



European Economic and Social Committee

TEN/590

Intergovernmental agreements in the energy field – revising the 2012 Decision

OPINION

European Economic and Social Committee

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]

Rapporteur: **Vladimír Novotný**

Consultation	European Commission, 16/02/2016 Council, 02/03/2016 European Parliament, 07/03/2016
Legal basis	Articles 194 (2) and 304 of the Treaty on the Functioning of the European Union.
Section responsible	Section for Transport, Energy, Infrastructure and the Information Society
Adopted in section	07/09/2016
Adopted at plenary	21/09/2016
Plenary session No	519
Outcome of vote (for/against/abstentions)	139/0/4

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the Commission's proposal and the proposal for a decision as a whole, and sees it as a step towards strengthening legal certainty in the area of energy investment and related infrastructure projects, increasing transparency with regard to security of gas supplies, and improving the functioning of the internal energy market.
- 1.2 The EESC is in favour of carrying out, by means of an "ex-ante" mechanism, an evaluation of international agreements in the energy sector that are concluded with third parties (IGA), as a means of avoiding the risk that agreements could come into conflict with EU law and the requirements of the internal energy market. At the same time, it considers prevention in this case to be a more effective approach than ex-post corrective measures.
- 1.3 The EESC proposes that the procedure of notification and verification prior to the conclusion (ex ante) of international agreements in the energy sector be restricted to agreements on supplying gas in the Member States, which is the most sensitive energy commodity as it is usually supplied to several EU Member States.
- 1.4 The EESC takes the view that the revised decision should only concern the drafting of framework agreements with a direct impact on the internal market of the Union and/or the security of energy supply, and the Commission should only assess whether or not the proposed IGA that is submitted to it complies with EU law.
- 1.5 Better protection of confidential information throughout the process of preparing the IGA will be one of the conditions for the successful implementation of the proposed notification and verification procedures with regard to international agreements on energy that are in preparation or under negotiation.
- 1.6 In the EESC's view, the ex-post legal and administrative procedures that are currently in force should be used to evaluate other energy agreements. However, at the same time it suggests that consideration could be given to Member States being able to voluntarily submit these agreements for an ex-ante evaluation at their own request.
- 1.7 The EESC also considers that the proposed twelve-week period available for the Commission to issue an unfavourable opinion, in the event that the draft agreement is deemed incompatible with EU law, should be the maximum time limit. After this period is over it will be assumed that the Commission has accepted the proposed agreement and that negotiations to conclude the IGA can move forward.

2. **Introduction**

- 2.1 The Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy is part of the European Commission's "winter package", which focuses on the security of energy supplies as part of the Energy Union project. This package focuses primarily on gas supplies from third countries.

- 2.2 In 2015, the Commission embarked upon an evaluation – with a view to revision – of the effectiveness of Decision No 994/2012/EU of 25 October 2012 on intergovernmental agreements, which established an information exchange mechanism for energy agreements between Member States and third countries.
- 2.3 The Commission's evaluation report concludes that the current decisions do not fulfil one of their main aims, which is to ensure that intergovernmental agreements comply with European Union law. The Commission identified three root causes of this problem:
- the fact that the Commission is not notified in advance about intergovernmental agreements, which increases the risk of these agreements being drawn up in a way that is not consistent with EU law;
 - the lack of legal mechanisms in some intergovernmental agreements enabling them to be modified or rescinded;
 - the lack of transparency in negotiations of intergovernmental agreements or their substitution effect.
- 2.4 The Commission has drawn up a proposal for a decision to repeal Decision No 994/2012/EU. It contains several significant changes aimed at tackling the findings of the review of that decision. This revision has two main objectives:
- to ensure the compliance of intergovernmental agreements with EU law in order to guarantee the proper functioning of the internal market and improve the EU's energy security; and
 - to make intergovernmental agreements with third countries more transparent in order to increase the cost effectiveness of the EU's energy supply and solidarity between Member States.

3. Commission document

3.1 The proposal for a revised decision contains the following elements:

3.1.1 Notification obligations with regard to intergovernmental agreements:

- the Member State is obliged to inform the Commission of its intent to enter into negotiations with a third country in order to conclude new intergovernmental agreements on gas supply or amend existing ones;
- the Commission should be kept informed of progress in preparations for the agreement once notice of the negotiations 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;
- the Member State is obliged to notify the Commission about draft intergovernmental agreements or amendments to them, with all accompanying documents, as soon as the parties have reached agreement on all of their main elements, so that the Commission can carry out an ex-ante evaluation;
- the Member State is obliged to notify the Commission regarding intergovernmental agreements or amendments, with all accompanying documents, upon ratification;
- the Member State is obliged to notify the Commission about all existing intergovernmental agreements or amendments, with all accompanying documents;
- agreements between undertakings are not covered by notification obligations, but may be submitted on a voluntary basis;
- the Commission is obliged to share information and documents it has received with other Member States, in accordance with data confidentiality provisions.

3.1.2 Evaluation by the Commission:

- the Commission is obliged to perform an ex-ante evaluation of draft intergovernmental agreements or amendments to these agreements and to inform the Member State within six weeks of possible doubts it may have about compatibility with Union law, in particular in the case of internal energy market legislation and Union competition law;
- the Commission is obliged to inform the Member State of its opinion on the compatibility of the intergovernmental agreement or amendment with Union law within 12 weeks of the date of notification;
- the Member State must not conclude the proposed intergovernmental agreement or amendment until the Commission has informed it, in its opinion, of any possible doubts. When concluding the proposed intergovernmental agreement or amendment, the Member State must take the utmost account of the relevant conclusions and findings of the Commission;
- 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.

3.1.3 Notification obligations and evaluation by the Commission with respect to non-binding instruments:

- the Member State is obliged to submit existing and future non-binding instruments to the Commission, along with all accompanying documents;
- the Commission may perform an ex-post evaluation of submitted non-binding instruments and inform the Member State accordingly if it considers that the measures implementing the non-binding instrument could conflict with Union law;
- the Commission proposes that the most efficient, effective and proportionate option with regard to costs would be for its ex-ante evaluation of intergovernmental agreements to be mandatory. Member States should be obliged to notify the Commission at an early stage of any negotiations on an intergovernmental agreement on gas supplies and to submit the proposals involved to the Commission for the purposes of its ex-ante evaluation.

3.2 According to the Commission, this decision is expected to favour:

- increased legal certainty, which promotes investment;
- the smooth functioning of a more competitive internal energy market free from segmentation;
- increased transparency with regard to the security of supply in all Member States.

4. General comments

- 4.1 The EESC has already addressed the issue of agreements in the energy sector in connection with preparations for Decision No 994/2012/EU of the European Parliament and of the Council in 2012¹. In its opinion, the EESC emphasised that energy agreements should be guided by both strategic and commercial considerations, while at the same time respecting the principles of proportionality and transparency.
- 4.2 The Committee regretted, inter alia, that the draft decision did not cover significant trade agreements by private parties in the energy sector extending to several Member States, in which there was a risk of conflict with EU law. It warned of potential threats that could arise where strategic partnerships might lead to the enforced adoption of practices imposed by non-EU interests where these may prove to be detrimental.
- 4.3 With regard to the proposed decision of the EP and the Council revising Decision No 994/2012/EU of the European Parliament and the Council, European employers' organisations have expressed their reservations in their capacity as key partners in social dialogue and representatives of organised civil society. The employers' associations maintain that the ex-post

¹ [OJ C 68, 6.3.2012, pp. 65-69.](#)

mechanism is sufficient. They stress that the evaluation should be targeted at agreements that have an impact upon the internal energy market or the security of energy supply.

- 4.4 Civil society organisations and a certain number of Member States have also insisted that liability be imposed where there is leakage of sensitive information and the requirement to provide adequate protection for commercial interests. They also supported the exclusion of agreements between private entities and those based on Euratom mechanisms from the scope of the decision and put forward the requirement that the revision of Decision No 994/2012/EU should as a whole respect the freedoms of enterprise and commerce, the protection of trade secrets and the right to good administration.
- 4.5 During public consultations carried out as part of the proceedings, similar objections were also raised by interested parties, including European sectoral organisations and regulatory organisations. They highlighted, among other things, the fact that the Commission's supporting documents [SWD(2016) 28 final] do not provide sufficient proof or compelling, evidence-based arguments enabling the reader to legitimately conclude that the legislation currently in force does not fulfil its objectives and must therefore be replaced by new legislation. Stricter enforcement of the existing decision could enable problems with international agreements to be addressed without the need to resort to fresh legislation.
- 4.6 With a view to reaching an appropriate compromise, in the present opinion the EESC draws on comments and objections set out above from across the spectrum of civil society organisations, as well as on the Commission's own arguments. It also draws on the conclusions of the EU Energy Council.
- 4.7 On the basis of the Commission's experience regarding the difficulty of modifying international agreements that have already been concluded in the energy sector where an inconsistency with EU law is discovered after the fact, the EESC supports the proposal to apply the ex-ante mechanism as a means of preventing violations of EU law and the rules of the internal energy market in cases that are relevant to the EU as a whole or that affect several Member States.
- 4.8 The EESC takes the view that the revised decision should therefore only affect major intergovernmental agreements with third parties that have a direct impact on the internal market of the Union and/or the security of energy supply, and the Commission should only assess whether or not the proposed IGA that is presented to it complies with EU law.
- 4.9 The Commission should not be given any specific mandate when it provides assistance to a Member State that is negotiating a small IGA of limited importance. At the same time, the option should be maintained for Member States to themselves request advice from the Commission, with the aim of preventing conflict between the negotiated agreement and EU law. In such cases, the Commission should be bound by strict deadlines to provide relevant information.

5. **Specific comments**

- 5.1 The EESC thinks that the control mechanism should continue to apply only to international agreements on gas supplies.
- 5.2 The Committee endorses the Commission's view that the obligations set out by the proposal for a decision should not apply to agreements concluded between private entities. It does, nevertheless, recommend that application of the proposed ex-ante mechanism be considered in the case of agreements in the private sector that may have a significant impact on the internal energy market or the security of energy supply. However, the rules for this procedure must be clearly determined.
- 5.3 The EESC expects accountability to be enshrined in cases where commercially sensitive information is lost and such cases to be examined in the light of criminal law.
- 5.4 The EESC does not think it necessary or beneficial for the decision under consideration to apply to non-legally binding instruments (Article 2 of the proposal).
- 5.5 The Committee expresses doubts regarding the Commission's statement that the proposal will not have any impact on the EU budget. In particular, in cases where the ex-ante mechanism is extended to agreements between private entities, both administrative costs and administrative burdens are likely to rise. The EESC would have liked to see an analysis of how the principle of solidarity will be respected and the principle of proportionality upheld in the new decision.
- 5.6 The EESC approves the Commission's proposal to maintain the optional nature of the advice it provides (Article 4 of the proposal): its assistance should never be obligatory in negotiations between a Member State and a third country.

Brussels, 21 September 2016.

Georges Dassis
President of the European Economic and Social Committee
