| INCEPTION IMPACT ASSESSMENT | | | |
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| **TITLE OF THE INITIATIVE** | Review of the Decision on information exchange mechanism with regard to intergovernmental agreements (IGA) between Member States and third countries in the field of Energy | | |
| **LEAD DG – RESPONSIBLE UNIT – AP NUMBER** | ENER – A3-A1 – AP 2016/ENER/005 | **DATE OF ROADMAP** | 10 / 2015 |
| **LIKELY TYPE OF INITIATIVE** | Proposal for a Decision of the Parliament and Council revising the IGA Decision 994/2012/EU | | |
| **ADDITIONAL INFORMATION** | *https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmental-agreements-decision* | | |
| **This Inception Impact Assessment is provided for information purposes only and can be subject to change. It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.** | | | |

## A. Context, Subsidiarity Check and Objectives

### Context

Political context

- 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 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**.
- More concretely, the Energy Union strategy indicates, 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 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)[2]. The main feature of this mechanism is that the Commission carries out systematic 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 the review of the IGA Decision.

[1] COM/2014/0330 final
[2] 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 key EU initiatives

- The recently adopted Energy Union strategy of 25 February 2015 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. 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 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 future, the Commission should be informed about the negotiation of intergovernmental agreements from an early stage, so that a better ex ante assessment of IGA's compatibility with internal market rules and security of supply criteria is ensured. Commission participation in such negotiations with third countries and a move towards standard contract clauses could also more effectively avoid undue pressure and ensure respect of European rules. Therefore, the Commission will review the Intergovernmental Agreements Decision and will propose options to ensure that the EU speaks with one voice in negotiations with third countries.*"
- Moreover, any amendment to the regime for IGAs should not be inconsistent with proposals for the ongoing revision of the Security of Gas Supply Regulation (SoS)[3]. Indeed, the Energy Union foresees that: "*In the context of the review of the Security of Gas Supply Regulation, 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 Commission notes however, that while the IGA Decision covers IGAs concerning all energy matters, the SoS relates only to commercial gas supply contracts.
- Finally, a Recommendation is also foreseen on the application of Article 103 of the Euratom Treaty, which provides for a specific ex-ante procedure for EURATOM related IGAs. These IGAs are excluded from the current IGA Decision but it will be important to also ensure consistency between the two processes.

**Issue**

- Experience with the current system shows that it is **useful to receive information on existing IGAs and to identify legal issues posed by these IGAs in terms of compatibility with EU law, it is however not efficient to cure these problems.**
- In particular, none of the IGAs identified by the Commission as problematic (see above) has been modified so far either because no termination clause was foreseen in the IGA, or because political incentives to renegotiate are too weak.
- In summary, as the Energy Union strategy formulates it, the main problem of the current system is that: "*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*".
- Since the adoption of the IGA Decision, **124 IGAs have been notified** by Member States to the Commission. Almost all IGAs were concluded before the entry into force of the IGA Decision.
- 73 out of the 124 notified IGAs concerned general energy cooperation, mainly bilateral cooperation between EU Member States and a wide range of third countries, a few of them (less than 10) being Memoranda of Understanding in a specific energy field (such as LNG or energy efficiency), another few of them covering general investment protection provisions or bilateral dispute settlement protocols in the field of energy. In this category, some Member States have notified a great number of IGAs and other none. These IGAs did not raise concern and the Commission did not follow-up on them. However, their notification was useful as some of these IGAs concerned overall energy cooperation with countries such as Ukraine, Morocco, Moldova, Belarus or Russia and helped increase transparency as regards bilateral energy relations with EU Neighbouring countries.
- 10 out of the 124 notified IGAs concerned specific agreements on the supply, import or transit of energy products (oil, gas or electricity) or setting the rules for the exploitation of gas or oil fields.
- Finally, 41 out of the 124 notified IGAs concerned either bilateral or multilateral agreements for the development of energy related infrastructures, with a great majority of oil and gas pipelines, including6 South Stream IGAs concluded between EU Member States and Russia.
- 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, all related either to infrastructure projects or supply of energy products . Letters were consequently sent to **9 Member States in 2013**. Member States were

[3] OJ, L 295, 12.11.2010, p.1

invited to amend or terminate the IGAs in question in order to resolve the identified incompatibilities. With 15 out of the 51 IGAs falling within the two above mentioned categories, the number of problematic IGAs related to infrastructures or supply is significant, i.e. around 1 of 3.

- However, to date, no Member State has managed to renegotiate or terminate their incompatible IGAs. Since the adoption of the IGA Decision, no ongoing IGA negotiations have been notified by Member States to the Commission on a voluntary basis.
- Member States and potentially companies active in the energy sector and infrastructure projects when an IGA makes a direct reference to a commercial contract.

**Subsidiarity check**

- The legal basis for the revision of the IGA Decision is 194 TFEU which is a shared competence;
- The IGA Decision was adopted in 2012, respecting the subsidiarity principle;
- Experience shows that assessment by Member States is not sufficient and satisfactory to ensure compliance of IGAs with EU law and creates legal uncertainty;
- Commission's involvement ex ante could provide essential added value by resolving problems (conflicts between obligations of MS under international treaty law and EU law; lack of legal uncertainty, lack of security of supply and investment up-stream;
- Finally, the progressive integration of energy infrastructure and markets, the common reliance on external suppliers, the need to ensure solidarity in times of crisis, all imply that decisions on energy taken exclusively at national level without the involvement of neighbouring countries and the EU may be sub-optimal. The IGA Decision, stands at the cross roads of the external dimension (as it involves agreements with third countries) and of the internal market (as non-compliant provisions such as destination clauses have a negative impact on the free flow of energy products within the internal market). There is therefore a clear added value to reinforce the cooperation and transparency at EU level notably in the framework of the IGA Decision.

**Main policy objectives**

This initiative participates to the overall objective to ensure transparency at EU level and compatibility with EU law as regards energy supply and that the EU speaks with one voice in energy negotiations with third countries.

Sub-objectives are:

- Avoid undue pressure at Member States level by major trading partners and;
- To improve the functioning of the internal market by ensuring an IGA's compatibility with EU law, in particular competition law and internal market rules, as well as security of supply criteria.

## B. Option Mapping

The Energy Union strategy indicates that "*in future, the Commission should be informed about the negotiation of intergovernmental agreements from an early stage*" and that "*Commission participation in such negotiations with third countries and a move towards standard contract clauses could also more effectively avoid undue pressure and ensure respect of European rules*." This could mean, from a legislative review perspective, a number of options:

**Baseline scenario – no EU policy change**

Keep the IGA Decision as it currently exists.

**Options of improving implementation and enforcement of existing legislation or doing less/simplifying existing legislation**

**Options:**

<u>Measures dealing with Member States that do not notify existing IGAs</u>

- One possibility would be that once the Commission has become aware of a non-notified IGA it might urge the concerned Member State to officially notify the IGA.
- Another possibility could be that the Commission conducts an assessment of the IGA without formal notification of this IGA.

<u>Measures dealing with existing IGAs not in line with EU law</u>

- The Commission could strengthen the infringement policy against Member States that are not willing to renegotiate or renounce the IGAs that have been found incompatible. In practical terms, the Commission services would first normally open an EU Pilot against the Member State concerned (informal pre-infringement stage). Should the EU Pilot phase prove insufficient (e.g. because renegotiations failed and

the Member State did 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.

**Assessment:**

These options should be pursued in any case. It would however not cure the problem which arises when a Member State has already signed a non EU law compliant IGA that does not contain a clause which allow the Member State to terminate or suspend the IGA (in legal terms it will be almost impossible for this Member State to renegotiate or terminate this IGA if the third country does not agree).

**Alternative policy approaches**

**Option 1: Model clauses for inclusion in IGA which do not infringe EU law/guidelines**

The current IGA Decision provides for the development of optional model clauses as a guide for Member States concluding IGAs. So far, however, no such model clauses have been developed. Such model clauses could be developed and the consequences of their use for the assessment process by the Commission be specified. However, in practice establishing such a list of model clauses is very challenging because there are few clauses which are per se unlawful or positive under any circumstances. Alternatively or in addition the Commission could adopt guidelines on the use of clauses (or "guidance notes"), which according to the Commission are/ are not problematic in principle and encourage/ or not, competitive and interconnected energy markets.

**Option 2: Ex-ante control of IGAs by the Commission could become obligatory**

Member States could be obliged to inform at an early stage the Commission of on-going IGA negotiations and submit their draft IGAs to the Commission for an ex-ante control. The process of this ex-ante control could be developed together with model IGA clauses.

In this context, the Commission could for instance take inspiration from the verification mechanism set up by Article 103 of the EURATOM Treaty which provides a one month obligatory ex-ante control prior to final signature of agreements concerning matters within the purview of this Treaty.

A number of sub-options could be envisaged:

- Threshold approach: the request for an ex-ante control could be limited only to those IGAs linked to major energy infrastructure projects and supply of commodities and the related definitions be developed.
- Non-binding instruments: to avoid that a more stringent assessment create a substitution effect Member States could be obliged to notify non-binding instruments such as Memoranda of Understanding that set in detail the conditions for major infrastructure projects of the supply of energy commodities.

**Option 3: The Commission could have the right to participate as an observer in IGA negotiations**

Under the current IGA Decision Member States only "may request the assistance of the Commission". Member States could become obliged to invite the Commission to participate in the negotiations, as an observer. This option could be self-standing or be an add-on to option 2.

**Option 4: The Commission could negotiate EU agreements in the field of energy, exercising EU's external competence**

Compulsory ex-ante information of the Commission could allow to check and to discuss in advance whether an EU-agreement (exclusive or mixed) could be more appropriate to achieve a given objective.

**Alternative policy instruments**

See below

**Alternative/differentiated scope**

Not relevant, as the IGA Decision applies to Member States.

**Options that take account of new technological developments**

Not relevant. The problem is essentially a legal issue.

**Preliminary proportionality check**

- As indicated in the problem setting section, the experience of the Commission with the current system is **that it is useful to receive information on existing IGAs and to identify legal issues posed by these IGAs in terms of compatibility with EU law, it is however not efficient to cure potential problems of incompatibility with the EU acquis**. In particular, none of the IGAs identified by the Commission as problematic (see above) has been terminated so far either because no clause was foreseen in the IGA which would allow an early termination of the IGA, or because political incentives to renegotiate are too weak.
- Moreover, as third countries are not bound by EU law, strengthening the infringement policy would have only a limited effect on already signed IGAs. The options proposed above are therefore in a growing order of stringency. The compulsory ex-ante control option is the least stringent approach to avoid non-compliant IGAs. The active participation of the Commission to the negotiations of future IGAs would be more intrusive, notably in terms of competence.

## C. Data Collection and Better Regulation Instruments

**Data collection**

Much of the information is already available within the Commission. No external contractor would be needed for collecting data.

Article 8 of IGA Decision 994/2012/EU on 'Reporting and review' stipulates amongst other points that:

1. By 1 January 2016, the Commission shall submit a report on the application of this Decision to the European Parliament, the Council and the European Economic and Social Committee.
2. The report shall, in particular, assess the extent to which this Decision promotes compliance of intergovernmental agreements with Union law and a high level of coordination between Member States with regard to intergovernmental agreements. It shall also assess the impact that this Decision has on Member States' negotiations with third countries and whether the scope of this Decision and the procedures it lays down are appropriate.

This report will be based on the evaluation report that is under development and will be annexed to the Impact Assessment and will feed into the review of the IGA Decision, as well as on the outcome of the consultation process. The evaluation report will be based on Better Regulation principles in a proportionate manner and the five mandatory Better Regulation criteria (Relevance, effectiveness, efficiency, coherence and EU-added value), and will cover also aspects such as quantification of costs and cost/benefit, administrative burden, and simplification. The report will be complemented by a separate document which will contain the results and outcome of the consultation process (see below).

**Consultation approach**

- This initiative would target mainly Member States. They will be essential in allowing a further step in transparency of gas supply, in the context of the energy security crisis;
- An open consultation took place from July to October 2015 allowing Member States, companies and citizens to answer questions: https://ec.europa.eu/energy/en/consultations/consultation-review-intergovernmental-agreements-decision
- The Gas Coordination Group is an existing forum that will be involved at all stage of the preparation of the proposal;
- Inside the Commission, the LS, the SG and DG COMP will be essential interlocutors. EEAS will also be instrumental as this initiative will have an effect on international energy relations.

**Will an Implementation plan be established?**

**No**

Implementation of the IGA Decision depends on the signature of IGAs by Member States which cannot be anticipated, hence the need for an ex-ante review mechanism. However, a compulsory ex-ante assessment by the Commission could be accompanied by model clauses developed and decided at EU level (see above)

## D. Information on the Impact Assessment Process

- The Impact Assessment is under development.
- An IA ISG has been be set up. It met on 21/09, 05/10 and 19/10.
- Main involved services are: Secretariat-General; Legal Service; DG Climate Action; DG Competition; DG Internal Market, Industry, Entrepreneurship and SMEs; DG Economic and Financial Affairs; DG

Environment; DG Migration and Home Affairs; DG Neighbourhood and Enlargement Negotiations; DG Trade; the European External Action Service and the Joint Research Centre.

Communication

- Article 8 of the IGA Decision (Reporting and Review) requires the Commission to submit a first report by 1 January 2016 (and then every 3 years after the submission of the first report). According to the wording of Article 8, this report would contain two parts: 1) one part would assess the application of the IGA Decision in particular the extent to which this Decision promotes compliance of IGAs with EU law and a high level of coordination between Member States, 2) a second part would assess the functioning of the decision, in particular "*whether the scope and the procedures it lays down are appropriate*";
- This report could be part of the first report on the European Energy Security Strategy foreseen for Q4 2015.

## E. Preliminary Assessment of Expected Impacts

**Option 1: Model clauses for inclusion in IGA /guidelines**

- **Pros**: The development of standard clauses could be a cost efficient way to increase the compatibility of IGAs with EU law and their coherence at EU level. Depending on their legal effect they could also increase the bargaining power of Member States by preventing incompatible regulatory concessions. The process of drafting those model clauses could also increase the dialogue between Member States and would be fully transparent. Such consequences have been experienced following the development of standard clauses in other areas of EU acquis, notably in the aviation sector.
- **Cons**: The effectiveness of such model clauses would however depend on their legal effect and on their anchoring into EU legislation. In the case of IGAs in the field of energy, that can cover a wide variety of situations and can be underpinned by commercial contracts, a model clauses approach would need a careful consideration of the legal effect of the use of such clauses for the final compatibility check by the Commission.

**Option 2: Compulsory ex-ante control**

- **Pros:** The compulsory ex-ante control would address the issue that once the IGA is concluded the positions of the signatories have already been fixed, which creates legal and political commitment and pressure not to change any aspect of the agreement. Moreover, such an amendment would be supported by the recent case-law of the ECJ, according to which, in principle, the Commission should also 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;
- **Cons:** In 2011 a clear majority of Member States were not ready to accept such an ex-ante control mechanism. Since then, however, circumstances have changed, the Energy Union Strategy has been put forward and an even stronger support from the European Parliament has emerged.

**Option 3: Mandatory Commission participation in IGA negotiations**

- **Pros:** Commission participation would help to avoid any potential non-compliant provisions and could build on the development of standard clauses;
- **Cons:** Negotiations in the energy field are often very intensive and time consuming, often spread over weeks and months. It would very challenging in practical terms for the Commission services to be able to participate in all negotiations. Moreover, the Commission presence in the negotiations and lack of objections could create the impression that the Commission agrees with the negotiated IGA. This could make it more difficult for the Commission to challenge the IGA at a later stage, in particular in infringement and Court proceedings.

**Option 4: EU agreements**

- **Pros:** EU-agreements could provide for a uniform legal framework covering all energy infrastructure projects. They would allow for a EU wide and coherent approach in favour of security of supply and the completion of the internal market. In addition EU-agreements could ensure making full use of the bargaining power of the EU in case of agreements related to energy commodities supply. Investor security and security of supply across the EU would be significantly improved and differences in Member States' bargaining power and security of supply would be fully removed. This option would be coherent with the recent case-law of the ECJ, according to which, in principle, the Commission should also 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.
- **Cons:** This option could result in a major shift in competences from the national to the EU level which could be disproportionate to tackle the related problem.

**Likely economic impacts**

The proposed options would not change the economic impact of the current IGA Decision. As exemplified by the South Stream case, projects based on IGAs incompatible with EU law are likely to face important legal and economic uncertainties. An ex-ante process would increase legal and investment certainty.

**Likely social impacts**

Not relevant.

**Likely environmental impacts**

No changes foreseeable compared to the current IGA Decision.

**Likely impacts on simplification and/or administrative burden**

Administrative burden

- Each of the options could increase administrative burden *ex ante* for Member States and the Commission. But these options would be less burdensome than procedures aiming at modifying or terminating already concluded IGAs due to the incompatibility of the IGA with EU-law.

Simplification

In a legislative review, a number of clarification and simplification could be brought with no impact on the content of the proposal i.e.:

- In Article 3 of the IGA Decision, the deadline for the submission of the existing IGAs was 17 February 2013. This does not apply anymore and the review could be the occasion to clarify that the current 9 months ex-post assessment deadline for Commission applies to all new IGA concluded after the entry into force of the IGA Decision.
- In the context of the review it could also be stipulated that the 9 months ex post assessment by the Commission shall not apply to IGAs which were submitted to the Commission for ex ante assessment prior to their signature

**Likely impacts on SMEs**

No specific impact on SMEs

**Likely impacts on competitiveness and innovation**

A compulsory ex- ante assessment by the Commission would ensure compliance of IGAs with EU law. This would enhance the competition in the internal energy market because the relevant EU rules (for instance Third Energy Package rules on third party access and unbundling or EU competition and public procurement rules) would be fully respected. A functioning internal market would increase security of supply.

**Likely impacts on public administrations**

See above (Likely impacts on simplification and/or administrative burden)

**Likely impacts on third countries, international trade or investment**

- A compulsory ex-ante assessment by the Commission could have as an effect that the envisaged IGA would not be signed with a third country or it would be designed or modified in a way that it complies with EU law. This would affect the relationship with the third country concerned. An obligatory ex-ante assessment by the Commission would, however, provide legal certainty and stability in the contractual relationship with third countries, which is essential for a good relationship with third countries as well as for successful project implementation and investments in the Member States.
- Members of the EEA or Contracting Parties of the Energy Community might decide to apply the revised IGA Decision as well. This will require reflections about appropriate adaption clauses in the new IGA Decision including the question as to whether these countries should be considered as "third countries" within the meaning of the revised IGA Decision once they have decided to apply this Decision .