internal energy market or on the security of energy supply in the Union.

4. The obligation to notify to the Commission according to paragraphs 2 and 3 does not apply in respect of agreements between undertakings.
5. All notifications pursuant to paragraphs 1 to 3 of this Article, Article 6(1) and (2) and Article 7(1) and (2) shall be made through a web-based application provided by the Commission. The periods referred to in Article 5(1) and (2) and Article 6(3) shall start to run on the date when the complete notification file has been registered in the application.

#### *Article 4*

#### **Assistance from the Commission**

1. Where a Member State gives the Commission notice of negotiations pursuant to Article 3(1), the Commission services may provide it with advice on how to avoid the incompatibility of the intergovernmental agreement or of the amendment to an existing intergovernmental agreement under negotiation with Union law. That



Member State may also request the assistance of the Commission in those negotiations.

2. 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.
3. Where the Commission participates in the negotiations as an observer, it may provide the Member State concerned with advice on how to avoid the incompatibility of the intergovernmental agreement or amendment under negotiation with Union law.

#### *Article 5*

#### **Assessment by the Commission**

1. The Commission shall, within six weeks of the date of notification of the complete draft intergovernmental agreement or amendment, including annexes thereto, pursuant to Article 3(2), 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 particular with internal energy market legislation and Union competition law. In the absence of a response from the Commission within that period, the Commission shall be deemed not to have any such doubts.
2. Where the Commission informs the Member State concerned pursuant to paragraph 1 that it has doubts, it shall inform the Member State concerned of its opinion on the compatibility with Union law, in particular with internal energy market legislation and Union competition law, of the draft intergovernmental agreement or amendment concerned within 12 weeks of the date of notification referred to in paragraph 1. In the absence of an opinion from the Commission within that period, the Commission shall be deemed not to have raised any objections.
3. With the approval of the Member State concerned, the periods referred to in paragraphs 1 and 2 may be extended. The periods referred to in paragraphs 1 and 2 shall be shortened in agreement with the Commission if circumstances so warrant.
4. The Member State shall not sign, ratify or agree to the draft intergovernmental agreement or amendment to an existing intergovernmental agreement until the Commission has informed the Member State of any doubts, in accordance with paragraph 1, or, where applicable, has issued its opinion in accordance with paragraph 2, or, in the absence of a response or opinion from the Commission, until the periods referred to in paragraphs 1 or, where applicable, 2, have elapsed.

When signing, ratifying or agreeing to an intergovernmental agreement or amendment, the Member State concerned shall take utmost account of the Commission's opinion referred to in paragraph 2.

## *Article 6*

### **Notification obligations and assessment by the Commission with respect to existing intergovernmental agreements**

1. By [3 months following the entry into force of this Decision] at the latest Member States shall notify to the Commission all existing intergovernmental agreements, including annexes and amendments thereto.

Where the existing intergovernmental agreement refers explicitly to other texts, the Member State concerned shall also submit those other texts in so far as they contain elements which may have an impact on the functioning of the internal energy market or on the security of energy supply in the Union.

The obligation to notify to the Commission according to this paragraph does not apply in respect of agreements between undertakings.

2. Existing intergovernmental agreements which have already been notified to the Commission in accordance with Article 3(1) or (5) of Decision No 994/2012/EU, or point (a) of Article 13(6) of Regulation (EU) No 994/2010 at the date of entry into force of this Decision shall be considered as having been notified for the purposes of paragraph 1 of this Article, provided that the notification meets the requirements of that paragraph.
3. The Commission shall assess intergovernmental agreements notified in accordance with paragraph 1 or 2. Where, following its first assessment, the Commission has doubts as to the compatibility of those agreements with Union law, in particular with internal energy market legislation and Union competition law, the Commission shall inform the Member States concerned accordingly within nine months of the notification of those agreements.

## *Article 7*

### **Notification obligations and assessment by the Commission with respect to non-binding instruments**

1. Upon adopting a non-binding instrument or an amendment to a non-binding instrument, the Member State concerned shall notify the non-binding instrument or the amendment, including any annexes thereto, to the Commission.

Where the non-binding instrument or the amendment to the non-binding instrument refers explicitly to other texts, the Member State concerned shall also submit those other texts in so far as they contain elements which may have an impact on the functioning of the internal energy market or on the security of energy supply in the Union.

2. By [3 months following the entry into force of this Decision] at the latest Member States shall notify to the Commission all existing non-binding instruments, including annexes and amendments thereto.

Where the existing non-binding instrument refers explicitly to other texts, the Member State concerned shall also submit those other texts in so far as they contain elements which may have an impact on the functioning of the internal energy market or on the security of energy supply in the Union.

3. The obligation to notify to the Commission according to paragraphs 1 and 2 does not apply in respect of agreements between undertakings.
4. 4. Where, following its first assessment, the Commission considers that the measures implementing the non-binding instrument notified to it under paragraphs 1 and 2 could conflict with Union law, in particular with internal energy market legislation and Union competition law, the Commission may inform the Member State concerned accordingly.

#### *Article 8*

### **Transparency and confidentiality**

1. When providing information to the Commission in accordance with Article 3(1) to (3), Article 6(1) and Article 7(1) and (2), 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.

A Member State shall make such an indication with regard to the existing agreements referred to in Article 6(2) by [3 months following the entry into force of this Decision] at the latest.

2. Where a Member State has not identified the information as confidential in accordance with paragraph 1, the Commission shall make that information accessible in secure electronic form to all other Member States.
3. Where a Member State has identified as confidential in accordance with paragraph 1 an existing intergovernmental agreement, an amendment to an existing intergovernmental agreement, a new intergovernmental agreement, an existing non-binding instrument, an amendment to an existing non-binding instrument or a new non-binding instrument, that Member State shall make available a summary of the information submitted.

That summary shall contain at least the following information regarding the intergovernmental agreement, non-binding instrument or amendment in question:

- (a) the subject matter;
- (b) the aim and the scope;
- (c) the duration;
- (d) the parties;
- (e) information on the main elements.

This paragraph shall not apply to information submitted in accordance with Article 3(1) and (2).

4. The Commission shall make the summaries referred to in paragraph 3 accessible in electronic form to all other Member States.
5. Requests for confidentiality under this Article shall not restrict the 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 9*

#### **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 non-binding instruments 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 non-binding instruments and considering appropriate action to address those problems and, where appropriate, proposing solutions;
- (c) on the basis of best practices and in consultation with Member States, developing optional model clauses, which, if applied, would significantly improve compliance of future intergovernmental agreements and non-binding instruments with Union law;
- (d) supporting, where appropriate, the development of multilateral intergovernmental agreements or non-binding instruments involving several Member States or the Union as a whole.

#### *Article 10*

#### **Reporting and review**

1. By 1 January 2020 at the latest, the Commission shall submit a report on the application of this Decision to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.
2. The report shall, in particular, assess the extent to which this Decision promotes compliance of intergovernmental agreements and non-binding instruments with Union law and a high level of coordination between Member States with regard to intergovernmental agreements and non-binding instruments. 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.

*Article 11*

**Repeal**

Decision No 994/2012/EU is repealed.

*Article 12*

**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 13*

**Addressees**

This Decision is addressed to the Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*