

REASONED OPINION

of the European Affairs Committee of the Federal Council

of 30 March 2016

**pursuant to Article 23g (1) of the Federal Constitutional Act in conjunction with Article 6 of
Protocol No.2 on the application of the principles of subsidiarity and proportionality**

COM (2016) 53 final

**Proposal for a Decision of the European Parliament and of the Council on establishing an
information exchange mechanism with regard to inter-governmental agreements and non-binding
instruments between Member States and third countries in the field of energy and repealing
Decisions No 994/2012/EU**

and

COM (2016) 52 final

**Proposal for a Regulation of the European Parliament and of the Council concerning measures to
safeguard the security of gas supply and repealing Regulation (EU) No 994/2010**

A. Reasoned Opinion

The project under consideration is incompatible with the principle of subsidiarity.

B. Grounds for Reasoned Opinion

*Proposal for a Regulation to safeguard the security of gas supply and repealing Regulation (EU) No
994/2010*

The Commission's proposal is based on Art. 194 of the Treaty on the Functioning of the European
Union (TFEU), which refers to measures to ensure security of energy supply in the Union. For the

measures planned (only some of which are new, compared with the Regulation to be repealed), the Commission has chosen the instrument of a regulation.

In principle, no objections are to be raised against measures intended to further improve security of supply at Union level, in particular as such measures may serve to prevent differences in cross-border procedures between different Member States that negatively affect the security of supply. This approach was taken by the European Union in 2010 with the adoption of Regulation (EU) 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC. Therefore, there is no cause for concern if individual measures from Regulation (EU) 994/2010 are taken over into the new proposal concerning measures to safeguard the security of gas supply.

However, the draft submitted also foresees a number of new provisions. According to Art.3 of the proposal, the Member States have to cooperate when faced with a supply crisis. To this end, the Commission defines “regions” comprising several Member States. The criteria for the composition of regions are specified in Art.3 para.7. The Commission is to be empowered to modify the composition of the regions on the basis of a delegated act. Thus, the Member States do not have the right to participate in the original composition of the regions or in subsequent modifications of regions.

This draft provision is to be rejected on grounds of subsidiarity, since the composition of the “regions” interferes with the sovereignty of the Member States.

If the idea of constituting “regions” to safeguard the security of gas supply is to be further pursued, uniform criteria to be applied throughout the Union will certainly be necessary, but factually relevant points of view of the Member States regarding the composition of regions also have to be taken into consideration. Possible selection criteria to be applied throughout the Union include the existence of transmission capacities and a comparable degree of transposition of the “third package” of legislation for the internal market in natural gas in the Member States concerned.

Furthermore, the formation of “regions” must be subject to the approval of the Member States concerned. The proposal to confer this power to the Commission by way of a delegated act is rejected, not least because the proposed delegated act lacks in specificity, as Art.18 of the proposed regulation, which establishes the power to adopt delegated acts, does not refer to Art.3 para.7.

Proposal for a Decision on establishing an information exchange mechanism with regard to inter-governmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decisions No 994/2012/EU

The legal basis for this decision is again Art.194 TFEU. The Commission considers it necessary to be informed on agreements between Member States and third countries in the field of energy prior to the conclusion of such agreements. An ex-ante check of draft agreements by the Commission is at the core of the proposed decision. Agreements between commercial entities are excluded from this requirement.

The introduction of a duty of notification of all intergovernmental agreements with third countries in the field of energy may constitute an interference with the sovereignty of the Member States: According to Art.5 para.4 of the proposed decision, the Member State is not to sign, ratify or agree to the draft intergovernmental agreement in the field of energy until the Commission has informed the Member States of any doubts, in accordance with para.1, or has issued its opinion in accordance with para.2, or until the periods referred to in para.1 and para.2 have elapsed. When signing and ratifying an intergovernmental agreement, the Member State concerned has to take utmost account of the opinion expressed by the Commission.

In principle, early involvement of the European Commission may be of advantage, as legal problems can be eliminated already during the negotiating phase. However, the Commission's right to express an opinion must be limited to legal aspects. Reservations have also been expressed with regard to the proposed extension of the decision to non-binding instruments in the field of energy, as this is likely to increase the bureaucratic burden.

From the viewpoint of proportionality, Art.5 of the proposed decision could be reconciled more easily with the primary law of the Union, if the involvement of the Commission were limited to it communicating its legal opinion on a specific agreement in the field of energy as regards the its compatibility with the rules for a functioning internal market in energy (including competition law) to the Member State concerned.