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NOTE

From:	General Secretariat of the Council
To:	Delegations
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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

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

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

N.B. In order to bring the discussion forward, the Presidency invites delegations to reflect on the written comments submitted, and react on them if appropriate during the next Energy Working Party meeting.

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 Committee¹,

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

Acting in accordance with the ordinary legislative procedure,²

Whereas:

¹ OJ C , , p. .

² OJ C , , p. .

- (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 2015³, 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 2014⁴. 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, 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 Council⁵ 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.

³ COM(2015)80

⁴ COM (2014)330

⁵ OJ L 299, 27.10.2012, p. 13.

- (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 negotiation of an intergovernmental agreement the Commission should have the possibility to advise the Member State(s) concerned on how to avoid incompatibility with Union law. In this framework, the Commission should also have the possibility to draw the attention of the Member State(s) concerned 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 where relevant; however, this should not form part of the legal assessment of the Commission of the draft intergovernmental agreement or amendment. Furthermore, the Commission should develop, in cooperation with Member States, optional model clauses and guidelines.
- (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.
- (7a)** 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. The Commission should consider shortening the periods foreseen for its assessment if appropriate, in particular if a Member States requests this or if a Member State has kept the Commission informed in sufficient detail during the negotiation phase, and having regard to the extent to which the draft intergovernmental agreement or amendment is based on model clauses. 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 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 **reach []** a suitable solution to eliminate the incompatibility identified.
- (10) This Decision should only apply to intergovernmental agreements that have an impact on the **operation or functioning of the** internal energy market or the security of energy supply in the Union⁶. **In this respect, legally binding agreements that merely set the framework for general energy cooperation, with no provision in particular on the development of infrastructures or energy supply towards the EU should not be covered.** 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.

⁶ **Note: the Presidency invites delegations to consider the following text suggestion for the start of this recital: "This Decision should apply to intergovernmental agreements; these, by their content, express the common will of the parties that the agreement should have entirely or in part a legal effect. Only those legally binding agreements that have an impact on the operation or functioning of the internal energy market or the security of energy supply in the Union should be notified. In this respect..."**

- (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, **because** 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 **covering certain well-defined aspects relating directly to interpretation of Union law, to the internal energy market or energy security**. 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 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 Council⁷.

⁷ 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).

- (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 [] a high level of coordination [] 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 **ensure []** the functioning of the internal energy market **and enhance the security of energy supply in the Union.**
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.

[] 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 [] 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.

[⁸ 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.

⁸ **Note: it was duly noted that many delegations have requested the deletion of this Article, whilst some others supported it. The Presidency nevertheless proposes to continue the reflection and discussion on NBI's, in particular as regards the issue of NBI's that contain (some) content that could be considered as 'binding' in practice.**

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 **interpret Union law or set conditions for energy supply (such as volumes and prices) or for the development of energy infrastructures []**.

3. The obligation to notify to the Commission according to paragraphs 1 and 2 does not apply in respect of agreements between undertakings.
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, **if it deems this useful, proportionate and appropriate.**

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 and by the Commission

- 1.** 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)** supporting, where appropriate, the development of multilateral intergovernmental agreements or non-binding instruments involving several Member States or the Union as a whole.
- 2.** **By the end of [2018], the Commission shall,** on the basis of best practices and in consultation with Member States, develop optional model clauses **and guidance, including a list of examples of clauses that do not respect the *acquis***, which, if applied, would significantly improve compliance of future intergovernmental agreements and non-binding instruments with Union law.

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