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PROPOSAL

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

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Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE
SUMMARY OF THE IMPACT ASSESSMENT
Accompanying the document 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

Delegations will find attached document SWD(2016) 28 final.

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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

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

{COM(2016) 53 final}
{SWD(2016) 27 final}

Executive Summary Sheet

Impact Assessment on the proposal to revise the Decision on the information exchange mechanism with regard to intergovernmental agreements (IGA) between Member States and third countries in the field of Energy

(IGA Decision 994/2012/EU)

A. Need for action

Why? What is the problem being addressed? Maximum 11 lines

The IGA Decision of 25 October 2012 established a mechanism for the exchange of information between Member States and the Commission on intergovernmental agreements (IGAs) in the field of energy. As analysed in the evaluation report annexed to this Impact Assessment, experience shows that the current IGA Decision is not meeting one of its principal objectives, namely to ensure compliance of IGAs with EU law. Specifically, it has proved ineffective in encouraging the transformation of IGAs that are discovered *ex-post* to be non-compliant with EU law into ones that are compliant. 3 main underlying drivers to this problem have been identified:

- The lack of any *ex-ante* notification of IGAs to the Commission, resulting in a risk of IGAs being developed that are non-compliant with EU law;
- The lack of adequate legal mechanisms in some IGAs allowing for their amendment or termination;

The lack of transparency in ongoing IGA negotiations / substitution effect.

What is this initiative expected to achieve? Maximum 8 lines

The review of the IGA Decision takes place in the context of the Energy Union Strategy, the objective of which is to give EU consumers - households and businesses - secure, sustainable, competitive and affordable energy supplies. The review has two main objectives:

- Increase the compliance of IGAs with EU law, thereby ensuring the proper functioning of the internal energy market and enhancing competition;

Increase the transparency of IGAs in order to increase the cost effectiveness of EU energy supply and increase solidarity between Member States.

What is the value added of action at the EU level? Maximum 7 lines

First, under EU law Member States are obliged to avoid or eliminate any incompatibility between European Union law and any IGAs they conclude with third countries. It is an EU aim (under Article 194 TEU) to ensure the proper functioning of the internal energy market, and this requires that energy imports into the European Union are in full compliance with the rules of the internal energy market. Second, the need for coordination at supranational level is increased by the progressive integration of energy infrastructure and markets at EU level, a shared reliance on external suppliers and the ambition on the part of the EU and its Member States to create an Energy Union.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why? Maximum 14 lines

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

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

Model clauses could be developed and the consequences of their use in IGAs for the assessment process by the Commission be specified.

Option 3: Ex-ante assessment of IGAs by the Commission could become obligatory:

Member States could be obliged to inform the Commission at an early stage of any ongoing IGA negotiations and to submit their draft IGAs to the Commission for an *ex-ante* assessment.

Option 4: The Commission could have the right to participate as an observer in IGA negotiations:

Under the current IGA Decision Member States "may request the assistance of the Commission". Member States could however be obliged to invite the Commission to participate in the negotiations as an observer.

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

Compulsory *ex-ante* notification would allow for the checking and discussion in advance of whether an EU-agreement (exclusive or mixed) would be a more appropriate means of achieving a given objective.

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

Who supports which option? Maximum 7 lines

A Public Consultation on this initiative ran from 28/07 to 22/10 2015, the main results of which were as follows:

- Public authorities: 6 Member States felt that the current system should be reinforced. 5 Member States were of the opinion that no revision of the current system was needed;
- Business: a large majority of the responses from business stakeholders stressed the importance of keeping commercial contracts outside of the scope of the IGA Decision.

Those in favour of strengthening the IGA Decision generally believed that the introduction of a compulsory *ex-ante* verification mechanism should be the main means of achieving that reinforcement.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)? Maximum 12 lines

This IA relies on a qualitative evaluation of the proposed options. This is due to the fact that it is not possible fully to quantify the direct and indirect macroeconomic effects of changes to the IGA Decision. The economic benefits of option 3 (compulsory *ex-ante* compatibility checks) would result from increased compliance of IGAs with EU law and would primarily be related to:

- Increased legal certainty, which favours investment. This is particularly true for infrastructure-related IGAs that are intended to provide legal certainty for projects involving high levels of investment;
- A well-functioning internal energy market without segmentation and with increased competition;
- Increased transparency as regards the security of supply situation in all Member States, which in turn could reduce the risk of duplication of investment and/or infrastructure gaps.

The impacts of a revised IGA Decision on environmental and social areas would be indirect. To the extent that such a revision increased the compliance of IGAs with EU law and so created a better overall business environment they would be positive.

What are the costs of the preferred option (if any, otherwise main ones)? Maximum 12 lines

The preferred option, option 3, could entail administrative costs both for the Commission and for MS

At EU level, the first level of *ex-ante* assessment for each new or renewed IGA submitted to the Commission would probably involve two officers in DG ENER for up to two full working days. The Commission's Legal Service and other relevant DGs would also need to be consulted, and would also need to invest the resources of one to two legal officers for an estimated one to two days.

At national level, the main legal assessment and drafting work necessary to conclude an IGA with a third country would be carried out whether or not there were an obligatory *ex-ante* notification provision. Therefore, the additional costs of this option at a national level would be linked to the submission of documents to the Commission for *ex-ante* assessment. If issues of non-compliance with EU law were detected, more legal experts would need to be consulted. Depending on the complexity of the IGA, several rounds of consultation with national authorities might be necessary, which would also imply that more officers, at hierarchical levels in the national administration, would need to devote additional hours to the issue during the pre-signature phase.

How will businesses, SMEs and micro-enterprises be affected? Maximum 8 lines

As commercial contracts would stay out of the scope the revised IGA Decision, the proposed option, option 3, would have no additional direct impact on businesses relative to the current system. However, the mandatory *ex-ante* assessment of draft IGAs by the Commission could delay the signature of the IGA and could thus indirectly affect the planning and investment decisions of commercial entities involved in energy supply or related infrastructure. However, option 3 would also improve the overall business environment, by increasing legal certainty and therefore saving money for companies involved in investments and related subcontracting, including SMEs.

Will there be significant impacts on national budgets and administrations? Maximum 4 lines

Apart from the administrative costs mentioned above, the proposed option would not have additional impact on national budgets.

Will there be other significant impacts? Max 6 lines

The introduction of compulsory *ex-ante* assessment by the Commission could have as an effect that an envisaged IGA with a third country would not be signed, or that it would be designed or modified in such a way as to comply with EU law. This could in turn affect the relationship with the third country concerned. Such *ex-ante* assessment would, however, provide legal certainty and stability in the contractual relationships between Member States and third countries. A separate issue is that Members of the EEA or Contracting Parties of the Energy Community may also decide to apply the revised IGA Decision.

D. Follow up

When will the policy be reviewed? Maximum 4 lines

The IGA Decision contains a review clause in Art. 8 requiring the Commission to prepare a report by 1st January 2016 and every three years thereafter. Thus, in addition to the evaluation report in annex to this Impact Assessment, the Proposal for a review of the IGA Decision will be accompanied by a first report to the European Parliament and the Council. The Commission intends to produce a subsequent report by 1. January 2020.