

Intergovernmental agreements in the field of energy

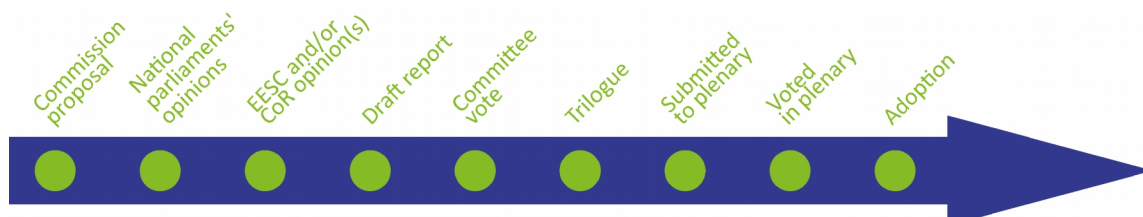
SUMMARY

The Commission has proposed a decision which would require Member States to submit draft intergovernmental agreements with non-EU countries in the field of energy to it before they are signed. The Commission would then check whether they are compliant with EU law, and Member States would have to take full account of the Commission's opinion. At present, Member States are required to submit such agreements to the Commission after signature. The Commission considers the present system as ineffective.

The final act restricts the scope of the ex-ante assessment to gas and oil contracts, while agreements related to electricity are subject to an ex-post assessment. If a Member State departs from the opinion in the Commission's ex-ante assessment, it must justify its decision in writing. The decision came into force in May 2017 after completion of the legislative procedure in the European Parliament and the Council.

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

<i>Committee responsible:</i>	Industry, Research and Energy (ITRE)	COM(2016) 53 final of 16.2.2016
<i>Rapporteur:</i>	Zdzisław Krasnodębski (ECR, Poland)	<i>procedure ref.:</i>
		2016/0031(COD)
<i>Procedure completed</i>	Decision (EU) 2017/684 OJ L 99, 12.4.2017, p. 1	Ordinary legislative procedure



This briefing further updates an earlier edition, of June 2016: [PE 583.833](#).

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Introduction

The legislative proposal for a decision on intergovernmental agreements in the field of energy was adopted on 16 February 2016 as part of the Commission's [energy security package](#). The proposed decision aims to ensure that potential conflicts with EU legislation are detected before an intergovernmental agreement (IGA) is signed, and to improve transparency of IGAs in order to increase the security and cost-effectiveness of EU energy supply. It supports the dimension 'energy security, solidarity and trust' of the Energy Union Strategy.

Context

The purpose of IGAs has typically been to provide legal certainty for the construction of import and export infrastructure, in order to facilitate the purchase of oil and gas or establish a more general framework for energy cooperation. IGAs are usually bilateral agreements that form the basis of more detailed commercial contracts.

According to BusinessEurope, IGAs play an important role by establishing a stable framework for long-term strategic investments. IGAs typically:

- set out the general obligations of governments and define the applicable law as well as the relationship with national and international law,
- establish obligations and mechanisms for exchange of information,
- provide a constructing and operating entity in case of infrastructure projects,
- in the construction phase, IGAs set out rights on land and requirements for security, standards, and local content, and
- in the operational phase, IGAs set rules on access, taxes, dispute resolution and liabilities for projects.

Conflicts with EU energy law can lead to legal uncertainty, discourage investments and impede the functioning of the EU's internal energy market.

The IGAs concerning the planned construction of the South Stream gas pipeline are a high-profile example. In December 2013, the Commission found that the IGAs which EU Member States had concluded with Russia were in breach of EU law and had to be renegotiated. In the aftermath of these discussions (and in the light of EU sanctions), Russia unilaterally cancelled the plans for the pipeline in December 2014.

Existing situation

Exchange mechanism for intergovernmental agreements on energy

[Decision No 994/2012/EU](#) of the European Parliament and of the Council (the 'IGA Decision') establishes an information-exchange mechanism with regard to IGAs between Member States and non-EU countries in the field of energy. It aims to facilitate

coordination between EU countries vis-à-vis third countries and to ensure that EU legislation is respected. The mechanism:

- requires EU Member States to submit all existing IGAs in the field of energy to the Commission for assessment,
- allows Member States to inform the Commission about ongoing negotiations with non-EU countries and to request the Commission's advice on the compatibility of potential agreements with EU law,
- requires Member States to submit all new IGAs to the Commission after their ratification, and
- obliges Member States to make the contents of IGAs available to each other, either in full or in summary form. A summary should contain information on the subject matter, aim and scope, duration, contracting parties and main elements of an agreement.

The Decision concerns all forms of energy except nuclear, for which mandatory ex-ante verification is already required under the Euratom Treaty. It applies to agreements between states, but not to commercial contracts between companies.

If a Member State concludes an IGA that does not respect EU law, the Commission can launch infringement proceedings against it.

Experience with the current legislation

The Commission summarised the experience gained from applying the 2012 IGA Decision in a [report](#) published on 16 February 2016, together with the legislative proposal.

Since the adoption of the 2012 IGA Decision, Member States have notified 124 IGAs to the Commission. Around 60% of these IGAs covered general energy cooperation and did not give rise to legal concerns, while the remaining, roughly, 40% covered the supply, import or transit of energy, rules for the exploitation of oil and gas fields, or development of infrastructure such as oil and gas pipelines. For 17 of the latter IGAs, the Commission has expressed doubts as to whether they are compatible with EU law (mainly concerning internal energy market legislation ('third energy package') and EU competition law). In 2013, the Commission sent letters to nine Member States, inviting them to resolve the incompatibilities by amending or terminating the IGAs concerned. According to the Commission report, no Member State has succeeded in terminating or renegotiating non-compliant IGAs, because this had not been provided for in the terms of the IGAs and would require the consent of the third country.

The Commission has been informed of one new IGA after the IGA Decision entered into force, and no draft IGA has been submitted to it on a voluntary basis for an ex-ante check.

Based on the above-mentioned experience, the Commission considers the IGA Decision ineffective in its present form, despite seeing it as reasonably efficient in terms of costs and benefits.

The changes the proposal would bring

The [proposed decision](#) covers not only IGAs, but also non-binding instruments, such as joint political declarations and certain types of memoranda of understanding. It does not apply to commercial contracts between companies, which are addressed separately in the Commission's proposal for a new [security of gas supply regulation](#).

Member States would have to inform the Commission when they intend to start negotiations with a third country for concluding a new IGA or amending an existing one.

Member States should keep the Commission regularly informed about the progress of such negotiations. The Commission may advise negotiating Member States on how to ensure compliance with EU law; in turn, they may request its assistance in conducting negotiations. The Commission may participate in negotiations as an observer, subject to the request or written approval of the Member State concerned.

Before the formal conclusion of negotiations, a draft IGA would have to be submitted to the Commission for ex-ante verification. Within six weeks of receiving the complete draft IGA, the Commission would have to inform the Member State concerned of any doubts regarding its compatibility with EU law, in particular internal energy market legislation and competition law. Should the Commission have doubts, it would have to give an opinion on the compatibility of the draft IGA with EU law within 12 weeks of receiving it. A Member State would not be able to sign an IGA before the Commission has informed it of any doubts or issued an opinion. Member States would have to take 'utmost account' of the Commission's opinion when signing a new or amended IGA. Upon ratification of a new or amended IGA, the Member State concerned would have to notify the IGA to the Commission.

Member States would have to notify existing IGAs to the Commission, if they have not already done so under the 2012 IGA Decision or the Security of Gas Supply Regulation (EU) No 994/2010.

Member States would also have to notify non-binding instruments or any amendments to them to the Commission after they have been adopted. Existing non-binding instruments would have to be notified within three months of the proposed decision's entry into force. Where the Commission considers that implementation of a non-binding instrument could conflict with EU law, it may inform the Member State concerned.

The Commission would make any non-confidential information provided to it by a Member State accessible to all other Member States in secure electronic form. Member States would have the right to mark parts of this information as confidential, and indicate whether it can be shared with other Member States. Where a Member State has marked information as confidential, it would have to make available to the Commission a summary of it, to be shared with other Member States. The Commission would have access to the confidential information and would have to ensure that access is strictly limited to those Commission staff for whom it is absolutely necessary to have the information available.

The Commission would facilitate and encourage coordination among Member States. It would issue a report on the application of the legislation by 1 January 2020, at the latest.

Expected impacts

According to the Commission's [impact assessment](#), the proposed decision would help ensure that IGAs comply with EU legislation and would enhance their transparency. The Commission expects the proposed decision to bring the following benefits:

- more legal certainty, which encourages investment, especially for infrastructure projects,
- better functioning of the internal energy market, without segmentation and with improved competition, and
- greater transparency regarding the security of energy supply, which could in turn reduce the risk of redundant investments and/or infrastructure gaps.

The European Parliament conducted an initial appraisal of the Commission's impact assessment (see the section 'Parliamentary analysis' on page 6).

Preparation of the proposal

The revision of the IGA Decision was outlined in the Commission's [Energy Union strategy](#) of 25 February 2015 under the dimension 'Energy security, solidarity and trust'.

A [public consultation](#) on the review of the IGA Decision was held from 30 July to 22 October 2015 (see 'Stakeholder's views' below). In October 2015, the Commission presented an [inception impact assessment](#), which summarises the experiences with the current legislation and presents four policy options.

Parliament's starting position

In its [resolution of 15 December 2015](#) on the Energy Union strategy, the Parliament called for a stronger role for the Commission in the negotiation of energy-related IGAs, including through participation in the negotiations as an observer and through making ex-ante and ex-post assessments. It asked the Commission to draw up draft contract clauses and guidelines, including a list of abusive clauses. It also called for more transparency regarding the key features of commercial contracts between EU companies and third-party players, whilst protecting the confidentiality of sensitive information.

Stakeholders' views

In a public consultation carried out by the Commission from July to October 2015, six [Member States](#) supported a reinforcement of the current system, while five Member States (Cyprus, Czech Republic, France, Germany and Hungary) felt that no revision was needed.¹ Those in favour of a revision generally favoured the introduction of mandatory ex-ante verification. A large majority of [business stakeholders](#) opposed the extension of the scope of the IGA Decision to commercial contracts.

[BusinessEurope](#) warns that if made mandatory, ex-ante verification of IGAs would be not only be disproportionate, but would also discourage trade, and breach established European legal principles.

[Eurogas](#), the association representing the European gas industry, is opposed to extending the scope of the IGA Decision to commercial contracts between companies. It furthermore considers that EU coordination should not delay the conclusion of IGAs, while avoiding the risk of disclosure of commercially sensitive information.

The [German Association of Energy and Water Industries](#) (BDEW) welcomes the increased transparency but insists that a strict separation between commercial aspects and political-level agreements must be preserved.

The [Austrian Federal Economic Chamber](#) considers that the existing legislation is sufficient and that mandatory ex-ante verification is redundant.

The [Energy Community Secretariat](#)² welcomes the Commission's intention to enhance the transparency of IGAs and to review the 2012 IGA Decision. It suggests broadening the review of the IGA Decision by involving the Energy Community. It proposes that IGAs between a member country of the Energy Community and a third country should be notified to and verified by the Energy Community Secretariat, and that an information-exchange mechanism between the Energy Community Secretariat and the European Commission should be established.

Advisory committees

The European Economic and Social Committee adopted its [opinion](#) in September 2016. It advocates restricting ex-ante verification to agreements relating to gas supply, which it regards as the most sensitive energy commodity. In its view, the decision should only concern framework agreements with a direct impact on the EU internal market and/or the security of gas supply, and the Commission should only assess the compliance of a proposed IGA with EU law. The EESC does not consider it necessary or beneficial to include non-binding instruments, and calls for better protection of confidential information.

Council and European Council

The [conclusions](#) of the March 2015 European Council called for ensuring full compliance with EU law of all agreements related to the buying of gas from external suppliers, notably by reinforcing the transparency of such agreements and their compatibility with EU energy security provisions.

National parliaments

Four national parliaments ([Austrian Federal Council](#), [Maltese House of Representatives](#), [Portuguese Assembleia da República](#) and the [French Senate](#)³) consider that the proposed decision breaches the principle of subsidiarity and submitted reasoned opinions before the subsidiarity deadline (20 April 2016).

The [Czech Senate](#) calls for a review of the proportionality of the proposed decision. The [Czech Chamber of Deputies](#) supports a cautious approach to the introduction of ex-ante assessment. The [Italian Senate](#) and the [Romanian Senate](#) also submitted comments.

Parliamentary analysis

The European Parliament's [initial appraisal of the Commission's impact assessment](#) concludes that it is of good quality with extensive background analysis, but critically notes the limited representativeness of stakeholders in the public consultation, and the heavy reliance on a qualitative and mostly descriptive evaluation.

Legislative process

Parliament's Committee for Industry, Research and Energy (ITRE) was responsible for the legislative procedure; while its Foreign Affairs (AFET), and International Trade (INTA) committees issued opinions on the proposal. The ITRE Committee [report](#) (rapporteur: Zdzisław Krasnodębski, ECR, Poland), adopted on 18 October 2016, would strengthen the role of the Commission.

On 6 June 2016, energy ministers in the Council [agreed](#) on a [general approach](#) that would restrict the scope of mandatory ex-ante verification to binding agreements in the field of gas supply only.

Negotiators for the Parliament and Council reached a [provisional agreement](#) on the proposal in trilogue on 7 December 2016. The plenary vote at first reading took place on 2 March 2017.

The [final act](#) differs from the Commission's original proposal by requiring the Commission's ex-ante assessment only for IGAs related to gas and oil. The Commission has five weeks to inform a Member State if it has doubts on the compliance of a submitted IGA with EU law (instead of six weeks in the Commission's proposal). IGAs related to electricity are subject to a mandatory ex-post assessment, but a review clause

opens the possibility of requiring a mandatory ex-ante assessment for electricity-related IGAs in the future. The definition of IGA is broadened to include 'international organisations' and 'transit'. If a Member State departs from the opinion in the Commission's ex-ante assessment, it must justify its decision in writing. The notification of non-binding agreements is not mandatory.

By 1 January 2020, the Commission must submit a report on the application of this decision to the Parliament, Council and the advisory committees. If appropriate, the report should be accompanied by a proposal to revise the decision.

The final act was signed by the presidents of the co-legislators on 5 April 2017. It was published in the Official Journal as [Decision \(EU\) 2017/684](#) and came into force on 2 May 2017.

References

[Member State/third country intergovernmental agreements in the field of energy: information exchange mechanism](#), European Parliament, Legislative Observatory (OEIL).

[Initial appraisal of a European Commission impact assessment: Intergovernmental agreements in the field of energy](#), European Parliamentary Research Service, April 2016.

Endnotes

¹ In 2011, a clear majority of Member States opposed mandatory ex-ante controls. The Commission's inception impact assessment considers that circumstances have changed since then, as the Energy Union strategy has been developed and the European Parliament has offered stronger support.

² The [Energy Community](#), established in 2005, expands the EU internal energy market to neighbouring countries (Albania, Bosnia-Herzegovina, Kosovo, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia, and Ukraine) that are willing to adopt the EU energy *acquis*. Its permanent secretariat is based in Vienna.

³ The Commission sent a [response](#) to the French Senate on 24 June 2016.

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