

## I. INTRODUCTION

The goal of the **Energy Union strategy**, adopted on 25 February 2015<sup>1</sup>, 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 where Member States see that they depend on each other to deliver secure energy to their citizens, 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**.

Specifically, the Energy Union strategy states, among other things, 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*". **The European Council in its conclusions of 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"**.<sup>2</sup>

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, a Decision which entered into force on 17 November 2012 (the IGA Decision)<sup>3</sup>. The main feature of the mechanism concerned is that the Commission carry out compliance checks of IGAs **after a Member State and a third country have concluded such agreements**.

Since 2012, the Commission has gained in depth 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 however 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 an international situation where energy security is at the centre of political debate, the Commission is therefore considering reviewing the current IGA Decision. This consultation document serves as a basis for getting stakeholders' assessment of the IGA Decision and identifying what could be improved in the mechanism it establishes in order to increase transparency in energy supply and ensure compliance with EU law.

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<sup>1</sup> COM/2014/0330 final

<sup>2</sup> European Council Conclusions 19-20 March 2015, EUCO 11/15

<sup>3</sup> 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

## **II. CURRENT INFORMATION EXCHANGE MECHANISM – DESCRIPTION**

### **1. Scope of application**

The IGA Decision establishes an information mechanism with regard to "intergovernmental agreements". These are "*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*".

Commercial contracts, either between Governments and private undertakings or between different private undertakings, are thus not covered. Under the IGA Decision Member States may, however, on a voluntary basis, communicate to the Commission commercial agreements that are explicitly referred to in IGAs.

The present consultation document does not consider the issue of commercial contracts.

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

### **2. Obligations and rights of 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 also on a voluntary basis inform the Commission of ongoing IGA negotiations, ask/permit the Commission to participate in such negotiations as an observer and ask for a compatibility check of a draft IGA.

### **3. Obligations and rights of the Commission**

- Compatibility checks of existing IGAs and notification by the Commission to the Member State(s) of any doubts about the compatibility of such agreements with EU law nine months after the submission of the relevant IGA;
- Compatibility check of negotiated but not yet concluded IGAs upon request of a Member State. The Commission has four weeks to express any doubts it may have. In the event of any doubt being expressed, 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 that ask/permit the Commission to participate in ongoing IGA negotiations.

### III. REINFORCING TRANSPARENCY OF IGAs AND THEIR COMPATIBILITY WITH EU LAW

Since the adoption of the IGA Decision, **124 IGAs have been notified** by Member States to the Commission. Almost all these IGAs were concluded before the entry into force of the IGA Decision.

After analysing the notified IGAs, the Commission has expressed doubts on the compatibility with EU law of **15 IGAs**, mainly in relation to the Third Energy Package. 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.

Since the adoption of the IGA Decision, no ongoing IGA negotiations have been notified by Member States to the Commission on a voluntary basis.

Against this background, the Commission is assessing various options to reinforce the transparency of IGAs in the context of security of supply and their compliance with EU internal energy market rules. Inspiration could be taken, for instance, from the well-functioning verification mechanism set by Article 103 of the EURATOM Treaty, which provides a 4 weeks obligatory *ex-ante* control prior to final signature of agreements concerning matters within the purview of this Treaty.

- 1) How could the current information mechanism with regard to IGAs be strengthened in terms of contributing to security of energy supply and ensuring the proper functioning of the internal energy market?
- 2) What incentives or mechanisms could you envisage that would reinforce the transparency of IGAs? How could we enhance the exchange of information on IGAs prior to their signature?
- 3) What incentives or mechanisms could you envisage that would reinforce the compatibility of IGAs with EU energy security provisions? Should a mandatory *ex-ante* verification mechanism be introduced?
- 4) If a mandatory *ex-ante* verification mechanism were introduced:
  - a) What should be the scope of the *ex-ante* assessment in terms of the criteria against which IGAs should be assessed?
  - b) How should the assessment mechanism be set up? Do you think that the *ex-ante* verification mechanism that exists for IGAs in the nuclear field (Article 103 Euratom) would be the right model?
  - c) At what stage in negotiations should Member States inform the Commission about the planned conclusion of an IGA?

Under the current IGA Decision the Commission may assist Member States in the negotiation of an IGA. This is possible at the request of the Member State(s) concerned or at the request of the Commission provided that the Member State concerned agrees to the Commission's assistance.

Furthermore, the IGA Decision provides for the development of optional model clauses as a guide for Member States that conclude IGAs. To date, however, no such model clauses have been developed. In other areas of EU law, the basing of an IGA on standard clauses which have been agreed at EU level beforehand results in a situation where the Member State is considered authorised to conclude the IGA.<sup>4</sup>

5) Do you think that mandatory assistance from the Commission in the negotiation of IGAs would be a suitable way of ensuring the compliance of future IGAs with EU law? Please provide reasons for your point of view.

6) What should the content of any model clauses be? What areas should they cover?

7) Should such model clauses serve as a guide for Member States? Or should their use have consequences for the assessment process by the Commission?

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<sup>4</sup> See for example Regulation (EC) 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 195, p. 3.