EUROPEAN
COMMISSION

Brussels, 9.3.2016
SWD(2016) 27 final/2

CORRIGENDUM
Replaces the document SWD(2016) 27 of 16.2.2016
Deletion of comments at the bottom of p.37 and 38, addition of the reference to the public consultation at the bottom of page 52 and renumbering of the footnotes

COMMISSION STAFF WORKING DOCUMENT

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) 28 final}

Table of Contents

1. INTRODUCTION

The goal of the **Energy Union Strategy**, adopted on 25 February 2015[1], is to give EU consumers - households and businesses - secure, sustainable, competitive and affordable energy.

To achieve this goal, the Energy Union Strategy proposes a fundamental transformation of Europe's energy system, based on a vision of an Energy Union, based on true solidarity and trust, and of an Energy Union that speaks with one voice in global affairs. This vision translates into concrete, mutually-reinforcing proposals, notably in the field of energy security, one of which is to **increase transparency on energy supply**.

More precisely, the Energy Union Strategy 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", building on the analysis already carried out in the European Energy Security Strategy[2] of May 2014. 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".

To achieve such compliance, 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)[3]. 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, 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 problems.** 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*".

In the new context of the Energy Union Strategy and in accordance with its Action Plan, the Commission is therefore considering a revision of the IGA Decision. The present Impact Assessment identifies the problems in the current information exchange mechanism with regard to IGAs. Further, it demonstrates the reasons for the current system being insufficient to achieve its major goal, which is to ensure full compliance of IGAs with EU law. It assesses options to improve it in order to increase the transparency of IGAs and their compliance with EU law, with the overall objective of reinforcing EU energy security.

[1] COM/2014/0330 final
[2] COM (2014)330
[3] 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

Relation with other EU initiatives

The Energy Union Strategy foresees in its Action Plan a number of actions to increase the energy security of the EU. The present Impact Assessment should therefore be seen in the context of other initiatives including the on-going revision of the Security of Gas Supply Regulation and a foreseen Recommendation on Article 103 of the Euratom Treaty providing for a specific ex-ante procedure for the EURATOM related IGAs[4].

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[5]. The present Impact Assessment will not consider the issue of commercial contracts related to IGAs since, as indicated in the Energy Union Strategy, this will be done, for commercial gas supply contracts, in the context of the review of the Security of Gas Supply Regulation, where "*the Commission will also propose to ensure appropriate transparency of commercial gas supply contracts that may have an impact on EU energy security, while safeguarding the confidentiality of sensitive information*". The Impact Assessment developed for the review of the Security of Gas Supply Regulation is covering this specific issue. This approach also corresponds with the result of the Public Consultation on the IGA Decision review (see 2.3 below) in which an overwhelming majority of the respondents either did not mention the need to include commercial contracts or clearly expressed the view that commercial contracts should stay out of the scope of the IGA Decision.

2. PROCEDURE

2.1. Identification

(1) Lead DG: DG ENER

(2) Associated DGs: SG, LS, DG CLIMA, DG COMP, DG GROW, DG ECFIN, DG ENV, DG HOME, DG NEAR, DG TRADE, EEAS, JRC, JUST

(3) Agenda planning/WP references: 2016/ENER/005.

[4] These IGAs are excluded from the current IGA Decision

[5] 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.

2.2. Organisation and timing

2.2.1. Drafting process

The process that led to drafting this Impact Assessment on the revision of the IGA Decision has followed a number of steps.

It builds on the directions set by the European Energy Security Strategy (EESS) of May 2014 as well as the key remaining challenges identified in the Energy Union Strategy of February 2015.

It also 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 this Impact Assessment.

Moreover, a public consultation was organized between July 28th and October 22nd 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. A summary analysis of the responses can be found in Annex 3, the main findings of which have been taken into consideration at key stages of this Impact Assessment. The non-confidential responses and a summary document have been published on the website[6].The EU's Gas Coordination Group also discussed specific elements considered for revision in a workshop dedicated to security of supply at large, on 4 May 2015.

Finally, the drafting on this Impact Assessment started in July 2015 with the help of an inter-service steering group which has been consulted regularly and at each stage of its development.

Key dates in this process were:

- 28 May 2014 — European Energy Security Strategy
- 16 October 2014 — Stress Test communication
- 16 October 2014 — Report on the implementation of Regulation 994/2010
- 25 February 2015 — Energy Union Strategy
- 19 March 2015 — European Council conclusions on energy issues
- 21 September 2015 — 1st meeting of the Inter-service Steering Group (ISG)
- 5 October 2015 — 2nd meeting of the ISG
- 19 October 2015 — 3rd meeting of the ISG
- 30 October 2015 — 4th meeting of the ISG
- 11 November 2015 — Submission of the Impact Assessment to the RSB[7]
- 2 December 2015 — Scheduled RSB Meeting date

2.2.2. Impact Assessment

The Impact Assessment has been prepared by DG ENER assisted by an Inter-service Steering Group made up of representatives invited from the following Directorates General: the SG,

[6] https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmental-agreements-decision
[7] Regulatory Scrutiny Board (RSB)

LS, DG CLIMA, DG COMP, DG GROW, DG ECFIN, DG ENV, DG HOME, DG NEAR, DG TRADE, JRC, DG JUST as well as the EEAS.

This impact assessment received a positive opinion from the Regulatory Scrutiny Board on December 4th 2015. The Regulatory Scrutiny Board's recommendations for further improvement (without the need for a resubmission) were fully taken into account, notably through amendments in the following main areas:

- Clarification of the baseline scenario, in particular as regards the relevance of IGAs for the future;
- Improved assessment of option 2 (obligatory model clauses).

2.3. Consultation and expertise

As described in section 2.2.1, DG ENER repeatedly solicited input to the review of the IGA Decision from all segments of the energy sector from the outset, in particular Member States, including on the problem definition and on specific technical elements. The consultations included a 12 week public web-based consultation (July to October 2015) as well as dedicated meetings, including as part of the EU's Gas Coordination Group (04/05/2015) and of the Strategic Group on International Energy Relations (07/05/2015).

2.4. External 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[8] on public access to European Parliament, Council and Commission documents (Article 4 (1) (a), 3rd 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), 2nd indent - Protection of court proceedings and legal advice). *Inter alia* for these confidentiality issues, it was decided not to develop an external study on the implementation of the current IGA Decision.

3. PROBLEM DESCRIPTION

3.1. Context of the problem

Stable and secure energy supplies are important for a predictable economic environment for the industrial sector and ultimately consumers in the European Union. However, EU's energy dependency is increasing. In less than 25 years (from 1990 to 2013), the share of net imports of energy products in the EU has increased from 45% to 55% of gross inland energy consumption[9]. With the depletion of traditional indigenous sources, this share is projected to rise further even though the increase will be mitigated by the increased use of new indigenous sources such as renewable energy. Member States are consequently seeking new energy supplies outside of the EU. Negotiations with energy suppliers in third countries frequently require political and legal support in the form of the conclusion of intergovernmental agreements (IGAs). IGAs are normally negotiated bilaterally and are often the basis for more detailed commercial contracts. Different categories of IGAs can be distinguished:

[8] OJ L 145, 31.5.2001, p.43
[9] Source: Eurostat Energy Statistics, 2015.

- IGAs used to provide legal certainty for the construction of import and export infrastructure, most notably cross-border oil, gas and electricity infrastructure, including LNG facilities;
- IGAs relating to the purchase, or to the facilitation of the purchase, of a commodity such as oil or gas;
- IGAs of a general nature establishing a framework for bilateral energy cooperation between Member States and third parties, either in general or in a specific field (for instance IGAs that set a framework for the exchange of expertise in the field of renewable energy).

3.2. Nature and extent of the problem

3.2.1. Impact of IGAs on EU's internal market and energy security

In line with the rules of the internal EU electricity and gas markets, in particular of the provisions of the Second and Third Energy Packages, Member States have introduced significant requirements in their energy legislation. Compliance with these requirements is not always in the commercial interest of third country energy suppliers. Member States can therefore come under pressure to include regulatory concessions in their IGAs with third countries and such concessions can threaten the operation, integrity and functioning of the EU internal energy market.

Regulatory concessions in IGAs can threaten a number of key areas of the EU acquis:

- The Third Energy Package: the introduction of the Third Energy Package has furthered the EU's efforts to open up energy markets. Member States are obliged to unbundle energy supplies from transmission networks, therefore allowing the entry of new market participants to energy supply markets. Implementation of the third energy package has had a positive impact on EU gas markets as evidenced by the development of wholesale gas prices, but can be threatened by IGAs that notably reduce the independence of entities supplying gas from the operators of the gas infrastructure. These incompatible clauses typically prevent, for example, ownership unbundling, third party access and competitive tariff setting, including the independence of the national regulator.

- Competition rules: these rules as enshrined in the Treaty also provide for strong powers to ensure the proper functioning of the internal market. Enforcement of competition rules ensures that anti-competitive provisions of supply contracts are prohibited and sanctioned and that, ultimately, energy markets function properly. Anti-competitive clauses in IGAs may include for example territorial restriction clauses in IGAs which prevent the cross-border sale of gas (for example through (re-)export bans and destination clauses). Anti-competitive clauses in related supply contracts, which may be inspired by the IGA, may also achieve the same objective indirectly, i.e. clauses which incentivize the buyer not to re-sell the gas (e.g. dual pricing mechanisms, information obligations etc.) or may include provisions relating to pricing or other terms and conditions that may infringe competition rules.

- EU public procurement rules: energy infrastructure projects implemented with third-country participation require strict scrutiny regarding the application of EU public procurement rules as non-compliances detected following the establishment of the legal framework for a project can result in delays, additional costs and can eventually jeopardise an entire infrastructure project. Recent cases highlight problems related to the direct awarding of the projects, including subcontracting, by the main developer.

Non-compliant IGAs, as analysed in the following section, often combine provisions that are incompatible with a number of these areas of the EU acquis.

To give a concrete example of what a clause that is incompatible with Union law would mean for the internal energy market, the Commission was notified an IGA signed between a

Member State and a large third country for the supply of oil. This IGA contained a clause specifying that a given amount of oil should stay in the market of that Member State. This constitutes a typical "destination clause". The practical effect of such a destination clause is that it prevents a given energy commodity from flowing freely from one Member State to others. It therefore impedes the proper functioning of the EU internal energy market.

3.2.2. Evaluation of the application of the current IGA Decision

To tackle the above mentioned challenges, the European Council of 4 February 2011 invited Member States to inform the Commission from 1 January 2012 of all their new and existing bilateral energy agreements with third countries[10].The IGA Decision of 25 October 2012 transformed the Conclusions of the European Council into a mechanism with detailed procedures[11] for the exchange of information between Member States and the Commission with regard to IGAs.

The Commission has carried out a fully-fledged evaluation report of the current IGA Decision, which is annexed to the present Impact Assessment. The main conclusion of this report is that while the current system established by the IGA Decision is generally useful to identify incompatibilities of IGAs with EU law, it is **not efficient in transforming concluded non-compliant IGAs into compliant ones.**

As detailed in the evaluation report in annex, **124 IGAs were notified** by Member States to the Commission following the adoption of the IGA Decision. All of these IGAs, but one, were signed before the entry into force of the IGA Decision.

Around 60% of these IGAs concerned general energy cooperation, mainly bilateral cooperation between EU Member States and a wide range of third countries. These IGAs did not raise concerns of compatibility with EU law and the Commission did not follow-up on them.

The remaining IGAs cover specific agreements on the supply, import or transit of energy products (such as oil, gas or electricity) or agreements for the development of energy related infrastructures, with a great majority related to oil and gas pipelines. After analysing the latter, the Commission has expressed doubts on the compatibility with EU law of **17 IGAs**.

So, even if a number of the notified IGAs were in line with the EU Law; around 1/3 of the most relevant IGAs, i.e. those related to energy infrastructures or the supply of energy commodities[12] contained provisions that were not compliant with EU law. In addition, some of these non-compliant IGAs resulted in very complex legal situation situations within Member States, between Member States, and with third countries.

To illustrate the impact that such incompatible IGAs might have on the EU energy market, one could take the example of the South Stream project. This project, underpinned by 6 non-

[10] This conclusion was confirmed by the Energy Council of 28th February 2011: "Improved and timely exchange of information between the Commission and Member States including Member States information to Commission on their new and existing bilateral energy agreements with third countries".
[11] See detailed provisions in annex.
[12] See evaluation report in annex.

compliant IGAs, was originally designed to transport around 60 billion cubic meters of gas a year. This would have represented around 21% of total annual EU gas imports.

The **South Stream case** has become a striking example of such a complex situation. South Stream was a Russia-driven gas pipeline project designed to cross the Black Sea from Russia to Bulgaria and further on to Austria and/or Italy. Pipeline branches to Hungary, Serbia and Slovenia were also under consideration. Initial supplies were planned to take place in the fall of 2015. The individual national stretches of the South Stream pipeline were to be developed by national joint ventures owned by Gazprom and the local gas incumbents.

Russia signed IGAs with a number of concerned EU Member States[13], with the exception of Italy, in order to facilitate the construction and operation of the pipeline. The Commission considered, however, that these IGAs and their implementation were in conflict in particular with the EU's internal energy market rules (for instance Third Energy Package). Despite Commission concerns regarding non-compliance with EU law, project implementation began in some Member States. In March 2014, the Commission set up a Working Group between the Commission and the Russian Federation/Gazprom to try to find a sound legal and regulatory framework for the South Stream project. Two meetings of the Working Group took place in 2014 but did not lead to any agreement. Following the Ukraine crisis and the initiation of a WTO dispute procedure by Russia with respect to the Third Energy Package, the work taking place within the South Stream Working Group was suspended**.** On 1 December 2014, President Putin announced in a press conference that South Stream would be discontinued.

The fact that the Commission was able to address the non-compatibility of the South Stream related IGAs only ex-post created a complex and difficult legal, political and economic situation for the parties involved.

This example illustrates a systemic difficulty that the Commission and the Member States are facing with non-compliant IGAs under the current IGA decision. As mentioned above, after analysing the IGAs notified by Member States, the Commission has expressed doubts on the compatibility with EU law of **17 IGAs**. Letters were consequently sent to the **9 Member States** concerned in 2013. These Member States were invited to amend or terminate the IGAs in question in order to resolve the identified incompatibilities. However, to date, no Member State has managed to renegotiate or terminate the IGAs in question.

So far, the Commission has not launched any infringement procedures against the concerned Member States. This is partly due to the fact that the South Stream project, which was the subject of 6 out of the 17 incompatible IGAs, has been discontinued. Furthermore, some IGAs ceased to apply because the initial duration of the IGA has expired in the meanwhile or because a specific condition set out in the IGA was not fulfilled in due time. The Commission is still considering whether launching infringement procedures would be appropriate for IGAs which are still in force, taking into account the specific legal situation of each Member State concerned. For more details please refer to section 3.2.4 of this Impact Assessment.

[13] Bulgaria, Hungary, Slovenia, Austria, Greece, Croatia. An IGA was also signed with Serbia and the Former Yugoslav Republic of Macedonia (Energy Community member and as such subject to similar obligations under the Second Energy Package).

3.2.3. Relevance of IGAs for the current energy sector

Another finding of the evaluation report is that since 2012, only one new IGA has been notified to the Commission. On the basis of this information alone, one could draw the conclusion that recent changes in the way energy commodities are imported in the EU have made IGAs less relevant for the energy sector. The Commission's assessment however is that the experience of the last 3 years alone does not provide a full picture of the long-term relevance of IGAs.

Indeed, the analysis of all the notified IGAs (some of which have been signed for a period of 30 years) shows that, in the case of major energy infrastructure investments as well as (to a lesser extent) for energy products imports, the conclusion of IGAs will continue to play an essential role. For example, three of out the currently existing non-compliant IGAs (which do not concern South Stream but are related to oil or gas supply and transit) will terminate within one year and could be re-opened for negotiation. Apart from the IGAs up for re-negotiations, the Commission expects more IGAs in the case of major energy infrastructure investments, as well as for energy products imports, within the coming years.

3.2.3.1. Relevance of IGAs for existing infrastructures:

IGAs continue to be relevant in the physical delivery of commodities to the EU. Significant infrastructure projects of the past (and future) continue to rely on public support in the form of IGA's that will need to be agreed/renewed in the coming years.

In the case of gas supplies, the share of piped gas in the total extra-EU imports has reached 90% in 2014, which represents roughly 257 bcm out of a total of 286 bcm. The majority of the gas pipelines connecting the EU to its trading partners were commissioned in the period from the late 1970s to the late 1990s and were based on contractual agreements between the project promoters and often underpinned by one or several agreements between the producing, transiting and receiving countries[14].

With regards to oil: 90% of EU crude oil imports is sea-borne and only 10% arrives via pipeline, an infrastructure that might require an IGA by project developers. For example a number of refineries in the Baltics and Central Europe are reliant to differing degrees on the Druzhba pipeline connecting production fields in the Russian Federation to the region. Similar to the case of natural gas described above, the Druzhba pipeline system was built in the '60s and '70s.

With regards to electricity: the share of extra-EU net imports in gross electricity generation is less than 1% for the EU28[15]. As in the case of crude oil, there are several EU Member States that exchange actively with non-EU neighbouring countries. Croatia, Lithuania and Latvia import more than 20% of their electricity. In particular, after the Ignalina nuclear power plant was shut down at the end of 2009, Lithuania heavily relies on electricity imports. In 2012 the country imported 29% of its annual power needs from Russia via a 750 kV transmission line and 25% from Belarus (through several transmission lines of 300-330 kV voltage). In spite of EU's efforts to integrate them more closely with the rest of Europe, for the time being some

[14] For more details see the evaluation report on the application of the IGA Decision in annex
[15] Source: annual data from ESTAT

isolated electricity systems (notably the Baltic Member States) heavily rely on electricity imported via cables from third countries. Similar to gas and oil, the connecting infrastructure was constructed several decades ago.

In summary, either a large share of the commodities at the EU level (in the case of gas) or a critical share for specific EU Member States (in the case of oil and electricity) is imported in the EU from third countries via physical connections (pipelines or cables). The construction of such complex infrastructures, in some cases spanning several thousand kilometers, was often and is still based on complex contractual agreements between the project promoters and often underpinned by one or several agreements between the producing, transiting and receiving countries.

Some of these IGAs, signed for a long period of time (15 to 30 years), will need to be renewed or amended (this was the case of the recent IGA between Russia and Slovakia on oil supply, which renews the previous one signed in 1999). Due to the long time span of such IGAs, their renewal and notification is thus subject to a cycle effect. It is thus not the number of notified IGAs that matters but the importance of the projects they underpin and their compliance with EU law. With respect to the renewal of IGAs for older infrastructure, the initial construction-related risks may also be mitigated at this point, meaning that it may be all the more important to now carry out an assessment of the IGA's compliance with EU law. A number of IGA's will therefore continue to require careful legal follow up. With regard to transit/transport of gas, for example, some IGAs still prescribe a number of clauses which go against the modern entry/exit system (e.g. some IGAs mandate physical metering of gas and de facto prevent the shift to the modern entry/exit system).

3.2.3.2. Relevance of IGAs for future infrastructure projects

The EU's import dependency is expected to remain at least stable or increase over the next two decades[16] (for fuels, technology and other materials). Even if a limited number of new energy corridors are expected to be developed in the coming years, **each of the potential new infrastructures can have a systemic impact on the entire European Union energy market. It is therefore essential that they are compatible with EU law. IGAs will continue to play an essential role from that perspective**.

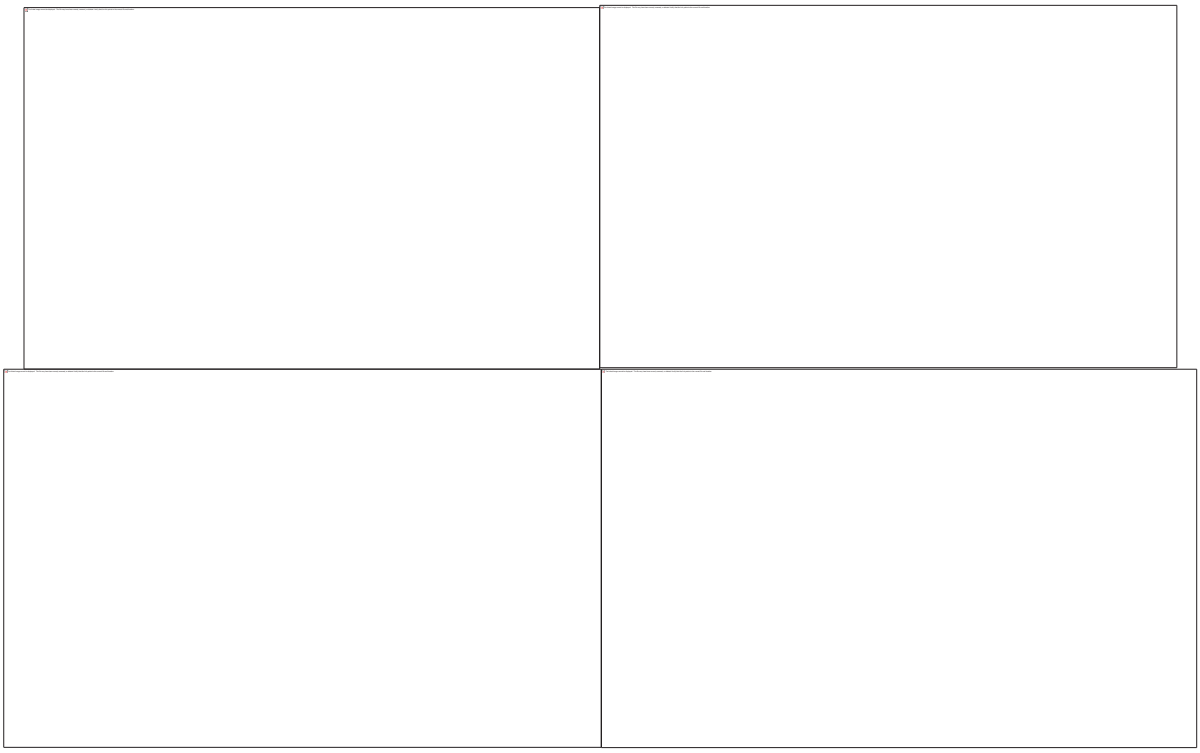
This is even more relevant today, because for new infrastructure projects the number of issues typically referred to in IGAs is increasing. As energy routes increase in length, the number, legal hierarchy and complexity of these agreements is also increasing, so that a simple network connection that would have been effected without an IGA in the 1970s (such as a North Sea gas connection) is now effected increasingly through a series of overlapping, often conflicting IGAs. To give an example, a network connection from Baku to the EU under the aegis of the Southern Corridor initiative involves up to 20 different agreements, more of half of them being IGAs and agreements between governments and companies (so called "Host

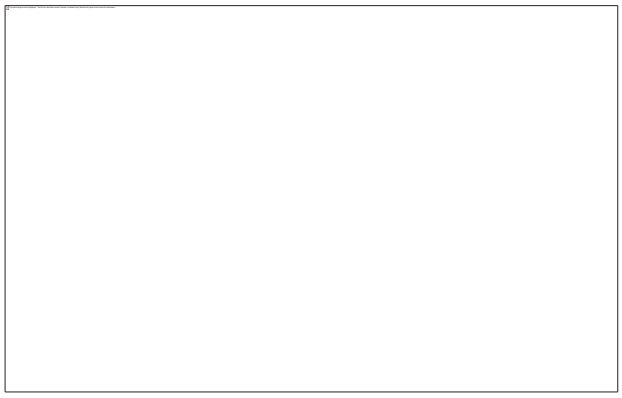
[16] In 2013, indigenous EU production represented about 35% (157 bcm) of total EU gas consumption of ca. 450 bcm. About 290 bcm were imported through pipelines from Russia (27%), Norway (21%), and Algeria (8%) and Qatar (5%). Consequently, with total EU production expected to decrease by 2030 to about 110 bcm per year (while conventional gas production is projected to diminish from currently ca. 140 bcm to about 80 bcm in 2030, any increases in non-conventional and biogas production will not be able to make up for that decline with expected contributions of respectively about 15 bcm and 13 bcm in 2030) and overall EU demand in 2030 expected to lie in a range between 380 and 450 bcm (in line with the different PRIMES scenarios), EU import needs are likely to be within a range between 270 and 340 bcm in 2030. See also intermediate scenarios in 2015 ENTSOG's 10 year network development plan, http://user-30078157.cld.bz/ENTSOG-TYNDP-2015

Government Agreements"). For fuels, liability is a major issue that can only be dealt with by governments and nearly all network connections are subject to bilateral or multilateral IGAs. Through the liability issue, jurisdiction must also be asserted, which implicates tax. In the context of this growing complexity, IGAs therefore keep all their relevance, notably for potential new energy project development that might occur in the framework of EU's energy diversification policy (for instance in the Mediterranean area).

3.2.3.3. Relevance of IGAs for energy supplies

At the EU level, the way in which energy commodities are imported within the internal market has changed over the last decade. As underlined by some respondents to the public consultation who questioned the need for changes to the current IGA Decision, for gas, in particular, the preferred price setting is tending to shift from long term oil indexed contracts to a market based mechanism, i.e. hub pricing. However, **the general shift towards gas market-based pricing mechanisms does not fully reflect the disparities that exist between EU Member States**. Whereas Member States from Central and Northwestern Europe confirm the general trend, other regions of the EU have not yet experienced the switch to hub-based pricing.





Moreover, the network-related IGAs developed in the last decades were meant to reduce political risks for the project promoters during the construction phase. To the extent that those pipelines are operational since many years and that the construction risks are largely mitigated, it is all the more important that those IGAs or their amended version are in compliance with EU law. This is also applicable for the network-related IGAs in the case of oil or electricity. Hence, irrespective of how the commodity is priced, IGAs will remain relevant in order to agree on the modalities of large-scale infrastructure projects.

Overall, the Commission's assessment is thus that IGAs will continue to play a key role in the EU's energy sector. The IGA Decision is thus fully relevant but needs to adapt to the changing nature of energy supplies and routes, which leads to the analysis of the specific problems of the current IGA Decision.

3.2.4. Relevance of IGAs in the current political context

Since 2012, when the current IGA Decision was adopted, the political context has changed.

Firstly, geopolitical developments (such as the crisis in Ukraine) have put security of energy supply at the top of the political agenda. The current political instability in regions that are crucial also for external energy relations (notably Libya and Syria) might also imply a partial re-assessment of Member States' existing security of supply strategies. Moreover, the South Stream experience has illustrated the need for ensuring more legal certainty for large infrastructure investments.

Secondly, before the current information exchange system was established in 2012, the Commission and the Member States were not aware of the number and negative effect of incompatible IGAs on the internal energy market.

In this new context, compliance of IGAs has been increasingly regarded both at an EU and national level as a key element for the proper functioning of the internal market and for ensuring security of supply. In this 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".

3.2.5. Specific drivers or factors relating to the current IGA Decision

As illustrated in the section above and in the evaluation report annexed to this Impact Assessment, the main problem with the current IGA Decision is that it is not fulfilling one of its principal objectives, which is to ensure compliance of IGAs with EU law. This issue was also identified as the main problem by all the respondents who expressed the view that the current IGA Decision would need to be reinforced.

This problem is due to a number of factors related to the provisions of the current IGA Decision. These are listed below, in order of importance:

A) Incompatible clauses are only detected after the agreement is signed and are difficult to change *ex-post* for political and legal reasons

The experience of the Commission to date is that the most important factor in the problem mentioned above is the *ex-post* nature of the notification obligation under the current IGA Decision.

The absence of *ex-ante* notification to the Commission reduces the potential for coordination between Member States. Member States that have less bargaining power than a third country with which they are in negotiations may accept provisions requested by that country that are clearly incompatible with EU law, in order to get access to energy resources or participate in an infrastructure project they consider essential for their own national energy security.

On the other hand, when Member States have significant bargaining power in such a situation, they may prefer to negotiate on their own to keep their comparative advantage and get the best deal possible, without necessarily making overall EU energy security their priority.

After signature of an IGA, changes are difficult. As stated in the Energy Union Strategy: "*in practice, we have seen that renegotiating (IGAs) is very difficult. The positions of the signatories have already been fixed, which creates political pressure not to change any aspect of the agreement*". At the post-signature stage there is also a political incentive for Member States to avoid tensions with powerful third countries /suppliers.

B) Some IGAs do not contain a legal mechanism for their amendment or termination

Apart from the political incentive not to change IGAs, the lack of effectiveness of the current IGA Decision mechanism, as highlighted in the evaluation report, is also largely due to the complex legal situation that Member States face once they have signed with a third country an IGA that is non-compliant with EU law. In general terms, this situation is as follows:

From the public international law perspective, Member States are obliged to comply with the obligations set out in the IGAs they have concluded (see Article 26 of the Vienna Convention of the Law of the Treaties: "*pacta sunt servanda*"). The fact that the IGA is not compliant with EU law does not, in principle, release the Member States from the need to comply with these obligations since the third country is not a member of the EU and therefore not obliged to comply with EU law.

From the EU law perspective, Member States are obliged to fulfil their obligations under EU law. The fact that the third country is not obliged to comply with EU law is of no relevance[17]. Member States must take all appropriate steps to eliminate the incompatibilities between EU law and the IGA in question (Articles 351 (2) and 4 (3) TFEU). This means that the Member State must renegotiate or terminate the IGA where appropriate.

For the termination or renegotiation of IGAs the rules under public international law apply. Termination or renegotiation are, first of all, possible if and to the extent that the termination or amendment is expressly foreseen in the IGA. In some specific cases, Member States may also have recourse to the termination and adaptation grounds set out in the Vienna Convention of the Law of the Treaties[18].

The practice of Member States in this area is not uniform. Most of the IGAs that the Commission considered to be incompatible with EU law were signed for a specific period of time, which amounted to between 15 and 30 years. Such IGAs usually provided for an automatic renewal of the IGA for up to 5 years, unless one of the parties notified the other party in writing of its intention to terminate the IGA. This notification usually has to be done 6 or more months prior to the expiration of the initial duration of the IGA or any subsequent extension period. In some cases, the notification period can be as long as 4 or 5 years. None of the IGAs in question contained any clause that would have allowed the Member State to terminate the IGA before the expiration of its initial duration. Some IGAs did not foresee any specific duration and were thus signed for an indeterminate period[19]. Almost all IGAs contained a clause which allowed the parties to amend the IGA. For this, the consent of the other party to the IGA was required.

On the basis of the provisions described above, Member States have not generally been in a position to unilaterally terminate or amend their IGAs, and have only been able to object to their automatic renewal. In this way they have been able to terminate old IGAs that were signed some 20 or 30 years ago in a relatively short period of time. For more recent IGA they

[17] As an exception, Article 351 (1) TFEU allows MS to fulfil their obligations arising from international agreement with third countries. However, this applies only to international agreement that were signed before the respective MS joined the EU. Furthermore, Article 351 (2) TFEU requires MS to take all appropriate steps to eliminate incompatibilities between international agreements and the EU Treaties.

[18] For instance Articles 56, 60 and 62 of the Vienna Convention.

[19] In one case the Member States was entitled to withdraw from the IGA after the end of the oil pipeline cost recovery period which was, however, not further determined in time.

have had in principle to wait until the expiration of the initial duration of the IGA before taking such a step.

To summarise, if a Member State has concluded an IGA which is binding under public international law and which does not contain a termination or suspension clause it is – in legal terms - almost impossible for the Member State in question to renegotiate or terminate the IGA, within a relatively short period of time, if the third country does not agree to that course of action. This greatly restricts the enforcement powers of the Commission even where an infringement procedure would be possible.

C) No transparency in ongoing IGA negotiations / substitution effect

Since the adoption of the IGA Decision the Commission has not been notified by Member States of any ongoing IGA negotiations and has only been notified of one new IGA.

The fact the Commission is not involved in ongoing IGA negotiations reduces upstream coordination between the Commission and Member States. Moreover, the process of negotiations, in which a draft agreement takes shape step by step, article by article, tends to result in the positions of the signatories becoming fixed, and creates political pressure not to change any aspect of the agreement at the end of the process.

However, the fact that the Commission is not being invited to participate in IGA negotiations appears to be a less important factor than the situation created by the absence of an *ex-ante* compatibility assessment. The Commission had already gained experience of participating in bilateral energy negotiations before the entry into force of the IGA Decision, and the results of that participation were mixed. The Commission as notably faced situations where, at the request of a Member State, it provided assistance in pointing out precisely which provisions of the draft amendments were in violation of EU energy law, but was not granted access to the final stage of the negotiations, which made it difficult for the Commission, at that time, to make an informed overall judgment on and to influence the outcome of the process while its responsibility and authority was engaged.

So the fact that the Commission has not been involved in IGA negotiations since 2012 is one element of the problem. However the effectiveness of such participation would in any case remain limited and would not replace an in-depth *ex-ante* compatibility check on the basis of a final draft text. The main problem may therefore not be the fact that under the current IGA Decision the participation of the Commission in IGA negotiations is not obligatory, but may instead relate to two different factors:

- First, the fact that under the current IGA Decision there is no obligation for Member States to notify the Commission of ongoing or future negotiations. Under Article 3(3), Member States "*may inform the Commission in writing of the objectives of, and the provisions to be addressed in, the negotiations* (…)". This means it is difficult for there to be meaningful political dialogue at an early stage between Member States themselves or between the Commission and Member States.

- Second, it has to be taken into account that, in practice, Member States also enter into agreements which are not legally binding, such as memoranda of understanding or other non-binding instruments.

As indicated in the evaluation report, while only one new IGA was notified to the Commission since 2012, it is clear that Member States have had contacts with third countries about infrastructure developments and also, by inference, commodity supply. Currently, these forms of cooperation are not captured by the IGA Decision. Thus, the Commission is not in a position to assess the extent to which Member States and third countries have entered into political commitments in this regard (e.g. in the form of memoranda of understanding, exchanges of notes or letters of intent). However, the Commission has gained some experience with regard to the existence and effect of such instruments. One example is that a section of the South Stream project in Europe was governed by a Memorandum of Understanding. Another recent example (that was notified on a voluntary basis) is a memorandum of understanding between one Member State and Qatar on LNG and LPG imports which was in fact a security of supply measure for a whole region covering several Member States.

These non-legally binding commitments can however have the same effect as binding agreements. Firstly, they may - once implemented - give rise to measures by the Member States or undertakings that are not compliant with EU law. Secondly, non-legally binding instruments can create strong political pressure on the Member State concerned and make it difficult for it to deviate from the political commitment.

The Commission considers that the number of non-legally binding commitments could increase in the future. This is because non-legally binding commitments have the advantage that they do not require any parliamentary scrutiny or ratification and/or EU scrutiny. They can therefore be signed in a short period of time and can be more flexible. This makes them more attractive compared to legally binding agreements.

3.3. Subsidiarity and the varying situation of Member States

Article 4 of the Treaty on European Union (TEU) requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties or resulting from the Acts of Union Institutions. Member States should therefore avoid or eliminate any incompatibility between Union law and international agreements they conclude with third countries[20].

It is the EU's aim (under Article 194 TEU) to ensure the functioning of the energy market and this requires that energy imported into the Union be fully governed by the rules establishing the internal energy market.

3.3.1. Necessity of EU action

An exchange of information[21] between Member States and between Member States and the Commission was therefore deemed necessary and was introduced with Decision 994/2012.

As has however been shown in the problem definition section above, despite this arrangement:

- In 17 cases Member states were not able to ensure full compatibility of the content of IGAs with EU law, notably with the rules governing the Third Energy package;

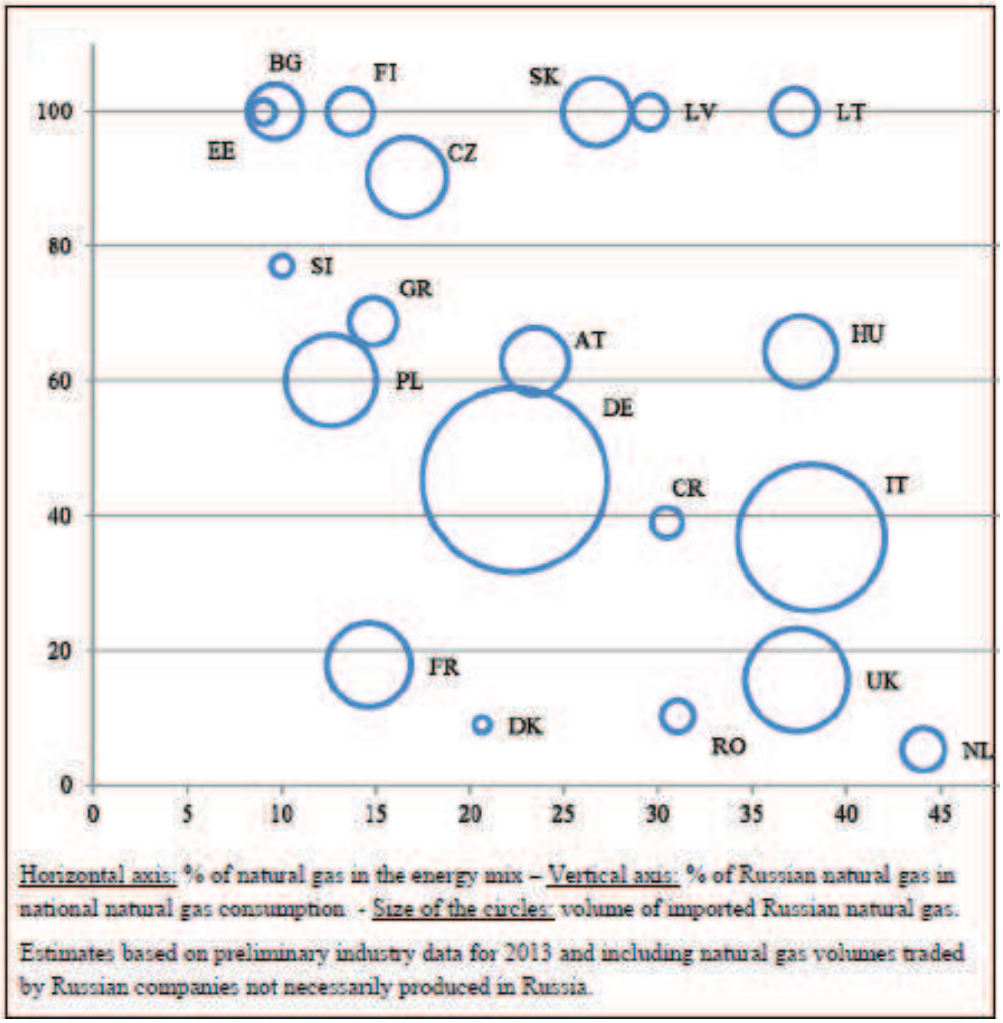
- The Commission could only, to a limited extent, fulfil its obligation to ensure the functioning of the energy market with regard to energy imported into the EU.

The need for coordination and cooperation at supranational level is further reinforced by recent developments in the EU internal energy market, namely the progressive integration of energy infrastructure and markets, the common reliance on external suppliers and the ambition on the part of the EU and Member States to create an Energy Union.

3.3.2. EU added-value

In terms of energy security, the situation of Member States is very diverse. Europe's least vulnerable areas are those where supplies are available from a substantial number of different sources and/or through a substantial number of different routes and where there is a functioning and liquid wholesale market. The most vulnerable areas often suffer from a lack of the infrastructure that is needed both to enjoy such a diverse supply base and for a functioning market to develop. While liquid markets are found only in a limited number of countries, those countries nevertheless cover some 80% of total EU gas demand. This differentiated situation means that different EU Member States have different levels of bargaining power vis-à-vis third countries, and different levels of exposure to external pressure. The table below illustrates this situation:

[20]See also Article 351 (2) TFEU which requires Member States to take all appropriate steps to eliminate incompatibilities between international agreements, that the Member States concluded before their accession to the EU, and the EU Treaties.
[21] See details of the provisions of the current IGA decision in annex 2.



The progressive integration of energy infrastructure and markets and the resulting common reliance on external suppliers imply that fundamental political decisions on energy taken by one Member State will have a serious impact on, and therefore should be discussed with, neighbouring countries. The same holds true for the external dimension of EU energy policy. The IGA Decision plays a crucial role in linking the external dimension of energy policy (because it relates to agreements with third countries) and the internal dimension (because provisions in IGAs that are not compliant with EU law have a negative impact on the resilience and functioning of the internal energy market).

There is therefore a clear added value in ensuring that all provisions of the IGA Decision support improvements in the exchange of information and enable the EU to speak with one voice and apply the best available negotiation techniques, as this contributes to greater solidarity and a deeper and fairer economic union.

4. OBJECTIVES

4.1. General objectives

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 changes that the review of the IGA Decision will recommend intend to contribute to the general objectives of ensuring the proper functioning of the internal market and increasing the energy security of the EU.

They would also aim, as a consequence, at increasing the solidarity between Member States and increasing the ability of the EU to speak with one voice in negotiations with third countries.

These objectives are in line with the following EU Treaty goals:

- To ensure security of energy supply in the Union (Article 194(1) (b) TFEU). The IGA Decision was adopted with Article 194 TFEU as its legal basis;

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

4.2. Specific objectives

To achieve the above mentioned general objectives, the revision of the IGA Decision has two main objectives:

(1) Increase the compliance of all future IGAs with EU law to ensure the proper functioning of the internal market

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

5. POLICY OPTIONS

With the intention of meeting the objectives set out in the previous section, the Commission services have identified a number of different policy options.

5.1. Option 1: Baseline scenario

Under this option, the legal provisions of the current IGA Decision would not be reviewed or would be limited to technical clarifications (for instance, in Article 3 of the current IGA Decision, the deadline for the submission of the existing IGAs was 17 February 2013. This does not apply anymore and it could be clarified that the current 9 month ex-post assessment deadline for Commission applies to all new IGA concluded after the entry into force of the IGA Decision). In parallel to such technical clarifications, the revision of the Security of Gas Supply Regulation will consider options to increase the level of transparency for commercial gas purchasing contracts attached to IGAs.

Moreover, on the basis of the existing text, the Commission could strengthen infringement efforts against those Member States that are not willing to renegotiate or renounce the IGAs that have been found incompatible with EU law. In practical terms, the Commission services first open a structured dialogue with the Member State concerned (an informal pre-infringement stage). Should the structured dialogue prove insufficient (e.g. because renegotiations fail and the Member State does not denounce the IGA), where appropriate, official infringement procedures could be launched. These proceedings could ultimately result in referrals to the European Court of Justice.

In the framework of the Public Consultation, opinions were divided on the opportunity to remain with the baseline situation. A number of the respondents considered that the current IGA Decision offered a balanced and sufficient framework. However, those respondents did not recognise the problem identified in section 3.2.4.

5.2. Option 2: Improved implementation: model clauses

The current IGA Decision (Article 7c) provides for the development of optional model clauses as a guide for Member States concluding IGAs. So far, no such model clauses have been developed. As indicated in recital 15 of the current IGA decision, these model clauses should have been the result of a "permanent exchange of information on IGAs at Union level, which should enable best practice to be developed". As explained in the problem definition section, this permanent exchange has not fully materialised. Since the Commission has not been informed about any ongoing negotiations, there has also not yet been a reason to develop such clauses. Furthermore, developing such clauses is very complex from a legal point of view. The difficulty is to develop model clauses that are both meaningful and whose content can be adapted to specific circumstances.

Different sub-options for model clauses could be assessed in this context:

- model clauses for energy-related IGAs could take inspiration from model clauses developed in other areas of EU acquis, notably in the aviation sector;

- model clauses could be developed for all possible issues or be limited to only a few recurrent and specific issues such as standard termination clauses, which were highlighted as a key factor in the problem definition section;
- model clauses could be listed in a 'positive' list of clauses exemplifying good practice; a softer approach would be to develop "guidance notes" providing a non-exhaustive 'negative' list of non-compliant clauses, abusive clauses or problematic issues.

- Model clauses could be made binding or be offered for optional use by Member States.

Depending on the scope and comprehensiveness of policy option 2 it could also complement other policy options.

The great majority of respondents to the Public Consultation were, on this specific point, in favour of the provisions of the current IGA Decision offering the possibility of developing optional model clauses. On the content of such clauses, many respondents highlighted however the difficulty of developing clauses that would be suitable for all energy related IGAs, given that these were often extremely complex and varied.

5.3. Option 3: Obligatory *ex-ante* assessment by the Commission

Member States could be obliged to inform the Commission at an early stage of any IGA negotiations that may start in the future and submit their draft new or renewed IGAs to the Commission for an *ex-ante* control prior to their signature or initialisation. This mechanism could for instance draw on the verification mechanism set up by Article 103 of the EURATOM Treaty, which provides for obligatory submission of draft agreements and contracts to the Commission and a 4 week obligatory *ex-ante* check prior to final signature of agreements concerning matters within the purview of the EURATOM Treaty[22].

A sub-option could be to extend the scope of the current IGA Decision to also cover agreements between Member States and third countries which are not legally binding, such as memoranda of understanding or other non-binding instruments. As mentioned in the problem definition, current practice shows that Member States enter into such types of agreements instead of signing legally binding IGAs. Even if legally non-binding, such instruments can be used to set out the framework for the construction and operation of pipelines and supply with energy commodities. This can be done in a very detailed manner. In this respect non-binding instruments can be similar to IGAs. Non-binding instruments can also contain provisions which – once legally implemented by the Member States or commercial entity – could result in a violation of EU law. In order to avoid such effects, a number of sub-options could be envisaged:

- One possibility could be to extent the scope of the revised IGA Decision to include also non-binding instruments for a mandatory ex-ante assessment by the

[22] "Member States shall communicate to the Commission draft agreements or contracts with a third State, an international organisation or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty. If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned. (…)"

Commissions. This approach would avoid that Member State bypass the mandatory ex-ante assessment for IGAs by instead entering into non-binding instruments.

- Another possibility could be to establish the obligation for Member States to notify a non-binding instrument only once it was agreed with the third country, and the Commission could be entitled to raise its concerns as regards the implementation of the instrument, where appropriate. Under both options, however, the definition of "non-legally binding instruments" would need to be restricted by a non-exhaustive list of criteria in the revised IGA Decision. These criteria would help to capture only those "non-legally binding instruments" that; *inter alia*, have an impact on the internal energy market, or contain interpretation of EU law or set the conditions for the development of energy infrastructures or energy commodities supply.

In the framework of the Public Consultation, opinions on the need to introduce an *ex-ante* verification mechanism mirrored those on the need to strengthen the IGA Decision, with those in favour of strengthening the IGA Decision generally believing that the introduction of an *ex-ante* verification mechanism should be the main vehicle for that reinforcement and those who felt that the current IGA Decision was sufficient generally opposing such a mechanism.

5.4. Option 4: Obligatory participation of the Commission in negotiations

In addition to formally notifying the Commission *ex-ante* of their IGAs and in any ongoing or future IGA negotiations, Member States could be required to invite the Commission as an observer to the negotiations. This would reinforce the current provisions under which Member States solely "*may* request the assistance of the Commission". This option would imply that Member States inform the Commission of any ongoing or future IGA negotiations, or scheduled decisive meetings with third countries and submit draft agreements to the Commission for review prior to such meetings taking place.

It would be at the discretion of the European Commission to decide on a case-by-case basis whether written comments prior to the meetings with third parties were sufficient or whether the participation of a Commission representative in the negotiation meetings would provide added value e.g. when the outcome of a negotiation is expected to have significant implications for other Member States. It would however be difficult for the European Commission to participate in all negotiation meetings, for obvious reasons relating to resource constraints.

A large majority of the respondents to the Public Consultation were opposed to mandatory assistance from the Commission in the negotiation of IGAs. Respondents opposed to including an *ex-ante* verification mechanism stressed the competence issue and underlined that the existing system, which allowed the assistance of the Commission on a voluntary basis at the request of the Member States, was a good tool. Those in favour of a mandatory *ex-ante* mechanism suggested that it would make the mandatory participation of the Commission in negotiations less necessary.

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

The EU could exercise its external competence in the field of energy by signing EU-level agreements with third countries, rather than leaving that to individual Member States. Under this option, Member States and the Commission could discuss in advance, in the appropriate fora, whether an EU-level agreement (exclusive or mixed) is more appropriate and effective than a national bilateral agreement with a third country. In case of an EU-level agreement, the national negotiation and drafting process would be replaced by a process in which the EU took the lead the negotiations on the basis of negotiating Directives, and in which national representatives were regularly informed about the progress of these negotiations.

This option would be consistent with the recent case-law of the ECJ, according to which, in principle, the Commission should intervene if an IGA is in breach of the exclusive external competence of the EU. Such exclusive competence arises whenever an IGA touches on issues for which EU-rules exist (tariffs for transmission lines for instance)[23].

No respondents to the Public Consultation explicitly mentioned the opportunity for EU agreements to replace bilateral energy related IGAs.

[23] See ECJ, Case C-66/13, *Green Network*, judgement of 26 November 2014.

6. ASSESSMENT OF THE IMPACTS OF THE VARIOUS POLICY OPTIONS

This Impact Assessment performs a proportionate assessment of the likely impacts of the five identified options, and relies mainly on a qualitative description and evaluation. This is due to the fact that it is not always possible to quantify the direct and indirect macroeconomic effects of changes to the IGA Decision (such as capital costs, labour costs, costs of energy supplies etc.). For this reason, this Impact Assessment does not use supporting modelling techniques. The Impact Assessment study draws on policy experience from the aviation sector for policy option 2 (model clauses) and from the area of nuclear international agreements for policy option 3. It seeks as far as possible to quantify administrative costs occurring within national and EU administrations.

For the purposes of this qualitative assessment the following impacts are deemed the most relevant and are therefore the ones that will be assessed in this chapter:

Economic impacts

This section addresses notably administrative costs occurring within national competent authorities and/or the Commission as these are the main direct and quantifiable outcome of any change to the IGA Decision.

Indirect economic effects are mainly due to changes in investment security and the associated (financial) risk. This is particularly true for infrastructure-related IGAs that provide legal and regulatory certainty. The biggest single cost factor would probably be the cost occurring to the competent authorities of a Member State and project promoters as a result of the suspension, after signature and/or commencement of related works, of an IGA that was deemed incompatible with EU law. The Member State in question would face the cost of compensation payments and/or penalties paid to third country government and private entities that had planned and possibly already invested in a project based upon the fact that an IGA had been concluded. Project promoters in the private sector (large companies and their subcontractors which can be SMEs) would have to bear the sunk costs of the related cancelled project, or potentially the costs of litigation. It could furthermore be expected that, after the cancellation of an important IGA, risk premiums for subsequent projects would go up. There would however be indirect positive economic effects resulting from increased transparency and the capacity of vulnerable Member States to better negotiate with third countries. The proposed options would also indirectly increase the security of supply for all Member States to the extent that:

- the more vulnerable Member States will gain more bargaining power as a result of information being shared better and/or the Commission being increasingly involved in the drafting of IGAs and/or the meetings themselves;
- all Member States ultimately gained from an increase in transparency around IGAs and from being in more of a position to have full oversight of investments (and hence avoid expensive duplication of security of supply projects), particularly in a situation where the third country concerned already possesses all of this information.

Finally the policy options listed above will, to various extents, improve the proper functioning and resilience of the internal energy market and the degree of competition in the energy sector, because they will result in a reduction in the number of legally-problematic IGA provisions. This will be described in more detail, in qualitative terms, below.

Environmental and social impacts

This section will not assess in detail the environmental and social impacts of the different options. The direct impact of the various proposed changes to the current Decision are mostly economic in nature, such as improved compliance and transparency of IGAs and ultimately improved security of supply. Thus the proposed policy options could only have indirect impacts on the environment and social issues, on the basis that any such impacts would be the consequence of decisions by stakeholders' (i.e. competent authorities, energy undertakings etc.) on the specific measures they would take. The expected environmental impact of each of the proposed options should not therefore be more negative than the impact of the operation of the current system, established by the IGA Decision in 2012. On the contrary, their potential indirect impact on the environment could be positive, if efforts to improve compliance of IGAs with EU law create a better business environment where environmental or labour issues are given more attention.

The same logic will apply to the impacts of the various options on employment and SMEs. None of the proposed options would add any direct impacts to the ones incurred by the current systems as regards employment. The proposed options would also entail no direct additional burden for SMEs as their implementation would essentially involve national authorities. However indirect impacts on the overall business environment could be foreseen and are analysed in this section as far as possible.

6.1. Impacts of option 1: baseline scenario

As described in the problem definition section, infringement procedures have not yet been systematically launched against Member States who are in breach of EU law in the context of an IGA. Keeping the current IGA Decision unchanged and launching infringement procedures against non-compliant IGAs could give a strong signal as regards planned and future agreements, and hence improve overall compliance of IGAs with EU law and the effectiveness of the Decision in the medium to long term. However, by the time any infringement process has come to a conclusion, something which could take up to several years, the related energy project might already have been cancelled – or indeed be very well advanced or completed. Investor's security will not be improved until the final judgement is available. This legal uncertainty would then also indirectly affect other Member States and business in general, as risk premiums associated with large cross-border infrastructure projects would increase.

This option could come with a high cost for authorities responsible for non-compliant IGAs that were suspended, as such authorities would have to pay fees both in the EU context and face international arbitration with all risks and costs involved if third parties refused to terminate or amend the IGAs concerned.

Such an approach could also incentivise Member States to instead make use of "non-legally binding instruments", which would fall outside the scope of the current IGA Decision. Such instruments would probably ultimately increase legal uncertainty rather than decrease it, as there would not only be the general uncertainty around these agreements and the underlying contracts, but also the additional uncertainty as to what extent the Commission could *ex-post* address any problematic issues.

6.2. Impacts of option 2: model clauses

Overall, the Commission's assessment is that the disadvantages of developing mandatory model clauses would outweigh their potential positive effect. This is mainly due to the fact that model clauses are useful when applied to a specific type of issues. The scope of the IGA Decision however covers a large variety of different situations.

The positive effects could be the following:

- In general, model clauses could help some Member States in terms of negotiating experience and in terms of bargaining power in negotiation with suppliers from third countries. Moreover, the process of drafting those model clauses could increase the level of dialogue between Member States, and between Member States and the Commission, indirectly having a positive effect on the level of awareness within national authorities of potential conflicts with EU law. The development of such model clauses would also be fully transparent.
- Such consequences have been seen following the development of standard clauses in other areas of the EU acquis, notably in the aviation sector. In November 2002, the European Court of Justice found that, if an Air Services Agreement (ASA) permits designation only of companies owned and controlled by nationals of the signatory EU Member State, such discrimination is in breach of EU law. As a result, every EU Member State was required to grant equal market access for routes to destinations outside the EU to any EU carrier with an establishment on its territory. ASAs between EU Member States and their bilateral partner States had to be amended to reflect this position. The model clauses developed to bring ASAs into line with EU law were therefore very specific and concerned for instance: designation of companies, safety or the taxation of aviation fuel.

However, developing mandatory model clauses for energy related IGAs would prove less efficient in the energy sector, mainly because energy-related IGAs frequently cover a wide variety of situations, from the delivery of energy commodities to transit agreements or cross-border infrastructure development projects. Such IGAs also differ substantially from one another as regards their magnitude and degree of complexity, with some IGAs only addressing fuel supply and/or infrastructure and others combining both aspects. Legal issues arising could therefore potentially be more varied than is the case with ASA model clauses. This complexity would be increased by the fact that draft IGAs frequently involve several tiers of documents (such as general agreements, specific commercial contracts and technical specifications) – documents which might, depending on the case, be linked to financial arrangements.

For these reasons, an ASA-type approach in the area of energy-related IGAs would need to address a significantly higher number of issues, risks and legal and political complexities – or alternatively might be used only partially for specific recurrent problematic issues and possibly be complemented by other policy options.

In a nutshell, the wide range of situations and business models under the scope of the IGA Decision will not allow for clauses to be developed that are precise enough to substitute for an in-depth ex-ante assessment of a final draft text.

This does not mean that a list of clauses reflecting either best practices (model clauses) or abusive clauses (blacklist) would not be useful for Member States when negotiating with third countries. Such clauses could help Member States to avoid an incompatibility with EU law. Different sub-options for model clauses could be assessed in that context, as described in section 5.2. In this context, careful consideration would be needed in particular as regards:

- the administrative costs related to the preparation of model clauses. Their preparation and development would involve a significant number of experts at both EU and national level for a relatively long period of time. Legal experts of large multinational and specialised smaller companies involved in energy development projects would possibly also need to be consulted at various points throughout the process;
- the legal effect of such clauses, acknowledging *a priori* that the degree of legal certainty provided by model clauses will in any case never be total and that total legal certainty will not be available until the Commission has had the opportunity to perform a full compliance check on the basis of a draft final text.

6.3. Impacts of option 3: obligatory *ex-ante* assessment by the Commission

A compulsory *ex-ante* compatibility check as described above would address the main issue identified in the problem description section, i.e. that the current IGA Decision does not ensure **compliance** of future or renewed IGAs with EU law. Existing IGAs would be made compliant once they are opened up for renewal/renegotiation. As mentioned above, the economic benefits that would result from increased compliance of IGAs with EU law would be related to:

- increased legal certainty, which favors investment. This is particularly true for infrastructure-related IGAs that are intended to provide legal and regulatory certainty for projects involving high levels of investment. This increased legal certainty is particularly important where several bilateral IGAs cover one transit agreement/infrastructure project;
- a well-functioning internal energy market, without segmentation at national level and with increased competition;
- increased transparency as regards the security of supply situation in all Member States, which in turn can avoid double investments and/or infrastructure gaps;

The benefits of increased legal certainty would be felt not only by the competent authorities in Member States that would no longer face the risk of the non-compliance of IGAs with EU law, but also by private energy and infrastructure companies, project managers and private and public banks involved in developing transit routes and infrastructure projects. The promoters of EU law compliant projects would benefit from these effects in terms of reduced legal and economic risks as issues would be tackled at an early stage and in a transparent manner; this would also have a positive impact on investment costs. Positive economic effects in terms of employment, provision of services and local economic activities could be spread further as the project moves from the planning phase to final investment decision and as subcontractors (including SMEs) are associated to the specific tasks related to the construction works of the project.

This option would also meet the second objective of the IGA Decision review, i.e. to increase **transparency**, especially if Member States would be obliged to notify, at an early stage, IGA negotiations that are foreseen to start in the future. For cross-border projects, this option would also give to all Member States concerned the same level of information as the third country on the specificities of the entire project.

This option could however entail indirect costs. For companies, even though commercial contracts will stay out of the scope of the IGA decision, a mandatory *ex-ante* control of IGAs could delay the conclusion of the related commercial contracts. This would increase the upstream phase of investments projects while improving legal certainty over the long run. For the Commission and Member States, it would also entail additional administrative costs. At the EU level, the first level of *ex-ante* assessment for each new or renewed IGA submitted to the Commission would probably involve two legal officers in DG ENER for up to two full working days (provided that the officials in question could cover all legal issues at stake and would not have to consult more widely). The Commission's Legal Service and other relevant DGs would also need to be consulted, and would also need to invest the time of one to two legal officers for an estimated one to two days. At a 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 was an obligatory notification provision. Therefore the additional cost of this option at a national level would be linked to the submission of documents for the *ex-ante* scrutiny to the European Commission. If fundamental and problematic issues with the draft new or renewed IGAs were detected, more legal experts would need to be consulted. Several rounds of consultation with national authorities might be necessary, which would also imply that more legal officers at all hierarchical levels in the national administration would need to devote additional hours to the issue during the pre-signature phase. The experience of nuclear-related IGAs shows that the 4 week scrutiny period granted to the European Commission would be extremely challenging in the event of serious doubts being raised as to the compatibility of an energy related IGA with EU law as, following legal scrutiny, the procedures required (in particular the need to organise a consultation of all relevant Commission services and to adopt a Commission Decision) would take time. Moreover, the number of problematic IGAs in the nuclear area has been lower than was the case with energy-related non-nuclear IGAs. Based on the Euratom Article 103 experience and the complexity of energy-related IGAs, the screening period considered reasonable should be at least 6 weeks as regards the deadline for informing Member States about any doubts and 12 weeks as regards the deadline for issuing an opinion. This would hence prolong the planning phase of related projects.

The Commission assessment is that, overall, the benefits of this option would be higher than its costs as a relatively moderate additional task for national authorities (notification of drafts that are anyhow being negotiated and drafted) can ensure that any future or renegotiated IGA will be fully compliant with EU law and no longer pose a regulatory risk for investors. At the same time, the degree of transparency with regard to planned and future reliance on external fuel supply by all Member States increases and will allow everyone to optimise their national security of supply and preparedness policies. The Commission can – once it is informed *ex-ante* - also ensure that the cross-border effects on other Member States are considered, thus ultimately increasing the EUs overall security of energy supply.

Moreover, limiting the scope of application of option 3 or complementary measures could help mitigate the associated additional administrative costs. For instance, as the problem definition section has shown that a large majority of the notified IGAs cover non-problematic general bilateral energy cooperation agreements, it could be decided that the proposed *ex-ante*

mechanism should only capture those IGAs covering energy infrastructure or the supply of commodities. Following the same approach, if the revised IGA Decision were to capture "non-legally binding instruments", one sub-option could be to restrict the definition of such "non-legally binding instruments" on the basis of a non-exhaustive list of criteria. Such criteria could narrow down the scope to those "non-legally binding instruments" that; *inter alia*, had an impact on the internal energy market, or contained interpretation of EU law or set conditions on the development of energy infrastructure or energy commodity supply.

6.4. Impacts of option 4: obligatory participation of the Commission in negotiations

Member States could be obliged to invite the Commission as an observer in the negotiation of new or renewed IGAs (the current IGA Decision states that Member States "***may*** request the assistance of the Commission"). In practice this option would probably be chosen as an add on to a mandatory *ex-ante* notification as Commission involvement would only be fully beneficial if the Commission possesses a maximum amount of information prior to a meeting. However, it could be possible to consider combining model clauses with Commission participation.

The assessment of this option is complicated by the fact that, to date, the Commission has not been invited to any ongoing negotiations. It is hence difficult to provide an estimation as to what extent the involvement of the Commission could result in a more homogenous outcome for all Member States.

Commission participation in IGA negotiations could possibly help to avoid the development of potentially non-compliant provisions to an even larger extent than in the previous option, as the Commission would be much more involved and hence also much more aware of potential conflicts. Also, having the Commission at the table would ensure that Member States with weaker bargaining power gain weight and that the EU as a whole increasingly speaks with one voice. Option 4 (as does option 3) would continuously streamline the positions taken in future energy non-nuclear IGAs (existing ones only to the extent that they are reopened/renegotiated) and could avoid costly parallel infrastructure planning or suboptimal decisions as the Commission can take on a strong role in ensuring the coherence and consistency of IGAs.

On the other hand it would also oblige Member States that do not necessarily need the EU as an observer to involve a third party in the negotiations (therefore adding also for them the administrative costs related to coordinating between the EU and the national level). The economic and administrative costs related to drafting and negotiation with the national authorities are similar to the ones observed under option 3, but the administrative costs for the Commission will increase as this would entail costs of participating in those meetings. The Commission services might however not have sufficient resources and time to participate in all negotiation phases for all potential IGAs, nor might they have access to all related commercial contracts and therefore be able to develop a proper compatibility assessment.

Moreover, this option could also create the impression that the Commission fully agreed with an IGA if it made no objections during the negotiation phase, even if it participated only partially in these negotiations. This could make it more difficult for the Commission to

challenge the IGA at a later stage, when issuing its *ex-post* (or *ex-ante*) opinion or during Court proceedings.

6.5. Impacts of option 5: Commission to negotiate EU agreements in the field of energy

Under this option, bilateral national agreements would be replaced by an EU-level agreement (exclusive or mixed) and negotiations be led by the EU on the basis of negotiating Directives. It would also be the EU that signs these agreements with third countries. In practice, this option would also require ex-ante information on all ongoing and upcoming IGA negotiations (option 3). The EU and the Member States would probably need to establish a permanent dialogue at a technical level in order to identify the most significant upcoming IGAs (or review of existing IGAs) with a cross border dimension as well as the best way to deal with them (exclusively at EU level/mixed competence). Where appropriate, the national negotiation and drafting process would then be replaced by a process in which the EU would lead in the drafting and in the negotiations and where national representatives would be regularly informed on progress. Already this screening exercise would add additional weeks to the current duration of IGA negotiations.

This option implies a shift of most of the costs associated with the negotiations (costs for the involved policy and legal officers, travelling costs for missions etc.) from the national administration to the Commission. This shift would however not leave the national administration without any costs, as the latter would still need some officials for monitoring the process at EU level (including possibly travelling costs for coordination meetings in Brussels). The EU-level would face additional administrative costs as it would need to continuously liaise with the concerned national authorities, debrief them regularly and ensure consistency between various IGAs. To the extent that this option would prolong the negotiation process, and therefore by implication the project lead times, it might also entail indirect costs on private operators.

In terms of benefits, the entirety of future IGAs can be assumed to be in compliance with EU provisions and security of supply considerations. EU agreements could provide for a uniform legal framework covering all energy infrastructure projects and providing for maximum investment security across the EU. From the perspective of investors and project promoters, it would also improve transaction costs and streamline project financing as the same rules would be applied to all types of energy infrastructure and across all Member States. This option would also allow for a global and consistent approach in favour of security of supply and the completion of the internal market. In addition, EU-agreements could ensure that full use is made of the bargaining power of the EU in the case of agreements related to energy commodity supply – even though it cannot be said for sure that the EU stepping in for Member States with a weaker bargaining power would always achieve outcomes equivalent to the ones for stronger Member States.

This option would however result in a major shift in competences from the national to the EU level. At his stage this option seems disproportionate as compliance with EU rules and strengthening of the EU's overall bargaining power does not require completely taking over the negotiations and could be better achieved by the previous options.

7. COMPARISON OF THE OPTIONS

To compare the options and define the preferred one, a table has been developed using as the main criteria the options' effectiveness, their efficiency, the level of administrative burden they incur and their proportionality. In this table, each option is compared with option 1, which is the baseline scenario. The level of effectiveness depends on two main factors which correspond to the two main objectives of the review of the IGA Decision: the increased level of compliance of IGAs with EU law and the increased level of transparency / solidarity between Member States. Note that, when screening and comparing the options, three pluses indicates a major improvement when compared to the baseline, two pluses a substantial improvement and one plus indicates an improvement, zero indicates no change and the minus signs indicate deterioration.

Criteria → **---------** **Options ↓**	**Effectiveness**		**Efficiency**		**Administrative Burden**		**Proportionality**	**Coherence**
	Compliance	**Transparency**	**Costs**	**Benefits**	**on Member States**	**On Commission**		
Option 1 Baseline	0	0	0	0	0	0	0	0
Option 2 Model clauses	+-++ *(depending on the scope of application and their legal effect)*	0	- to -- *(depending on the scope of application)*	+ to ++ *(depending on the scope of application)*	- to – *(depending on the scope of application)*	- to – *(depending on the scope of application)*	++++	+
Option 3 Obligatory *ex-ante* assessment	+++ *(for future and renewed IGAs)*	+++ *(for both Commission and other MS)*	*-- to -* *(depending on scope of application)*	+++	-	--	+++	++
Option 4 Mandatory Commission participation in IGA Negotiations	++ *(for future and renewed IGAs, assuming that Commission cannot participate in all negotiations)*	++ (for Commission) 0 for Member States	-	*++ (but only for a certain group of MS with current weaker bargaining position)*	-	--	++	0
Option 5 Commission negotiating EU agreements	+++ *(for future and renewed IGAs)*	+++ *(for both Commission and other MS)*	-	+++	-	---	--	-

As the table shows, the approach based on model clauses (option 2) demonstrates a wide range of possible positive results, as the effectiveness of this option will depend on the extent to which it can become both meaningful and applicable in a wide range of agreements. Developing a few standard clauses for the most frequently encountered problematic issues in IGAs such as the absence or suboptimal drafting of renegotiation and termination clauses could possibly provide important benefits in terms of compliance for future IGAs with relatively little mostly administrative cost. In such a case, model clauses do possibly not even have to be of binding nature in order to deliver these effects. However, if the ambition is to prepare model clauses for all possible foreseeable contract terms and situations, then the cost benefit analysis might even turn negative. A partial application of option 2 could also be combined with other policy options such as option 3 or option 4. Option 2 will not substantially improve transparency on the activities of Member States related to IGAs though, as neither the Commission, nor EU Member States will receive more information than under the baseline scenario about ongoing or future negotiations with third countries.

Option 3 provides the best cost effectiveness outcome with relatively minor additional administrative costs occurring for Member States and the Commission, and can guarantee that any future or renegotiated IGA is respecting EU provisions in the area of internal market and competition law. A positive side effect is the increased transparency that both the Commission and Member States would benefit from. Option 3 scores best for policy coherence as it would align non-nuclear and nuclear IGA notifications and it would possibly also complement the policy options for increased transparency that are being considered in the context of the review of the Gas Security of Supply Regulation. Finally from a political point of view, this option corresponds most closely to the Commission's proposal from 2011. At that time, a clear majority of Member States were unwilling to support such an *ex-ante* control mechanism. Since then, the political context has changed, including through the strong political momentum generated by the adoption in May 2015 of the Energy Union Strategy. The sudden cancellation of the South Stream project may also have changed perspectives. This option could also be expected to receive the support of the European Parliament. **For all these reasons, option 3 comes out of this assessment as the most effective and appropriate choice**, either as a stand-alone option or in combination with a limited application of option 2 (optional model clauses). Option 3 would also correspond to the opinion expressed in the Public Consultation by those in favour of reinforcing the current IGA Decision.

Option 4 could improve compliance and transparency, although not to the extent that option 3 would. Its main disadvantage is that the benefits and costs would fall differently on different Member States, with those Member States currently with a weaker bargaining power gaining and those Member States who do not require the Commission as participant in the negotiations paying an additional cost for no obvious benefit.

Option 5 delivers the same benefits as option 3 but with significantly higher costs. There would be a disproportionate level of intervention, with national level drafting and negotiations being replaced by EU level drafting and negotiations for the cases having the most significant cross border effects. This would imply inter alia that the Commission would sign agreements which would have substantial effects on national energy security of supply and infrastructures.

8. MONITORING AND EVALUATION

In order to assess whether the revised IGA Decision has achieved its objectives, the Commission will monitor the compliance of notified IGAs as part of its general work on enforcement. The main performance indicator will be the share of non-compliant IGAs out of the total number of notified IGAs (separated into existing and future ones).

Moreover, the IGA Decision contains a review clause in Article 8. This article requires the Commission to prepare a report by 1st January 2016 and every three years thereafter. This report shall in particular assess:

- the extent to which this Decision promotes compliance of IGAs with European Union law and a high level of coordination between Member States with regard to IGAs;
- the impact this Decision has on Member States' negotiations with third countries;
- the extent to which the scope of this Decision and the procedures it lays down are appropriate.

In addition to the evaluation report in annex to this Impact Assessment, a first report to the European Parliament and to the Council will accompany the 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, keeping the same criteria as described above, which are of sufficiently broad nature to capture the potential evolution of the implementation of the IGA Decision.

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 fail to respect its duties concerning the implementation and application of Union Law.

ANNEX 1: EVALUATION REPORT ON THE APPLICATION OF THE CURRENT IGA DECISION

Introduction

Negotiations with energy suppliers in third countries frequently require political and legal support in the form of the conclusion of intergovernmental agreements (IGAs). IGAs are normally negotiated bilaterally and are often the basis for more detailed commercial contracts. Different categories of IGAs can be distinguished:

- IGAs used to provide legal certainty for the construction of import and export infrastructure, most notably cross-border oil, gas and electricity infrastructure, including LNG facilities;
- IGAs relating to the purchase, or to the facilitation of the purchase, of a commodity such as oil or gas;
- IGAs of a general nature establishing a framework for bilateral energy cooperation between Member States and third parties, either in general or in a specific field (for instance IGAs that set a framework for the exchange of expertise in the field of renewable energy).

Since the liberalisation of the EU electricity and gas markets, particularly through the Second and Third Energy Packages, Member States have introduced significant requirements into their energy legislation. Compliance with these requirements is not always in the commercial interest of third country energy suppliers and Member States can therefore come under pressure to include regulatory concessions in their IGAs with third countries. Such concessions can threaten the smooth operation and proper functioning of the EU internal energy market.

To address this challenge, the European Council on 4 February 2011 concluded that there was a need for better coordination of EU and Member States' activities, with a view to ensuring consistency in the EU's external energy relations with key producer, transit, and consumer countries. The Council therefore invited Member States to inform the Commission, from 1 January 2012 onwards, of all their new and existing bilateral energy agreements with third countries.[24]

Decision 994/2012/EU of 25 October 2012 (the IGA Decision) translated the Conclusions of the European Council into a mechanism for the exchange of information between Member States and the Commission on IGAs. The IGA Decision defines IGAs as "legally binding agreements between one or more MS 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 types of energy commodities related supply and infrastructures IGAs, in particular gas, oil and electricity. Only IGAs concerning matters within the purview of the Euratom Treaty are excluded. For these IGAs, Article 103 of Euratom provides for a specific ex-ante procedure.

[24] This conclusion was confirmed by the Energy Council of 28th February 2011: "Improved and timely exchange of information between the Commission and Member States including Member States information to Commission on their new and existing bilateral energy agreements with third countries".

The objectives of the IGA Decision are:

- to improve the exchange of information between Member States and between Member States and the Commission on existing and planned IGAs, to facilitate coordination at EU level;
- to promote compliance of IGAs with EU law, in particular with EU competition law and internal energy market legislation.

Purpose of the current evaluation of the IGA Decision

This evaluation has a twin purpose. Firstly, it serves as a basis for the report on the application of the IGA Decision required under Article 8 of that Decision. That report has to be prepared by January 2016 and "shall" in particular assess:

- the extent to which the IGA Decision promotes compliance of IGAs with EU law and promotes a high level of coordination between Member States with regard to IGAs;
- the impact the IGA Decision has on Member States' negotiations with third countries;
- the extent to which the scope of the IGA Decision and the procedures it lays down are appropriate.

Secondly, this evaluation serves as one of the steps in the Impact Assessment for the review of the IGA Decision foreseen in the Energy Union Strategy of February 2015. On this basis, it will endeavour to answer the above mentioned questions while complying with the five mandatory evaluation criteria enshrined in the Better Regulation Guidelines, namely: effectiveness, efficiency, coherence, relevance and EU added value. It will also address the issue of the quantification of the costs and benefits of the IGA Decision and the potential for simplification.

Scope of the current evaluation

The current evaluation covers the application of the IGA Decision since its entry into force on 17 November 2012 and its impact on IGAs notified both before and after that date.
Under the current IGA Decision, the notification of agreements between commercial entities is not obligatory. Recital 7 of the IGA Decision instead states that Member States may, on a voluntary basis, communicate to the Commission commercial agreements that are explicitly referred to in IGAs (although in practice Member States have not made use of this option). **This issue is addressed in the evaluation carried out for the Impact Assessment accompanying the revision of the Security of Supply Regulation. Therefore the issue of commercial agreements is not covered in this evaluation.**

This evaluation also does not address encompass the results of the **public consultation** that was carried out in the context of reviewing the IGA Decision. That consultation ran from July 28th to October 22nd 2015. Responses to it from stakeholders, including Member States and energy-related industry associations, have been compiled and analysed in a stand-alone document that is annexed to the Impact Assessment on the review of the IGA Decision and that complements this evaluation report.

1) Effectiveness

This section assesses, inter alia*, the extent to which the objectives of the current IGA Decision have been achieved.*

To what extent has the IGA Decision promoted compliance of IGAs with EU law?

Since adoption of the IGA Decision, **124 IGAs have been notified** by Member States to the Commission. As far as it is possible to assess, Member States have therefore in general complied with their notification obligations. However there are agreements that are not 'legally binding agreements' either according to the definition set out in Article 2 of the IGA Decision or in the sense of public international law, for example *memoranda* of understanding, letters of intent, or political declarations, and for which there is therefore no notification obligation under the current IGA Decision. Nevertheless such agreements can go into great detail as regards the legal and technical specificities of e.g. energy infrastructure projects.

Of the 124 notified IGAs:

- **Around 60% covered general energy cooperation** (mainly bilateral energy cooperation between EU Member States and a wide range of third countries including, for example, Cuba, Vietnam, Singapore, Korea, India or China). Some Member States have notified to the Commission numerous IGAs of this type, while other Member States have notified none. None of these IGAs raised concerns and none have therefore been followed up by the Commission;
- **Around 40% concerned either specific agreements on the supply**, import or transit of energy products (oil, gas or electricity) or the establishment of rules for the exploitation of gas or oil fields; or **bilateral or multilateral agreements for the development of energy related infrastructure**, with the great majority being oil and gas pipelines (including 6 South Stream IGAs concluded between EU Member States and Russia).

After analysing the notified IGAs in the last category above, the Commission expressed doubts on the compatibility with EU law of **17** of them. The EU law in question mainly concerned either Third Energy Package provisions (e.g.: ownership unbundling, third party access and tariff setting, including the independence of the national regulator) or EU competition law (prohibition of market segmentation by means of destination clauses).

With 17 of the IGAs concerning energy supplies or energy infrastructure being judged of concern, the number of problematic IGAs in this category is therefore significant, roughly around one third.

Letters were sent in 2013 to the **9 Member States** concerned by the non-compatible IGAs mentioned above. These Member States were invited to amend or terminate the IGAs in question in order to resolve the identified incompatibilities. **However, to date, no Member State has managed to terminate or renegotiate the IGAs in question**.[25]
This is a consequence in particular, of the complex legal situation that arises once IGAs are signed with a third country. Specifically, once a Member State has concluded an IGA which is

[25] It should be noted that in some cases the IGA ceased to apply because the initial duration of the IGA has expired in the meanwhile or because a specific condition set out in the IGA was not fulfilled in time.

binding under public international law and which does not contain a termination or suspension clause, it is – in legal terms - almost impossible for the Member State concerned to terminate the IGA within a short period of time and before the end of the initial duration of the IGA without the agreement of the third country. The same applies as regards the renegotiation an IGA for which the consent of the third country is required. This in turn considerably limits the enforcement powers of the Commission, even if an infringement process is launched.
As regards new IGAs, meaning IGAs signed after the entry into force of the IGA Decision, only one IGA has been notified to the Commission (in 2015). It is therefore not possible at this stage, due to the small sample size, to draw any general lessons as to the effectiveness of the IGA decision in ensuring the compatibility with EU law of IGAs adopted subsequent to its entry into force.

In conclusion, the provisions of the current IGA Decision, 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.

To what extent has this Decision impacted on Member States' negotiations with third countries?

Since the adoption of the IGA Decision, the Commission has not been notified of any IGA negotiations by Member States.
However, it is clear that Member States have had contacts with third countries about infrastructure and also, by inference, commodity supply. As mentioned above, the Commission is not in a position to assess the extent to which Member States and third countries have entered into political commitments in this regard (e.g. in the form of memoranda of understanding, exchanges of notes or letters of intent).

In conclusion, the provisions of the current IGA Decision have not directly impacted Member States' negotiations with third countries. Neither have they (in particular due the ex-post nature of the compatibility check set out therein) resulted in the transformation concluded non-compliant IGAs into compliant ones. Therefore, the IGA Decision in its present form is not considered effective.

2) Efficiency

This section assesses, inter alia, the costs imposed by the current IGA Decision and compares them with the benefits of the system it establishes in order to judge if the said costs are justified.

What are the costs imposed by the current IGA Decision?

It is impossible to assess empirically or even to model the costs imposed by the current IGA Decision. However on the basis that the current IGA Decision requires an *ex-post* compatibility check of IGAs with EU law the following qualitative considerations can be highlighted:

IGAs that are compliant with EU law:

For compliant IGAs and IGAs concerning general bilateral energy cooperation that engage no aspect of EU law the IGA Decision does not entail direct costs for Member States, apart from the administrative costs linked to the notification of IGAs under the current information exchange mechanism. These administrative costs are very limited as IGAs can be uploaded electronically to the CIRCABC web portal and there are no translation requirements (the Commission bears the costs of translation and analysis).

IGAs that are assessed as being non-compliant with EU law:

The additional direct and indirect costs resulting from an IGA being assessed *ex-post* as incompatible with EU law, could be considered to include the following:
Direct costs (only relevant to public authorities):

- Administrative costs for the Commission relating to internal decision making and communicating with the Member State(s) concerned;
- Administrative costs for both Member State(s) and the Commission in the event of follow-up action by the Commission such as structured dialogues or infringement procedures.

Indirect costs (relevant to national authorities and undertakings involved in infrastructure projects):

- Cancellation, suspension or delay of infrastructure projects for which the legal framework is *ex-post* assessed as being incompatible once the physical infrastructure has already been partly developed and/or costs have been incurred;
- Litigation costs for Member States where no termination clauses have been inserted in their IGA and where the third country requests compensation for the non-application of the given IGA in front of an international arbitration court.

<u>What are the benefits associated with the current IGA Decision?</u>

Since the entry into force of the IGA Decision the Commission has only been notified of 1 new IGA. The other 123 IGAs of which the Commission has been notified were signed before 2012. It is therefore difficult to assess the benefits of the current IGA Decision on the basis of concrete examples. Any benefits of the current system to date could be expected to have arisen from an increased level of IGA compliance with EU law resulting from an expectation on the part of those entering into it of it later being subject to *ex-post* assessment.
The economic benefits of compliant IGAs are related to:

- Increased legal certainty, which favors investment. This is particularly true for infrastructure-related IGAs that are intended to provide legal and regulatory certainty for projects involving high levels of investment. This increased legal certainty is particularly important where several bilateral IGAs cover one transit agreement/infrastructure project;

- a well-functioning internal energy market, without segmentation at a national level and with increased competition;
- increased transparency as regards the security of supply situation in all Member States, which in turn can avoid double investment and/or infrastructure gaps;
- Increased cooperation between Member States and between Member States and the Commission that can help the EU to speak with one voice to third countries and therefore enhance the EU's bargaining power in energy negotiations.

Cost and cost/benefit analysis

For compliant IGAs, the current IGA Decision entails no significant administrative costs and has the potential to increase investment in energy infrastructure through enhanced legal certainty. For non-compliant IGAs, the costs associated with the IGA Decision can be high if indirect costs are taken into consideration, and are related to the *ex-post* nature of the compatibility check it establishes. . The benefits associated with the IGA Decision as regards non-compliant IGAS relate to the safeguarding of the functioning and integrity of the internal energy market and the contribution that makes to security of supply.

In conclusion, as regards cost and cost/benefit, the IGA Decision can be considered efficient. Overall the costs associated with the current IGA Decision are justified by the benefits it provides as it safeguards the functioning and integrity of the internal energy market and contributes to security of supply. However, the IGA Decision could be more efficient if the compatibility check 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.

3) Coherence

This section assesses, inter alia*, the extent to which the IGA Decision is coherent with other interventions which have similar objectives.*

The IGA Decision is coherent 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. It was developed in 2012 and complements the Security of Gas Regulation adopted in 2010[26]. Its scope is however wider than gas-only IGAs, covering as it does "*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 commodities related supply and infrastructures IGAs, in particular gas, oil and electricity. Only IGAs concerning matters within the purview of the Euratom Treaty are not covered. For those IGAs, Article 103 of the Euratom Treaty provides for a specific *ex-ante* procedure.

The review of the current IGA Decision forms part 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 has 5 mutually reinforcing dimensions: 1) Energy security,

[26] Gas Security of Supply Regulation (EU) 994/2010, OJ L 295, 12.11.2010, p.1

solidarity and trust, 2) A fully integrated internal energy market, 3) Energy efficiency as a contribution to moderation of energy demand, 4) De-carbonisation of the economy, 5) Research, innovation and competitiveness. The IGA Decision is at the core of the first of these dimensions, which states:

"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. Such compliance checks for Intergovernmental Agreements (IGAs) and related commercial agreements based on the relevant Decision are currently carried out after a Member State and a third country have concluded an agreement".

In conclusion, the IGA Decision is fully coherent with other initiatives that have similar objectives.

4) Relevance

This section assesses the extent to which the IGA Decision is still relevant.

Another finding of the evaluation report is that, since 2012, the Commission has only been notified of one new IGA. On the basis of this information, one could draw the conclusion that recent changes in the way energy commodities are imported into the EU have made IGAs less relevant for the energy sector.

The Commission's assessment, however, is that the experience of the last 3 years does not on its own provide a full picture of the long-term relevance of IGAs. Indeed, an analysis of all 124 previously mentioned notified IGAs (some of which have been signed for a period of 30 years) shows that, in the case of major energy infrastructure investments and (to a lesser extent) in the case of energy product imports, the conclusion of IGAs will continue to play an essential role.

Relevance of IGAs for infrastructure:

IGAs continue to be relevant to the physical delivery of commodities to the EU. Significant infrastructure projects of the past (and future) continue to rely on public support in the form of IGAs that will need to be agreed or renewed in the coming years.

In the case of gas supplies, the share of piped gas in total extra-EU imports reached 90% in 2014, or roughly 257 bcm out of a total of 286 bcm. The majority of the gas pipelines connecting the EU to its trading partners were commissioned in the period from the late 1970s to the late 1990s and were based on contractual agreements between the project promoters that were often underpinned by one or several agreements between the producing, transiting and receiving countries (see table below[27]):

[27] Source: on the share: ENTSO-G, 2014

Exporting country	Importing country	Selected pipelines	Year of commissioning
Norway	UK	FLAGS	1978-1982
		VESTERLED	1978
		LANGELED South	2006
	France	FRANPIPE	1998
	Belgium + others	ZEEPIPE	1993
	Germany + others	NORPIPE	1977
		EUROPIPE I	1995
		EUROPIPE II	1999
Algeria	Spain	MEG	1996
		MEDGAS	2010
	Italy	TRANSMED	1983
Lybia	Italy	GREENSTREAM	2004
Russian Federation	Germany	NORDSTREAM	2011
	Poland + others	YAMAL	1997
	Slovakia + others	BROTHERHOOD	1984
	Romania + others	TRANS-BALKAN	1987

With regard to oil: 90% of EU crude oil imports are sea-borne and only 10% arrive via pipeline infrastructure for which project developers might require an IGA. For example a number of the refineries in the Baltics and Central Europe are reliant to various degrees on the Druzhba pipeline connecting those regions with production fields in the Russian Federation. As with the natural gas pipelines described above, the Druzhba pipeline system was built in the '60s and '70s (see table below[28]):

FROM	TO	NAME	Capacity (kb/d)	Capacity (Mt/y)	Built
RF-BY-UA	HU	Druzhba South II	160	7.9	1963
RF-BY-UA	SK	Druzhba South I	400	20	1962
RF-BY	PL	Druzhba North	1000	50	1963
RF-BY	LV	Polotsk - Ventspils		14	1968
RF-BY	LT	Polotsk - Mazeikai		16	1979

With regard to electricity: the share of EU net imports in gross electricity generation is less than 1% for the EU28[29]. As in the case of crude oil, there are several EU Member States that trade actively with non-EU neighbouring countries. As shown in the next table, Croatia,

[28] Source: IEA, energy policies of selected IEA countries; public sources on the internet (https://en.wikipedia.org/wiki/Druzhba_pipeline)
[29] Source: annual data from ESTAT

Lithuania and Latvia import more than 20% of their electricity. Since the Ignalina nuclear power plant was shut down at the end of 2009, Lithuania in particular relies heavily on electricity imports: in 2012 the country imported 29% of its annual power needs from Russia via a 750 kV transmission line and 25% from Belarus (through several transmission lines of 300-330 kV voltage). Thus some isolated electricity systems in the EU (notably in the Baltic Member States) rely heavily on electricity imported via cables from third countries. As with gas and oil, the relevant connecting infrastructure was constructed several decades ago.

In summary, either a large share of a commodity at EU level (in the case of gas) or a critical share of a commodity for specific EU Member States (in the case of oil and electricity) is imported into the EU from third countries via physical connections (pipelines or cables). The construction of such complex infrastructure, in some cases spanning several thousand kilometers, was often and is still based on complex contractual agreements between the project promoters that is often underpinned by one or several agreements between the producing, transiting and receiving countries.

Some of these IGAs, many of which were signed for a long period of time (15 to 30 years), will need to be renewed or amended (this was the case for the recent IGA between Russia and Slovakia on oil supply, which renews the one signed in 1999). Due to the long time span of many IGAs, their renewal and notification is subject to a cyclical effect. It does not therefore necessarily follow that because the Commission has only been notified of one IGA since 2012 that it will not be notified of new IGAs in future. It is also not the number of notified IGAs that matters but the importance of the projects they underpin, and their compliance with EU law. With respect to the renewal of IGAs for older infrastructure, the initial construction-related risks may also by this point have been mitigated, meaning that it may be all the more important now to carry out an assessment of the IGA's compliance with EU law. A number of IGA's will therefore continue to require a careful legal follow-up. With regard to the transit/transport of gas, for example, some IGAs still prescribe a number of clauses which go against the modern entry/exit system (e.g. some IGAs mandate physical metering of gas and *de facto* therefore prevent the shift to the modern entry/exit system).

Relevance of IGAs to EU diversification policy and for future infrastructure projects

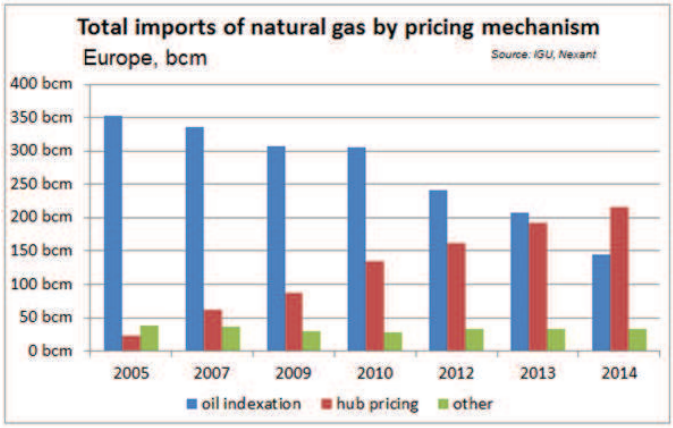
EU import dependency is expected to remain stable or increase over the next two decades[30] (for fuels, technology and other materials). Although only a limited number of new energy corridors are expected to be developed in the coming years, the potential new infrastructure involved in **each of them could have an impact on the entire European Union energy market. It is therefore essential that IGAs related to such infrastructure be compatible with EU law and with the EU's diversification policy.**

Moreover, for new infrastructure projects, the number of issues typically referred to in IGAs is increasing. As energy routes increase in length, the number, legal hierarchy and complexity of IGAs also increases, such that a simple network connection that would have been built without an IGA in the 1970s increasingly requires a series of overlapping, sometimes conflicting IGAs. To give an example, a network connection from Baku to the EU under the aegis of the Southern Corridor initiative involves up to 20 different agreements, more than half of them being IGAs and "Host Government Agreements" (i.e. agreements between governments and companies). For fuels, liability is a major issue that can only be dealt with by governments and nearly all network connections are subject to bilateral or multilateral IGAs. Through the liability issue, jurisdiction must also be asserted, which implicates tax. In the context of this growing complexity IGAs remain relevant, particularly as regards any potential new energy project development carried out in the context of the EU's energy diversification policy, for instance in the Mediterranean area.

Relevance of IGAs to energy supply

At EU level, the way in which energy commodities are imported into the internal market has changed over the last decade. For gas in particular the preferred means of price setting has shifted from long term oil indexed contracts to a market based mechanism, i.e. hub pricing (see table below):

[30] In 2013, indigenous EU production represented about 35% (157 bcm) of total EU gas consumption of ca. 450 bcm. About 290 bcm were imported through pipelines from Russia (27%), Norway (21%), and Algeria (8%) and Qatar (5%). Consequently, with total EU production expected to decrease by 2030 to about 110 bcm per year (while conventional gas production is projected to diminish from currently ca. 140 bcm to about 80 bcm in 2030, any increases in non-conventional and biogas production will not be able to make up for that decline with expected contributions of respectively about 15 bcm and 13 bcm in 2030) and overall EU demand in 2030 expected to lie in a range between 380 and 450 bcm (in line with the different PRIMES scenarios), EU import needs are likely to be within a range between 270 and 340 bcm in 2030. See also intermediate scenarios in 2015 ENTSOG's 10 year network development plan, http://user-30078157.cld.bz/ENTSOG-TYNDP-2015



However, **the general shift towards gas market-based pricing mechanisms conceals the disparities that exist between individual EU Member States**. Whereas the situation in Member States in Central and Northwestern Europe mirrors the general trend, other regions of the EU have not yet experienced the switch to hub-based pricing.

Network-related IGAs for gas pipelines developed in recent decades were meant to reduce the political risks for project promoters during the construction phase. As these pipelines have been operational for many years and the construction risks have therefore been largely mitigated, it is all the more important that the relevant IGAs (or the amended versions thereof) be in compliance with EU legislation. This is also applicable for network-related IGAs relating to oil or electricity.

Hence, irrespective of how the commodity is priced, it is likely that IGAs will remain relevant in order to agree on the modalities for developing large-scale infrastructure projects.

Overall relevance assessment

***In conclusion*: the Commission's assessment is that IGAs will continue to play a key role in the EU's energy sector. The IGA Decision is thus still relevant but needs to adapt to the changing nature of energy supplies and routes.**

5) EU added value of the intervention

This section assesses, inter alia, the extent to which the issues addressed by the 2012 IGA Decision continue to require action at EU level.

In terms of energy security, the situation of Member States is very diverse. Europe's least vulnerable areas are those where supplies are available from a substantial number of different sources and/or through a substantial number of different routes and where there is a functioning and liquid wholesale market. The most vulnerable areas often suffer from a lack of infrastructure that is needed both to enjoy such a diverse supply base and for a functioning market to develop. While liquid markets are found only in a limited number of countries, those countries nevertheless cover some 80% of total EU gas demand.

This differentiated situation means that different EU Member States have different levels of bargaining power vis-à-vis third countries, and different levels of exposure to external pressure. The progressive integration of energy infrastructure and markets and the resulting common reliance on external suppliers imply that fundamental political decisions on energy taken by one Member State should be discussed with neighbouring countries. The same holds true for the external dimension of EU energy policy. The IGA Decision plays a crucial role in linking the external dimension of energy policy (because it relates to agreements with third countries) and the internal dimension (because provisions in IGAs that are not compliant with EU law have a negative impact on the functioning of the internal energy market).

***In conclusion*: there is a clear EU-added value to the IGA Decision, as it reinforces cooperation and transparency at EU level and contributes to the functioning of the internal energy market and to security of supply.**

Simplification

This section assesses, inter alia, whether there is potential for simplification in the current IGA Decision.

The current IGA Decision establishes a relatively simple information exchange mechanism. The main administrative burden for Member States relates to the notification process. IGAs can be uploaded electronically to the CIRCABC web portal and there are no translations requirements (the European Commission bears the costs of translations and analysis).

A clarification rather than a simplification could be envisaged. In Article 3 of the current IGA Decision the deadline for submission of existing IGAs is 17 February 2013. As this does not apply anymore it could instead be clarified that the current 9 month *ex-post* assessment deadline applies to all new IGAs concluded after the entry into force of the IGA Decision.

<u>In conclusion</u>: there is limited potential for simplification in the current IGA Decision. However a clarification could be introduced concerning the submission deadline for IGAs concluded after the entry into force of the IGA Decision.

Overall Conclusion

This report is based the experience gained by the Commission since the entry into force of the IGA Decision in 2012 and on the in-depth analysis of the 124 IGAs notified in this context. This provides a solid basis for an overall qualitative assessment of the current system based on the criteria set in Article 8 of the IGA Decision:

- This report concludes, 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 Commission on a voluntary basis for ex-ante check. Therefore the IGA Decision in its present form is not considered effective.
- As regards **efficiency** and in particular the aspects of cost and cost/benefit, the IGA Decision is considered efficient. 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 check 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.
- On **coherence, the IGA Decision is judged to be fully coherent** with other initiatives and legislative acts that have similar objectives.
- On **relevance**, this report makes 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. It also underlines 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.
- Finally, as regards **simplification**, a clarification could be introduced concerning the submission deadline for IGAs concluded after the entry into force of the IGA Decision. Specifically, it could be stipulated that the 9 month *ex post*-assessment by the Commission shall not apply to IGAs which were submitted to the Commission for *ex ante* assessment.

Overall, therefore, this report concludes 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.

ANNEX 2: RIGHTS AND OBLIGATION UNDER THE CURRENT IGA DECISION

The current mechanism, established in 2012, contains the following main features:

Scope of application

The IGA Decision establishes an information mechanism with regard to *"intergovernmental agreements"*. These are *"legally binding agreements between one or more MS 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"*.

Commercial contracts between Governments and private undertakings or between different private undertakings are thus not covered. According to the IGA Decision MS may, however, on a voluntary basis communicate to the Commission commercial agreements that are explicitly referred to in IGAs (recital 7 of the IGA Decision).

The IGA Decision imposes the following obligations on MS and Commission respectively:

Obligations and rights of the Member States

- Obligation to submit existing IGAs to the Commission by 17 February 2013;
- Obligation to submit new or amended IGAs to the Commission once ratified;
- Member States "may" (i.e. no obligation) also inform the Commission of on-going IGA negotiations, ask/permit the Commission to participate in the negotiations and ask for a compatibility check of a draft IGA.

Obligations and rights of the Commission

- Compatibility checks of existing IGAs and notification by the Commission to the Member States of any doubts about the compatibility with EU legislation nine months after the submission of the relevant IGA;
- Compatibility check of negotiated but not yet concluded IGAs upon request of a Member States. The Commission has four weeks to raise any doubts it may have. In case of any doubt, the Commission has further six weeks to perform the compatibility check and to issue an opinion. These time periods can be shortened or extended in certain circumstances;
- Assistance to Member States asking/permitting the Commission to participate in on-going IGA negotiations;
- Sharing of information about on-going negotiations with other Member States;
- Facilitating and encouraging coordination among Member states in view, amongst others, to identifying common problems in relation to IGAs and to developing optional model clauses.

ANNEX 3: ANALYSIS OF THE RESPONSES TO THE PUBLIC CONSULTATION

The public consultation on the revision of the IGA Decision ran from July 28th to October 22nd 2015.

The Commission received some **25 responses** from stakeholders. These included answers from **11 Member States** or national regulatory authorities in the field of energy, the **Energy Community Secretariat**, **6 major EU energy companies, 5 energy-related business federations** or chambers of commerce and two answers from individual **citizens**.

Although the number of responses might appear limited, the inputs received cover a wide variety of players and represent a broad spectrum of different opinions, as detailed in the analysis below. As many of the answers were cross-cutting in nature, the analysis is not presented question by question but instead summarises the key outcomes of the consultation:

The need to strengthen the system established by the current IGA Decision

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 current IGA Decision, opinions within each of the main categories of respondent were divided:

- Public authorities: 6 Member States or regulatory authorities felt that the current system should be reinforced (with one of them stressing, however, that this should not be done in such a way as to entail an excessive additional administrative burden). 5 Member States were of the opinion that no revision of the current system was needed and that its full implementation should be sufficient to ensure the transparency of IGAs and their compliance with EU law.

- Business: a large majority of the responses from business stakeholders stressed two main points: the need to keep commercial contracts outside of the scope of the IGA Decision and the fact that the current system was sufficient to reach the objective of ensuring transparency and compliance of IGAs with EU law. However 2 large energy companies were of the opinion that the current system should be reinforced, with 1 company even proposing that commercial undertakings be given the right to seek Commission advice during the negotiation process.

The mandatory ex-ante verification mechanism

Opinions on the need to introduce an *ex-ante* verification mechanism mirrored those on the need to strengthen the IGA Decision, with those in favour of strengthening the IGA Decision generally believing that the introduction an *ex-ante* verification mechanism should be the main vehicle for that reinforcement and those who felt that the current IGA Decision was sufficient generally opposing such a mechanism.

A particular point was raised by the Secretariat of the Energy Community, which suggested in its response that the IGA Decision be extended to involve the Energy Community and that the Secretariat be involved in *ex-ante* notification and verification.

The scope of the ex-ante assessment

Respondents who were in favour of an *ex-ante* assessment all expressed the view that such an assessment should be limited to EU law. Views amongst them varied however on the area of the EU acquis that would be most relevant, with most citing competition law and internal energy market rules as being the most appropriate. Some amongst them cited rules on security of supply, including "soft law" such as Communications and Strategies endorsed by the European Council, while others did not. Respondents also cited rules on transparency (i.e. REMIT, EIR, MIFID 2).

Article 103 Euratom as a model for an ex-ante mechanism

Respondents in favour of establishing an *ex-ante* mechanism generally insisted on the need to establish not just the principle but also the specific procedures involved in such a verification mechanism. While the majority of such respondents felt that Article 103 Euratom was a good source of inspiration in that regard, some made clear that this article was specific to nuclear IGAs and would not be suitable for IGAs related to other energy commodities – or was not appropriate in terms of timing and/or specific procedures. One respondent also cited as a potential source of inspiration, at least in terms of procedures, the mechanism used for the designation and certification of transmission system operators for electricity and gas, set out in article 10 and 11 of Directives 2009/72/EC and 2009/73/EC and Article 3 of Regulation 714/2009 and 715/2009.

The stage in negotiations at which Member States should inform the Commission of the planned conclusion of an IGA

Respondents in favour of an ex-ante mechanism underlined that this process should be an ongoing one, with regular contacts between the Commission and the Member State(s) in question. They stressed however the importance of two key points in time (with some variation in views in each case):

1) *As regards the beginning of negotiations:* some advocated an information exchange before the start of the negotiation process while others felt this should be at its start. There were also differences of opinion on whether it should be voluntary or mandatory.

2) *As regards the end of negotiations:* some proposed an *ex-ante* assessment immediately after agreement on the final draft IGA, whilst others thought this should take place before the IGA was initialled or signed. One respondent highlighted the importance of providing sufficient time for the compliance check at the end of the process and raised the possibility of late drafts being shared before agreement on the final pre-signature version.

Mandatory assistance from the Commission in the negotiation of IGAs

A large majority of the respondents were opposed to mandatory assistance from the Commission in the negotiation of IGAs.

Respondents from a business background stressed the need to avoid mandatory participation in the negotiation of commercial contracts. Respondents opposed to including an *ex-ante* verification mechanism stressed the competence issue and underlined that the existing system, which allowed the assistance of the Commission on a voluntary basis at the request of the Member States, was a good tool. Some Member States also insisted on the fact that third countries might not accept the mandatory participation of the Commission in negotiations.

Those in favour of an *ex-ante* mechanism suggested that it would make the mandatory participation of the Commission in negotiations less necessary. Some of these respondents expressed a more nuanced position on the notion of mandatory participation supporting an approach where mandatory assistance would not necessarily mean actual participation at the negotiation table but instead regular information exchange and compliance checks of the IGAs concerned. Only one Member State was clearly in favour of the mandatory participation by the Commission, without prejudice to the sovereign rights of Member States to negotiate IGAs, and proposed a mechanism allowing the Commission to assist with and participate in negotiations as an observer while leaving the Member State(s) the right to decide on the scope of IGAs and subsequent contracts.

Model clauses

The great majority of respondents were in favour of the current system, which provides the possibility of developing optional model clauses.

On the content of such clauses, many respondents highlighted the difficulty of developing clauses that would be suitable for energy projects, given that these were often extremely complex and varied. Some underlined the usefulness of having clauses related to the technical aspects of the energy internal market (i.e. unbundling, 3rd party access, tariff setting). On the form of such clauses: some respondents proposed a list of best practice, while others a list of clauses that were deemed to be contrary to EU law (or abusive). On legal effect, most of the respondents were in favour of keeping the use of model clauses optional and flexible. A limited number of respondents proposed a more stringent system, whereby only model clauses should be used, unless a change were duly justified, or a system whereby the use of model clauses would create a presumption of conformity that would obviate the need for a subsequent ex-ante assessment. On the process for developing model clauses, almost all respondents in favour of model clauses wanted clauses to be developed in close cooperation with Member States.

Access to the individual responses to this public consultation

The Commission has contacted respondents to obtain their consent to publish their responses.

Where these are not confidential they can be found at the following address:

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