EUROPEAN COMMISSION

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Mr Eduardo FERRO RODRIGUES
President of the Assembleia da República
Palácio de S. Bento
P – 1249-068 LISBOA

Dear President,

The Commission would like to thank the Assembleia da República for its Reasoned Opinion on the proposal for a Decision 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(2016) 53 final}.

This proposal constitutes an important component of the Energy Union, the goal of which is to provide EU consumers – households and businesses – with secure, sustainable, competitive and affordable energy supplies. It aims at ensuring the compatibility of intergovernmental agreements in the field of energy with EU law and to increase their transparency, thereby ensuring the proper functioning of the internal energy market and the EU's security of supply.

The Commission welcomes the Assembleia da República's view on the benefits to be gained from building a true Energy Union that is founded on solidarity among Member States and on the strategic importance of ensuring the EU's security of energy supply, particularly in view of the need to reduce energy dependency.

The introduction of a mandatory ex-ante assessment has been identified in the impact assessment accompanying the Commission's proposal as the only efficient way to ensure full compatibility of such intergovernmental agreements (IGAs) with EU law and increase their transparency. To date, no Member State has managed to terminate or renegotiate those IGAs assessed as non-compliant under Decision No 994/2012/EU[1]*. This is notably due to the complex legal situation that arises once IGAs are signed between a Member State and a third country. Once a Member State has concluded an IGA which is binding under public international law and does not contain a termination or suspension clause, it is – in legal terms – almost impossible for the Member State concerned to terminate the IGA within a short period of time and before the end of its initial duration without the agreement of the third country. The same applies to the renegotiation of an IGA, for which the consent of the*

[1] OJ L 299, 27.10.2012, pp. 13–17.

third country is required. This in turn considerably limits the enforcement powers of the Commission, even if an infringement process were to be launched.

As regards the concerns raised by the Assembleia da República with respect to the fact that a mandatory ex-ante check is likely to infringe the principle of subsidiarity, the Commission would like to underline that the result of the proposed ex-ante check would not be a legally binding decision by the Commission. The assessment by the Commission would only have a suspensory effect for a limited period of time of twelve weeks maximum (which can be shortened in accordance with Article 5 (3) of the proposal). Moreover, the basis for such ex-ante checks would be strictly limited to the relevant provisions of the EU acquis. Under the proposed framework, Member States would remain free to finalise the negotiations and sign IGAs as long as they fully respect EU law. The proposed ex-ante control would, therefore, not constitute a judgment passed on the political opportunity of negotiating an IGA but a control of the negotiated IGA's legality. This is fully in line with the Treaties, especially articles 4 and 194 of the Treaty on the Functioning of the European Union which establish a shared competence between the EU and its Member States in the field of energy.

The Commission would also like to clarify that the proposed ex-ante check would not apply to non-legally binding instruments. Whilst the Commission acknowledges that the scope of the proposal extends to non-legally binding instruments as they can have similar impacts on the internal energy market as IGAs and their implementation might result in a violation of EU law, the proposed check of non-legally binding instruments would be exercised only ex-post, be optional and its scope even more limited than for IGAs (namely to non-legally binding instruments containing interpretation of Union law, setting the conditions for energy supply or the development of energy infrastructure) in order to implement the principle of subsidiarity in practice.

The Commission, therefore, considers that the ex-ante mechanism it proposes is the most efficient solution to tackle the lack of compliance of IGAs with EU law while fully respecting the principle of subsidiarity.

In response to the more technical questions in the Reasoned Opinion, the Commission would like to refer the Assembleia da República to the annex to this letter.

The points made above are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council in which your government is represented.

The Commission hopes that these clarifications address the issues raised by the Assembleia da República and looks forward to continuing our political dialogue in the future.

Yours faithfully,

Frans Timmermans
First Vice-President

Maroš Šefčovič
Vice-President

ANNEX

The Commission has carefully considered each of the issues raised by the Assembleia da República in its Reasoned Opinion and is pleased to offer the following clarifications.

On the experience of non-compliant agreements:

As regards the figures underpinning its impact assessment, the Commission would like to underline that stating that only 17 out of 124 IGAs were found incompatible with EU law under the current Decision No 994/2012/EU does not give the full picture of the problem at hand. As explained in the impact assessment, around 60% of the 124 notified IGAs concerned general energy cooperation, mainly bilateral cooperation between EU Member States and a wide range of third countries. Many of these IGAs were in reality out of the scope of the current Decision No 994/2012/EU and could not have been notified by Member States. The remaining 40% of notified IGAs cover specific agreements on the supply, import or transit of energy products (such as oil, gas and electricity) or agreements for the development of energy-related infrastructure, of which a great majority relate to oil and gas pipelines. After analysing such IGAs, the Commission expressed doubts on the compatibility with EU law of 17 of them. Therefore, around one third of the most relevant IGAs, namely those related to energy infrastructure or the supply of energy commodities, contained provisions that were not compliant with EU law.

Moreover, the Commission wishes to stress that it is not the number of incompatible IGAs that matters, but their potential impact on the internal market or the EU's security of supply. A good example cited in the impact assessment is the South Stream project which was underpinned by six non-compliant IGAs and was originally designed to transport around 60 billion cubic metres of gas a year. This would have represented around 21% of total annual EU gas imports. Even if only a limited number of new energy corridors are expected to be developed in the coming years, each potential new infrastructure projects could have a considerable impact on the entire energy market of the EU or parts of it. It is therefore essential that such IGAs are compatible with EU law.

Taking the above into account, the Commission considers that the ex-ante mechanism it proposes is the most efficient solution to tackle the lack of compliance of IGAs with EU law while fully respecting the principle of proportionality.

On option two of the impact assessment:

The Commission respectfully disagrees with the statement that reinforcing compliance with the EU acquis could be better achieved through the second option proposed in the impact assessment. This option relates to the possibility of standard clauses being included in IGAs. Such model clauses could help Member Sates when negotiating IGAs with third countries (the Commission, therefore, intends to develop such optional model clauses). However, as outlined in the impact assessment, Decision No 994/2012/EU concerns all energy commodities (except for nuclear) and covers supply, infrastructure and bilateral cooperation IGAs. Depending on the project, the business model and the regulatory set-up can vary. Consequently, the wide range and complexity of situations and business models that may fall

under the scope of Decision No 994/2012/EU will not allow for the development of clauses precise enough to substitute an in-depth ex-ante assessment of a final negotiated draft text. Such model clauses will, therefore, not solve the issue that, once an incompatible IGA is signed, it is almost impossible to change ex-post.