KAMRA TAD-DEPUTATI HOUSE OF REPRESENTATIVES

MALTA

19 April 2016

President of the European Parliament
President of the Council of the European Union
President of the European Commisson

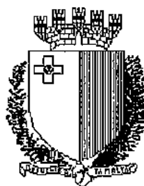
PROPOSAL FOR A DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON ESTABLISHING AN INFORMATION EXCHANGE MECHANISM WITH REGARD TO INTERGOVERNMENTAL AGREEMENTS AND NON-BINDING INSTRUMENTS BETWEEN MEMBER STATES AND THIRD COUNTRIES IN THE FIELD OF ENERGY AND REPEALING DECISION NO 994/2012/EU (COM(2015)53)

The House of Representatives of Malta examined 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(2015)53)' and concluded that it does not satisfy the principle of subsidiarity and proportionality.

Therefore, attached to this letter please find a reasoned opinion of the Parliament of Malta as provided for in Protocol No. 2 of the Lisbon Treaty.

Yours sincerely,

Anġlu Farrugia
Speaker



House of Representatives

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REASONED OPINION OF THE HOUSE OF REPRESENTATIVES OF MALTA: 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

While noting that the primary objectives of the proposal are to ensure the proper functioning of the internal market and to ensure the security of supply in the Union as set out in Article 194 (1) of the Treaty on the Functioning of the European Union, the Parliament of Malta is of the opinion that the European Commission is going beyond the powers (*ultra vires*) of what is permitted by the Treaties of the European Union.

The Maltese Parliament notes that the Commission justifies its proposal on an Impact Assessment Report dated 16 February 2016. The Commission argues that this report shows that evaluation by Member States alone is not sufficient and satisfactory to ensure compliance of intergovernmental agreements (IGAs) with EU law and thus creates legal uncertainty. The Commission considers that its *ex ante* involvement would provide an essential added value for resolving conflicts between the obligations of Member States under international law and EU law. Furthermore, the Commission considers that political decisions on energy should not be taken exclusively at national level without the involvement of neighbouring countries and the EU and that there is a clear added value to reinforce the transparency and cooperation at EU level in the framework of this proposal.

The Maltese Parliament considers that a mere statement according to which the Commission considers that assessments by Member States is not sufficient to ensure compliance of IGAs with EU law, is not enough to have recourse to provisions of EU law to impose new obligations on Member States to notify the Commission of their intent to enter into negotiations with regard to new or existing IGAs or amendments to existing IGAs, and of the adoption of non-binding instruments for the Commission's assessment.

The Maltese Parliament stresses that obliging Member States to notify the Commission of: (i) their intent to enter into negotiations with regard to new or existing IGAs or amendments to existing IGAs and for the Commission to participate in the negotiations as an observer (ex ante notification); and (ii) of the adoption of non-binding instruments for the Commission's assessment, go against the principles of subsidiarity and proportionality.

In its Assessment Report, the Commission stresses on more than one occasion that around one third (17) of IGAs were being judged "of concern". However, the reality is that the seemingly large percentage (34%) is based on selective quantification analysis. The Commission was informed of 124 IGAs: 60% of which covered general energy cooperation, while 40% concerned either specific agreements on the supply, import or transit of energy products or the establishment of rules for the exploitation of gas or oil fields, or bilateral or multilateral agreements for the development of energy-related infrastructure.

The Commission then noted that IGAs which covered general energy cooperation did not contain provisions that were of concern (60%). Of the remaining 40% of agreements, only those concerning energy supplies or energy infrastructure (which therefore does not consist of the full 40% of IGAs), were deemed to contain provisions that were of concern.

If one overlooks the fact that of the 40%-class only those concerning energy supplies or energy infrastructure contained questionable provisions, which classifies the "faulty agreements" by type, it still remains a fact that the number of agreements containing provisions that were of concern amounts to 13.7%, which is significantly lower than the percentage quoted by the Impact Assessment Report to substantiate the need for a new Council Decision. Finally, of the 17 faulty IGAs, 6 of them were associated with the South Stream case, which means that 4.8% dealt with the same issue. This leaves only 8.9% of IGAs that contained other issues which the Commission would have to address individually. On the basis of the principle of proportionality this low percentage is not considered sufficient justification to establish an *ex ante* notification mechanism.

Whilst the Maltese Parliament stresses the fact that compliance of intergovernmental agreements with EU law is important to ensure the proper functioning of the internal market and enhance the EU's energy security, it disagrees that *ex ante* compatibility checks undertaken by the Commission are required as per Article 3 of the proposed Council Decision. This arguably goes beyond the spirit of subsidiarity and proportionality and would tend to involve the transferring of part of a Member State's sovereign powers to conclude an agreement with third countries.

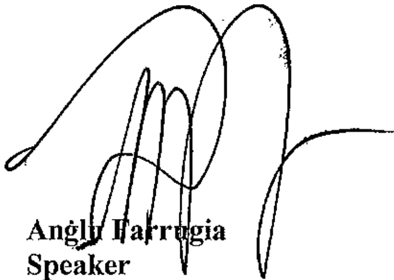
The Maltese Parliament notes that in case of incompatibility with EU law, there are mechanisms already in place that can be applied as provided in the Treaties. For instance, in case of a breach in EU competition law, the Commission could resort to the mechanisms provided under Section 1 and 2 of Chapter 1, Title VII of the TFEU. In cases of incompatibility with the EU, the Commission could also resort to initiating infringement proceedings under Article 258 of the TFEU.

Article 7 of the proposal outlines the obligations and assessment by the Commission of non-binding intergovernmental agreements. The Maltese Parliament believes that since such agreements are not legally binding, they cannot be said to be in breach of Union law. The Commission only has those powers that are conferred upon it by the Member States or the Treaties. Similarly, the Court of Justice of the European Union only has powers of jurisdiction over non-legally binding agreements that produce legal effects. As a result, since the Court of Justice of the European Union may not have jurisdiction over some parts of these intergovernmental agreements unless they produce legal effects, the Commission will not have the competence to scrutinise those parts that do not produce legal effects. Under the terms of the current proposal, Member States would effectively be providing the Commission the possibility to scrutinise non-binding intergovernmental agreements to assess their

compatibility with EU law in their entirety, without distinguishing between those parts that produce legal effects and those that do not.

Given that the Maltese Parliament has its reservations on the Impact Assessment Report and due to the fact that (i) the Commission's proposal to enter into negotiations with regard to new or existing intergovernmental agreements or amendments to existing intergovernmental agreements and for the Commission to participate in the negotiations as an observer (*ex ante* notification); and (ii) the adoption of non-binding instruments for the Commission's assessment, go against the principles of subsidiarity and proportionality:

The Parliament of Malta has decided to object to the Proposal and to deliver this reasoned opinion in terms of the procedure defined in Article 6 of Protocol No. 2 concerning the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union.



Anġlu Farrugia
Speaker