



2016/0031(COD)

30.5.2016

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DRAFT REPORT

on the 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)0053 – C8-0034/2016 – 2016/0031(COD))

Committee on Industry, Research and Energy

Rapporteur: Zdzisław Krasnodębski

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the 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)0053 – C8-0034/2016 – 2016/0031(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2016)0053),
 - having regard to Article 294(2) and Article 194(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0034/2016),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on Industry, Research and Energy (A8-0000/2016),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a decision

Recital 6

Text proposed by the Commission

(6) During the negotiations the Commission should have the possibility to **advise** on how to avoid incompatibility with Union law. In particular, the Commission **could** develop, together with Member States, optional model clauses or guidelines. The Commission should have the possibility to draw attention to the

Amendment

(6) During the negotiations the Commission should have the possibility to **advise** on how to avoid incompatibility with Union law. In particular, the Commission **should** develop, together with Member States, optional model clauses or guidelines. The Commission should have the possibility to draw attention to the

Union's energy policy objectives and the principle of solidarity between Member States and Union policy positions adopted in Council or European Council conclusions.

Union's energy policy objectives and the principle of solidarity between Member States and Union policy positions adopted in Council or European Council conclusions.

Or. en

Amendment 2

Proposal for a decision Recital 7

Text proposed by the Commission

(7) In order to ensure compliance with Union law, Member States should notify the draft intergovernmental agreement to the Commission before it becomes legally binding for the parties (ex-ante). In a spirit of cooperation, the Commission should support the Member State in identifying compliance issues of the draft intergovernmental agreement or amendment. The respective Member State would then be better prepared to conclude a Union law compliant agreement. The Commission should have sufficient time for such an assessment in order to provide for as much legal certainty as possible while avoiding undue delays. In order to fully benefit from the Commission's support Member States should refrain from concluding an intergovernmental agreement until the Commission has informed the Member State of its assessment. ***The Member States should take all necessary steps to*** find a suitable solution to eliminate the incompatibility identified.

Amendment

(7) In order to ensure compliance with Union law, Member States should notify the draft intergovernmental agreement to the Commission before it becomes legally binding for the parties (ex-ante). In a spirit of cooperation, the Commission should support the Member State in identifying compliance issues of the draft intergovernmental agreement or amendment. The respective Member State would then be better prepared to conclude a Union law compliant agreement. The Commission should have sufficient time for such an assessment in order to provide for as much legal certainty as possible while avoiding undue delays. In order to fully benefit from the Commission's support Member States should refrain from concluding an intergovernmental agreement until the Commission has informed the Member State of its assessment. ***Where the Commission finds that a draft intergovernmental agreement does not comply with Union law, the Member State concerned should*** find a suitable solution to eliminate the incompatibility identified.

Or. en

Amendment 3

Proposal for a decision

Recital 9

Text proposed by the Commission

(9) The Commission should assess the compatibility with Union law of intergovernmental agreements that entered into force or are applied provisionally prior to the entry into force of this Decision and inform the Member States accordingly. In the event of incompatibility, Member States should ***take all necessary steps to*** find a suitable solution to eliminate the incompatibility identified.

Amendment

(9) The Commission should assess the compatibility with Union law of intergovernmental agreements that entered into force or are applied provisionally prior to the entry into force of this Decision and inform the Member States accordingly. In the event of incompatibility, Member States should find a suitable solution to eliminate the incompatibility identified.

Or. en

Amendment 4

Proposal for a decision Recital 11 a (new)

Text proposed by the Commission

Amendment

(11a) It is the legally binding force of an instrument (or of parts thereof), not its formal designation, that should determine whether it qualifies as an intergovernmental agreement or, in the absence of such legally binding force, as a non-binding instrument for the purposes of this Decision.

Or. en

Justification

It is important to underline that it is the content which determines the nature of the document and not its formal designation.

Amendment 5

Proposal for a decision

Recital 13

Text proposed by the Commission

(13) This Decision should not create obligations as regards agreements between undertakings. **However**, Member States should be free to communicate to the Commission, on a voluntary basis, **such** agreements that are referred to explicitly in intergovernmental agreements or non-binding instruments.

Amendment

(13) This Decision should not create obligations as regards agreements between undertakings **which are subject to notification under Regulation (EU) 2016/... of the European Parliament and of the Council** ^{1a}. Member States should be free to communicate to the Commission, on a voluntary basis, **other** agreements that are referred to explicitly in intergovernmental agreements or non-binding instruments.

^{1a} **Regulation (EU) 2016/... of the European Parliament and of the Council of ... concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ L ...) [COD 2016/0052 - SoS regulation].**

Or. en

Justification

Clarification that agreements between undertakings shall be notified under the SoS regulation if they fall within its scope.

Amendment 6

Proposal for a decision
Recital 16

Text proposed by the Commission

(16) A permanent exchange of information on intergovernmental agreements at Union level should enable best practices to be developed. On the basis of those best practices, the Commission, where appropriate in cooperation with the European External Action Service as regards the Union's external policies, should develop optional model clauses to be used in intergovernmental agreements between Member States and third

Amendment

(16) A permanent exchange of information on intergovernmental agreements at Union level should enable best practices to be developed. On the basis of those best practices, the Commission, where appropriate in cooperation with the European External Action Service as regards the Union's external policies, should develop optional model clauses to be used in intergovernmental agreements between Member States and third

countries. The use of such model clauses should *aim to avoid conflicts of* intergovernmental agreements *with* Union law, in particular internal energy market rules *and* competition law, *and conflicts with* international agreements concluded by the Union. Their use should be optional, and it should be possible to adapt their content to any particular circumstance.

countries. The use of such model clauses should *ensure that such* intergovernmental agreements *do not infringe* Union law, in particular *the* internal energy market rules, competition law, *public procurement rules, environmental rules, the Union's security objectives or* international agreements concluded by the Union. Their use should be optional, and it should be possible to adapt their content to any particular circumstance.

Or. en

Amendment 7

Proposal for a decision Recital 18

Text proposed by the Commission

(18) The Commission should facilitate and *encourage* coordination between Member States with a view to enhancing the overall strategic role of the Union through a strong and effective coordinated approach to producer, transit, and consumer countries.

Amendment

(18) The Commission should facilitate and *ensure* coordination between Member States with a view to enhancing the overall strategic role of the Union through a strong and effective coordinated approach to producer, transit, and consumer countries.

Or. en

Amendment 8

Proposal for a decision Article 1 – paragraph 1

Text proposed by the Commission

1. This Decision establishes a mechanism for the exchange of information between Member States and the Commission with regard to intergovernmental agreements and non-binding instruments in the field of energy as defined in Article 2, in order to optimise

Amendment

1. This Decision establishes a mechanism for the exchange of information between Member States and the Commission with regard to intergovernmental agreements and non-binding instruments in the field of energy as defined in Article 2, in order to optimise

the functioning of the internal energy market.

the functioning of the internal energy market ***and to ensure the security of supply to the Union.***

Or. en

Amendment 9

Proposal for a decision

Article 2 – paragraph 1 – point 3

Text proposed by the Commission

(3) ‘non-binding instrument’ means a legally non-binding arrangement between one or more Member States and one or more third countries, such as a memorandum of understanding, joint declaration, ministerial joint declaration, joint action or joint code of conduct, which contains interpretation of Union law, sets the conditions for energy supply (such as volumes and prices) or the development of energy infrastructures;

Amendment

(3) ‘non-binding instrument’ means a legally non-binding arrangement between one or more Member States and one or more third countries, such as a memorandum of understanding, joint declaration, ministerial joint declaration, joint action or joint code of conduct, which contains interpretation of Union law, sets the conditions for energy supply (such as volumes and prices) or the development ***or operation*** of energy infrastructures;

Or. en

Amendment 10

Proposal for a decision

Article 3 – paragraph 4

Text proposed by the Commission

4. The obligation to notify to the Commission according to paragraphs 2 and 3 does not apply in respect of agreements between undertakings.

Amendment

4. The obligation to notify to the Commission according to paragraphs 2 and 3 does not apply in respect of agreements between undertakings, ***which are to be notified to the Commission in accordance with Regulation (EU) 2016/... of the European Parliament and of the Council^{1a}.***

^{1a} ***Regulation (EU) 2016/... of the***

Or. en

Justification

Clarification that agreements between undertakings shall be notified under the SoS regulation if they fall within its scope.

Amendment 11

Proposal for a decision

Article 3 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. In the case of doubt as to whether an agreement constitutes an intergovernmental agreement or an existing intergovernmental agreement under this Decision and thus whether it is to be notified in accordance with Articles 3 and 6, Member States shall consult the Commission without delay.

Or. en

Amendment 12

Proposal for a decision

Article 4 – paragraph 1

Text proposed by the Commission

Amendment

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

1. Where a Member State gives the Commission notice of negotiations pursuant to Article 3(1), the Commission services **shall** provide it with advice on how to **ensure that** the intergovernmental agreement or the amendment to an existing intergovernmental agreement under negotiation, **or other text to which it**

negotiation *with Union law. That Member State may also request the assistance of the Commission in those negotiations.*

explicitly refers, comply with Union law and the Union's energy security objectives.

Or. en

Amendment 13

Proposal for a decision Article 4 – paragraph 2

Text proposed by the Commission

2. *At the request of the Member State concerned, or at the request of the Commission and with the written approval of the Member State concerned,* the Commission *may* participate in the negotiations *as an observer.*

Amendment

2. The Commission *may* participate in the negotiations as an observer.

Or. en

Amendment 14

Proposal for a decision Article 4 – paragraph 3

Text proposed by the Commission

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

Amendment

3. *In the course of the negotiations, the Commission shall* provide the Member State concerned with advice on how to *ensure that* the intergovernmental agreement or amendment under negotiation *complies* with Union law *and the Union's security objectives.*

Or. en

Amendment 15

Proposal for a decision Article 5 – paragraph 1

Text proposed by the Commission

1. The Commission shall, within six weeks of the date of notification of the complete draft intergovernmental agreement or amendment, including annexes thereto, pursuant to Article 3(2), inform the Member State concerned of any doubts it may have as to the compatibility of the draft intergovernmental agreement or amendment with Union law, in particular with internal energy market legislation **and** Union competition law. In the absence of a response from the Commission within that period, the Commission shall be deemed not to have any such doubts.

Amendment

1. The Commission shall, within six weeks of the date of notification of the complete draft intergovernmental agreement or amendment, including annexes thereto, pursuant to Article 3(2), inform the Member State concerned of any doubts it may have as to the compatibility of the draft intergovernmental agreement or amendment, ***or other text to which it explicitly refers*** with Union law, in particular with internal energy market legislation, Union competition law, ***public procurement rules, environmental rules and the Union's energy security objectives***. In the absence of a response from the Commission within that period, the Commission shall be deemed not to have any such doubts.

Or. en

Amendment 16

**Proposal for a decision
Article 5 – paragraph 2**

Text proposed by the Commission

2. Where the Commission informs the Member State ***concerned*** pursuant to paragraph 1 that it ***has doubts, it shall inform the Member State concerned of its opinion on the compatibility*** with Union law, ***in particular with internal energy market legislation and Union competition law, of the draft intergovernmental agreement or amendment concerned*** within 12 weeks of the date of notification referred to in paragraph 1. In the absence of an opinion from the Commission within that period, the Commission shall be deemed not to have raised any objections.

Amendment

2. Where the Commission informs the Member State concerned pursuant to paragraph 1 that it ***finds the intergovernmental agreement or amendment to be incompatible*** with Union law, ***it shall provide the Member State with a detailed opinion*** within 12 weeks of the date of notification referred to in paragraph 1. In the absence of an opinion from the Commission within that period, the Commission shall be deemed not to have raised any objections.

Or. en

Amendment 17

Proposal for a decision

Article 5 – paragraph 4 – subparagraph 2

Text proposed by the Commission

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

Amendment

Before signing, ratifying or agreeing to an intergovernmental agreement or amendment, the Member State concerned shall **demonstrate how objections expressed in** the Commission's opinion **as** referred to in paragraph 2 **have been addressed in order to ensure full compliance with Union law and the Union's energy security objectives.**

Or. en

Amendment 18

Proposal for a decision

Article 6 – paragraph 1 – subparagraph 3

Text proposed by the Commission

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

Amendment

The obligation to notify to the Commission according to this paragraph does not apply in respect of agreements between undertakings, **which are to be notified to the Commission in accordance with Regulation (EU) 2016/... of the European Parliament and of the Council ^{1a}.**

^{1a} **Regulation (EU) 2016/... of the European Parliament and of the Council of ... concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ L ...) [COD 2016/0052 - SoS Regulation].**

Or. en

Justification

Clarification that agreements between undertakings shall be notified under the SoS regulation if they fall within its scope.

Amendment 19

Proposal for a decision

Article 6 – paragraph 3

Text proposed by the Commission

3. The Commission shall assess intergovernmental agreements notified in accordance with paragraph 1 or 2. Where, following its first assessment, the Commission has doubts as to the compatibility of those agreements with Union law, in particular with internal energy market legislation **and** Union competition law, the Commission shall inform the Member States concerned accordingly within nine months of the notification of those agreements.

Amendment

3. The Commission shall assess intergovernmental agreements notified in accordance with paragraph 1 or 2. Where, following its first assessment, the Commission has doubts as to the compatibility of those agreements with Union law, in particular with internal energy market legislation, Union competition law, **public procurement rules, environmental rules and the Union's security objectives**, the Commission shall inform the Member States concerned accordingly within nine months of the notification of those agreements.

Or. en

Amendment 20

Proposal for a decision

Article 6 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Assessment by the Commission of intergovernmental agreements as well as existing intergovernmental agreements shall be without prejudice to the application of the Union rules on infringements, State aid and competition and shall not in any way pre-empt their assessment.

Amendment 21

Proposal for a decision

Article 7 – paragraph 1 – subparagraph 1

Text proposed by the Commission

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

Amendment

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

Or. en

Amendment 22

Proposal for a decision

Article 7 – paragraph 3

Text proposed by the Commission

3. The obligation to notify to the Commission according to paragraphs 1 and 2 does not apply in respect of agreements between undertakings.

Amendment

3. The obligation to notify to the Commission according to paragraphs 1 and 2 does not apply in respect of agreements between undertakings, ***which are to be notified to the Commission in accordance with Regulation (EU) 2016/... of the European Parliament and of the Council***^{1a}.

^{1a} ***Regulation (EU) 2016/... of the European Parliament and of the Council^a of ... concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ L ...) [COD 2016/0052 - SoS regulation].***

Or. en

Justification

Clarification that agreements between undertakings shall be notified under the SoS regulation if they fall within its scope.

Amendment 23

Proposal for a decision Article 7 – paragraph 4

Text proposed by the Commission

4. Where, following its first assessment, the Commission considers that the measures implementing the non-binding instrument notified to it under paragraphs 1 and 2 could conflict with Union law, in particular with internal energy market legislation **and** Union competition law, the Commission **may** inform the Member State concerned accordingly.

Amendment

4. Where, following its first assessment, the Commission considers that the measures implementing the non-binding instrument notified to it under paragraphs 1 and 2 could conflict with Union law, in particular with internal energy market legislation, Union competition law, **public procurement rules, environmental rules and the Union's energy security objectives**, the Commission **shall** inform the Member State concerned accordingly.

Or. en

Amendment 24

Proposal for a decision Article 7 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. Before signing, ratifying or agreeing to a non-binding instrument or amendment, the Member State concerned shall demonstrate how the objections expressed in the Commission's opinion have been addressed to ensure full compliance with Union law and the Union's energy security objectives.

Or. en

Amendment 25

Proposal for a decision

Article 7 – paragraph 4 b (new)

Text proposed by the Commission

Amendment

4b. In the case of doubt as to whether an instrument constitutes a non-binding instrument or an existing non-binding instrument under this Decision and thus whether it is to be notified in accordance with Article 7, Member States shall consult the Commission without delay.

Or. en

Amendment 26

Proposal for a decision

Article 9 – paragraph 1 – point c

Text proposed by the Commission

Amendment

(c) on the basis of best practices and in consultation with Member States, developing optional model clauses, which, if applied, would significantly improve compliance of future intergovernmental agreements and non-binding instruments with Union law;

(c) on the basis of best practices and in consultation with Member States, developing, **by ... [insert the date: 1 year after entry into force of this Decision]**, optional model clauses, which, if applied, would significantly improve compliance of future intergovernmental agreements and non-binding instruments with Union law;

Or. en

Amendment 27

Proposal for a decision

Article 9 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. By ... [insert the date: 1 year after entry into force of this Decision], the Commission shall, on the basis of best practices and after consulting Member

States, develop an aggregated information system which, while protecting the confidentiality of sensitive information, guarantees increased transparency of the main elements of intergovernmental agreements so as to establish an indicative benchmark which can be utilised by Member States in negotiations in order to prevent the abuse of dominant positions by third countries.

Or. en

EXPLANATORY STATEMENT

The main component of a successful energy policy as defined in the Energy Union communication is access to secure, sustainable and competitively priced energy for all Europeans. Let us take them one by one and see how they are addressed in the IGA proposal.

Energy security

As far as security is concerned, the Commission proposes that non-binding instruments, such as joint declarations between EU member states and third countries, be subject to a review after they have been signed. This is in stark contradiction with intergovernmental energy agreements which are to be examined *ex ante*. Documents of that kind shall all be subject to an assessment by the Commission before they are allowed to go ahead. This would bring in not only necessary legal certainty for capital-intensive investments but also address the problem of the lack of a definition for “energy security” which, unfortunately, is nowhere to be found in EU law. Since the term is extremely hard to pinpoint legally, the Commission needs to be able to intervene if legitimate energy security concerns arise. The exact scope of the Commission’s involvement can be further discussed to tailor it specifically to the needs of member states suffering from the dominance of one supplier that refuses to play by the common market rules. Other EU countries must show solidarity in this respect with less privileged members of the bloc. Equal scrutiny of intergovernmental contracts and non-binding instruments will also prevent temptation by the parties to play “regulatory jugglery” and pursue negotiations based on a less rigorous cooperation model.

Competition

Up-front regulatory check-up would ensure a well-functioning internal market without fragmentation and encourage more fair competition. Under the current IGA decision, the Commission established that 17 intergovernmental agreements were not compliant with EU law. This represents roughly one third of the most relevant deals that were analysed, i.e. those related to infrastructure projects or energy supply. Having detected the irregularities, the Commission decided not to launch an infringement procedure against any of the member states concerned. This proved to be difficult for political and legal reasons. But the fact remains that these agreements skew the functioning of the common market and harm its competitiveness. It also undermines trust among EU countries that see some members of the club sign such deals irrespective of the interest of the Union as a whole. Fortunately enough, the Commission managed to block South Stream – the most controversial agreement of this kind. Had it gone ahead it would have threatened Europe’s diversification efforts including the Southern Gas Corridor (one of its key investments in this respect) and forced out potential suppliers other than Russia. The fact that the Commission could only examine the South

Stream case based on its results created a difficult situation for the parties involved, since deals had already been signed and certain investments already been made. This is yet another argument for more transparency in energy negotiations which, if applied by all member states, would eliminate investment risks and direct funds into projects fully compliant with EU law and energy security objectives.

Sustainability

Some opinions have been expressed that the sustainability issue has not been properly addressed in the Commission's proposal as it focuses on energy imports to the EU which makes it more dependent on external energy suppliers. Given the EU's efforts to increase its energy efficiency, the argument goes, the Commission risks overestimating gas demand. This is flawed reasoning. The heating and cooling strategy is an important element of the sustainable energy security package focusing exclusively on moderating Europe's demand. Concrete EU legislative actions are also expected later this year. In the IGA proposal, it is important to concentrate on the supply side of the energy equation. In this context, one has to remember that gas is a necessary transition fuel towards a low-carbon future. If we are to import any fossil fuel it would better be gas, which is the least dirty. Yet those who think that Europe should increase its energy imports are missing the point. This proposal is not only about Europe's gas consumption but more importantly its import dependency. In 2013 (the latest figures available from Eurostat) the latter stood at about 65%, increasing from roughly 43% in 1995. Demand for imported gas is likely to remain stable at least over the next two decades since domestic EU production is set to decline by 60% by 2035 according to ENTSOG. The conclusion is that in the years to come, Europe will get a lot of its gas from abroad, which is why our diversification efforts need to be maximised.

Energy policy at a crossroads

The EU is in desperate need of a success. Torn apart between migratory and eurozone crises, it needs a new integration narrative that will prove Europe can successfully move forward. Energy is one of the fields where the EU's potential has remained largely untapped. This can be changed by applying the basic principles on which the integration project was founded, i.e. solidarity and trust among member states, to future European energy endeavours. In front of us, there is a unique opportunity to put a game-changing piece of legislation in place which would show that Europe stands united on the energy front. If we fail, there is a serious risk that a key policy area, instead of being at the core of European integration, will make member states drift further apart.