

**RESOLUTION OF THE ASSEMBLY OF  
THE REPUBLIC of PORTUGAL – COM(2016)53-IGA**

**TRANSLATION**

**Adoption of the reasoned opinion on the non-compliance with the subsidiarity principle of the proposal for a Decision of the European Parliament and of the Council concerning a mechanism for exchange of information on intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision 994/2012/EU**

The Portuguese Parliament has decided, under Article 166d(5) of the Constitution and Law No 43/2006 of 25 August, to send to the Presidents of the European Parliament, the Council and the European Commission the following reasoned opinion on the respect of the subsidiarity principle by the proposal for a Decision of the European Parliament and of the Council 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 994/2012/EU:

1- Initiative concerned, is liable to infringe the principle of subsidiarity in that it shows a transfer of tasks from Member States to the Commission and such transfer leads to an increase to effectively implement the objectives set out in Article 194 of the Treaty on the Functioning of the European Union (TFEU) on energy.

The grounds of the relevant opinion are the following:

- The impact assessment presented by the Commission does not show depth the concrete negative impacts for the functioning of the internal market, nor to the table in matters of security and that, of the total number of intergovernmental agreements taken into account (124), only 17 have experienced non-compliances, including 6 relating to a project already discontinued.
- The Commission argues that "experience shows that the assessment made by the Member States it is neither sufficient nor sufficient to ensure the compliance of intergovernmental agreements with EU law and creates legal uncertainty". Even if, to recognise faults in the assessment of compliance by the Member States in the framework of Decision 994/2012/EU the Member States who want it can apply, optionally, an ex ante evaluation to the Commission.
- Recognising the benefits of building a true Energy Union, that is founded also on solidarity between the Member States and with the Commission, and the strategic importance of ensuring the Union's energy security, particularly in view of the current geopolitical context and the need to reduce energy dependency towards the Russian Federation, and to reduce the energy isolation of the Iberian Peninsula, it is considered that Member States are also in a better position to enforce these goals with regard to intergovernmental agreements in

accordance with the law of the Union and better position to enforce these goals with regard to for intergovernmental agreements in accordance with the law of the Union.

- It is further considered that reinforcing compliance with the *acquis communautaire* in the matter could be better achieved through the option 2 proposed in the impact assessment: “standard clauses to be included in intergovernmental agreements which contravene the right/EU Guidelines”, this would guarantee the proportionality of the instrument towards the intended objectives and the respect of the principle of subsidiarity.

Approved on 15 April 2016

THE PRESIDENT OF THE ASSEMBLY OF THE REPUBLIC,

(Mr Ferro Rodriguez)

## **PART I — INTRODUCTION**

In accordance with Article 7 of Law No 43/2006 of 25 August, on the monitoring, examination and pronouncement by the Assembly of the Republic on matters relating to the construction of the European Union, as amended by Law No 21/2012 of 17 May, as well as the methodology of scrutinising European initiatives approved on 8 January 2013, the European Affairs Committee received the proposal for a Decision of the European Parliament and of the Council concerning a mechanism for exchange of information on intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision 994/2012/EU.

## **Part II — GROUNDS**

### **I. Background**

Decision 994/2012/EU established a mechanism for exchange of information on intergovernmental agreements between Member States and third countries in the field of energy. The Decision established the possibility for the Commission to assess the compliance of such intergovernmental agreements with European rules, after those have been completed. This is a useful instrument in that it allows information exchange about agreements already entered into and the identification of problems arising from its possible incompatibility with Union law. However, the Commission considers that it is an inefficient instrument since only allows the identification of incompatibilities after the completion of the agreements.

According to the Commission, as long as this Decision is in force, Member States have concluded 124 intergovernmental agreements, 60 % of which was cooperation agreements in the field of energy, not raised legal problems of compatibility, and the remaining 40 % relating to agreements on sources and remedies energy supply, operating rules of oil and gas, or development of infrastructure. Of these, the Commission identified problems of compatibility in 17 (out of which 6 concern to the “South Stream” project which would allow the supply of natural gas from Russia to a number of Member States, and which has now been discontinued), especially in relation to internal energy market rules laid down in the third energy package and EU competition rules. Recognising that the renegotiation of certain clauses in these agreements is very difficult and time-consuming, but moreover, legal uncertainty to market operators, the Commission considers that the evaluation of compatibility with EU law must be carried out on a logic ex-ante and not ex-post in order to ensure a priori compliance with the *acquis communautaire*, particularly in view of the objectives of the Energy Union. Indeed, the current review of the Decision 994/2012/EU is part of the set of measures in the Strategy for Energy Union (COM (2015) 80) adopted in February 2015.

The impact assessment presented by the Commission to Parliament and Council accompanying the proposal in question, identified 5 options for improving the functioning this exchange system based on the rules laid down in the third energy package, it concluded that the best option would be “option 3: compulsory ex-ante assessment of intergovernmental agreements by the Commission”.

## **II. Objectives**

Against this background, this proposal pursues the following objectives:

- ensure the compliance of intergovernmental agreements with EU law in order to ensure the proper functioning of the internal energy market and the improving the EU's energy security;
- to improve transparency of intergovernmental agreements in order to increase the cost-effectiveness of energy supply in the EU and solidarity among Member States.

## **III Main provisions**

The proposal for revision provides for the introduction of the following elements:

- Main reporting obligations of the intergovernmental agreements:
  - The obligation for Member States to inform the Commission of their intention to enter into negotiations with a third country concerning the conclusion of new intergovernmental agreements or amendment of existing agreements;
  - The Member States' obligation to notify the Commission of a draft intergovernmental agreement or amendment of an agreement, submission of all accompanying documents as soon as in the negotiations between the parties that agreement has been reached on all the main elements for an ex-ante evaluation of the Commission;
  - The obligation for Member States to notify the Commission of an intergovernmental agreement or of its modification, with all accompanying documents, after its ratification;
  - The obligation for Member States to notify the Commission of all inter-governmental agreements or their amendments with all accompanying documents;
- Commission's assessment: obligations
  - The obligation for the Commission to carry out ex-ante assessments of draft intergovernmental agreements or of his amendment and to inform the Member State of any doubts as to compatibility with Union law, in particular with the legislation relating to Internal energy market and Union competition law, within six weeks;
  - The obligation for the Commission to inform the Member State of its opinion on the compatibility of the intergovernmental agreement or amendment concerned with Union law within 12 weeks from the date of notification;
  - The Member State may not conclude an intergovernmental agreement or amendment until the Commission has told you any doubts or its opinion. When concluding an intergovernmental agreement proposed or a proposed amendment, the Member State shall take utmost account of the opinion of the Commission;
  - The obligation for the Commission to perform the ex post evaluation of existing intergovernmental agreements or of his amendment and to inform the other Member States in the event of doubts as to the compatibility of their agreements with EU law within nine months from the date of notification.

- Reporting obligations and evaluation by the Commission with regard to non-binding instruments:

- The obligation of the Member States non-binding instruments to the Commission existing and future, with all the accompanying documents;
- The Commission may perform the ex post evaluation non-binding instruments submitted and inform Member States accordingly if it considers that the measures implementing the non-binding instrument could conflict with the law of the Union;
- The Commission's obligation to share the documents received with other Member States in compliance with the provisions on confidentiality.
- The scope of this proposal extends, therefore, in addition to the intergovernmental agreements binding, such as non-binding agreements, memoranda of understanding, or other instruments is nevertheless limited to the agreements concluded between States, not including therefore trade agreements with operating companies of the energy sector.

In the light of the provisions made in the proposal, the following must be considered:

### **1. The legal basis**

The legal basis put forward in this proposal is the Art 194 TFEU, which stipulates the shared competence of energy policies between Member States and the European Union, particularly concerning:

- a) ensure the functioning of the energy market;
- b) ensure security of energy supply in the Union;

### **2. The principles of subsidiarity and proportionality**

The proposal amends landings of responsibility under which is based on Decision 994/2012/EU. Indeed there is a 'transfer of functions of Member States for the European Commission.

Nevertheless, I consider that the pleas raised by the Commission to change this legal framework are not sufficient for or supporting documents for such a transfer and raise doubts as to compliance with the subsidiarity principle.

In the light of Art 194 TFEU, which stipulates the objectives of the sharing of competence in energy policy, the Commission considers that both the operation of the energy market, as the security of energy supply in the Union are not properly addressed by an ex-post analysis to intergovernmental agreements and thus suggests that obligation to check compliance ex ante. However, the impact assessment submitted by the Commission proves in depth the concrete negative impacts for the functioning of the internal market, nor to the energy security framework, and, taking into account the universe under consideration — 124 intergovernmental agreements -, only 17 have experienced non-conformities, of which 6 relating to a project already discontinued.

The Commission submits that ‘experience shows that the assessment by Member States is not sufficient nor satisfactory to ensure the compliance of intergovernmental agreements with EU law and creates legal uncertainty’. Even if, to recognise failures in conformity assessment by Member States in the framework of Decision 994/2012/EU the Member States, which so wish, may request, on a voluntary basis, an ex ante evaluation to the Commission.

Recognising the benefits of building a true Energy Union that is founded also on solidarity among Member States and between them and the Commission, and the strategic importance of ensuring the Union’s energy security, particularly in view of the current geopolitical context and the need to reduce energy dependency from Russia, as well as reduce energy isolation of the Iberian Peninsula, it is considered that Member States are also in a better position to enforce these goals with regard to for intergovernmental agreements in accordance with the law of the Union. It is therefore considered that the compliance testing mandatory ex-ante under binding and non-binding intergovernmental agreements are likely to infringe the principle of subsidiarity. It is further considered that reinforcing compliance with the *acquis communautaire* in the matter could be better achieved by option 2 proposal in the impact assessment: “standard clauses to be included in intergovernmental agreements which contravene the right/EU Guidelines”, this would guarantee the proportionality of the instrument towards the intended objectives and the respect of the principle of subsidiarity.

In addition, in the public consultation carried out by the Commission prior to the presentation of this proposal, 5 Member States considered that this legal framework was sufficient, objecting to a revision of the decision, specifically objecting to the proposal which creates mandatory checks ex-ante. On the other hand, in the scrutiny of national parliaments, the Austrian Parliament also ruled claiming doubts as to whether the principle of subsidiarity and to the French National Assembly should, similarly, provide a reasoned opinion to that effect. Finally, the Parliamentary Committee for Economy, Innovation and Public Works issued Opinion adopted unanimously, where it concludes that the proposal ‘is liable to infringe the principles of subsidiarity enshrined in art. 5 TEU’.

### **PART III — CONCLUSIONS**

Having regard to the assessment drawn up to this proposal, the other above considerations and the opinion of the Committee for Economic Affairs, Innovation and public works to which I support, the European Affairs Committee concludes as follows:

1. The proposal for a Decision COM (2016) 53 is liable to infringe the principles of subsidiarity and proportionality, in the light of Art. 5 TEU.
2. In view of the scrutiny process still on-going in the national parliaments, and the relevance of the subject matter concerned, it is suggested the follow up by the European Affairs Committee in the decision-making process on to the proposal under examination.

Regina Bastos