ENERGY AGREEMENTS WITH THIRD COUNTRIES

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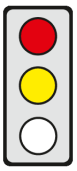
KEY ISSUES

Objective of the Decision: In future, in order to ensure that intergovernmental agreements (IGAs) between EU Member States and third countries in the energy sector are compatible with EU law, the Commission wants to check these agreements before they come into force ("ex-ante check").

Affected parties: Companies in the energy sector.



Pro: An ex-ante check of IGAs may prevent them from infringing EU law. This will increase legal certainty.

Contra: An obligatory ex-ante check of IGAs, in conjunction with the obligation to take "utmost" account of the Commission's opinion, represents drastic intervention in the sovereignty of the Member States and is therefore disproportionate.

CONTENT

Title

Decision COM(2016) 53 of 16 February 2016 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

Brief Summary

- **Context and objectives**
  - Private sector contracts between energy suppliers from third countries and energy companies in the EU often require political and legal support from the respective home country. This generally takes the form of
    - binding intergovernmental agreements ["IGAs"; COM(2016) 54, p. 5] or
    - non-binding agreements, e.g. a memorandum of understanding or joint declaration.
  - Under the IGA Decision (No. 994/2012/EU), Member States must submit all IGAs for checking by the Commission after they have come into force following ratification ("ex-post check"; Art. 3 (1) and (5)).
  - Member States have notified the Commission of 124 IGAs. Of these, roughly 40% are relevant to the functioning of the internal energy market and security of supply. They regulate [SWD(2016) 27, p. 9]
    - the import or transit of oil, gas or electricity and/or
    - the construction and operation of energy related infrastructures, particularly oil and gas pipelines.
  - Of these IGAs, according to the Commission, 17 were in breach of EU law [SWD(2016) 27, p. 8 et seq.], namely
    - the Third Internal Energy Market Package (see cep**Compass**, p. 46 et seq.), in which IGAs e.g. fail to comply with the rules on separating energy supply and grid operation and rules on grid access for third-party providers;
    - EU competition law in that IGAs e.g. ban the resale of imported gas in the EU;
    - EU rules on public procurement, e.g. with regard to the construction of energy infrastructures.
  - No Member State has yet managed to remove infringements of EU law contained in IGAs by way of subsequent negotiations because
    - IGAs frequently lack appropriate termination or adaptation clauses;
    - after ratification of an IGA, signatory states are no longer willing to make changes.
  - In order to ensure that IGAs and non-binding agreements comply with EU law, the Commission wants
    - to replace the currently – "ineffective" – IGA Decision (No. 994/2012/EU) (Recital 4);
    - to check IGAs in future before they come into force;
    - to check non-binding agreements in future too, after they have been adopted.
- **Area of application**

  The proposed new IGA Decision governs (Art. 2)
  - binding IGAs between at least one Member State and at least one third country, which have an impact on the functioning of the internal energy market or security of supply;
  - non-binding agreements between at least one Member State and at least one third country which concern the interpretation of EU law, the conditions for energy supply – e.g. volume and price – or the construction of energy infrastructure;

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– but not private sector contracts between companies (Recital 13).

- "**Ex-ante checks" of new and amended IGAs**
  – Member States must inform the Commission in writing "at the earliest possible moment" of their intention to enter into negotiations with third countries on new IGAs or changes to existing IGAs (Art. 3 (1)).
  – Member States must keep the Commission "regularly" informed of the progress of the negotiations (Art. 3 (1)).
  – As soon as Member States and third countries have agreed on the "main elements" of an IGA, and before the closure of formal negotiations, Member States must send the draft IGA together with any annexes and accompanying documents to the Commission ("Notification", Art. 3 (2) and (5)).
  – The Commission must inform Member States within six weeks of notification of any doubts it may have as to the compatibility of the draft IGA with EU law (six-week period, Art. 5 (1)).
  – Within twelve weeks of notification, the Commission must provide Member States with an opinion containing concrete details of how the draft IGA breaches EU law. If it does not do so, it may be assumed that the Commission has no objections. (Twelve-week period, Art. 5 (2))
  – Member States cannot give final approval to the IGA (Art. 5 (4))
    - before expiry of the six-week period,
    - before expiry of the twelve-week period, if the Commission expresses doubts about the lawfulness of the draft IGA within the six-week period.
  – Finally approved new or amended IGAs must
    - "take utmost account" of the Commission's opinion (Art. 5 (4));
    - be sent to the Commission (Art. 3 (3)).

- "**Ex-post checks" of existing IGAs**
  – Member States must send all existing IGAs, which have not yet been submitted, to the Commission within three months of entry into force of the Decision (Art. 6 (1) and (2)).
  – Within nine months, the Commission will assess the IGAs which have been submitted as to their compatibility with EU law and notify the Member States of the result of the assessment (Art. 6 (3)).

- **"Ex-post checks" of non-binding agreements**
  – Member States must submit all non-binding agreements with third countries to the Commission and must do so
    - after adoption in the case of new or amended non-binding agreements (Art. 7 (1));
    - within three months of entry into force of the Decision in the case of existing non-binding agreements (Art. 7 (2)).
  – Where it considers that a non-binding agreement conflicts with EU law, the Commission may "inform" the Member State concerned "accordingly" (Art. 7 (4)).

- **Transparency and confidentiality**
  – Member States may indicate which parts of the documentation sent to the Commission must be treated as confidential (Art. 8 (1)) and cannot therefore be sent to other Member States.
  – Information not identified as confidential will be made accessible "in secure electronic form" to all other Member States by the Commission (Art. 8 (2)).
  – Member States must prepare summaries for all IGAs and non-binding agreements which they indicate to be confidential.
    - The summaries must contain information on the parties, subject matter, aim, scope, duration and the main regulatory elements (Art. 8 (3)).
    - They will be made accessible to all other Member States in electronic form (Art. 8 (4)).

- **Coordination among Member States**
  The Commission supports coordination among Member States in order to (Art. 9)
  – design IGAs and non-binding agreements in such a way that they are consistent with a coherent external EU energy policy;
  – support the development of multilateral IGAs and non-binding agreements involving several Member States or the EU as a whole;
  – identify common problems of the Member States when negotiating IGAs and non-binding agreements and develop possible solutions;
  – design "optional model clauses" for IGAs and non-binding agreements which are compliant with EU law.

Main changes to the status quo

- New: "ex-ante checks" of draft IGAs.
- New: non-binding agreements must also be submitted for "ex-post checking".

Statement on Subsidiarity by the Commission

According to the Commission, the ex-post assessment of IGAs is not sufficient to ensure that IGAs comply with EU law. An ex-ante check allows infringements of EU law to be recognised and avoided during negotiations. Also, in view of the increasing level of integration of the energy markets and the EU's dependency on energy imports, important decisions on external energy policy can no longer be made exclusively at national level without the involvement of other affected Member States and the EU Coordination among the Member States provides a "clear added value" in this regard. (p. 3-4)

Policy Context

The Commission emphasised, both in its Energy Security Strategy [COM(2014) 330, see cep**PolicyBrief**] and in its Energy Union Strategy [COM(2015) 80, see cep**PolicyBrief**], that all IGAs of the Member States relating to the purchase of energy from third countries, must be consistent with EU law in order to ensure security of the energy supply in the EU. For this purpose, the Commission announced a review of IGA Decision No. 994/2012/EU. The Decision now being proposed forms part of the energy security package which also includes a proposed Regulation on measures to guarantee a secure gas supply [COM(2016) 52, see cep**PolicyBrief**], a Communication on an EU strategy on liquefied natural gas and gas storage [COM(2016) 49, see cep**PolicyBrief**] and a Communication on the EU strategy on heating and cooling [COM(2016) 51, see cep**PolicyBrief**].

Options for Influencing the Political Process

Directorates General:	DG Energy (leading)
Committees of the European Parliament:	Industry, Research and Energy (leading), Rapporteur: Zdzisław Krasnodębski (Conservatives & Reformists Group, PL)
Federal Ministries:	Economic Affairs and Energy
Committees of the German Bundestag:	Economic Affairs and Energy (leading); Foreign Affairs; Environment; EU Affairs
Decision-making mode in the Council:	Qualified majority (adoption by a 55% majority of the Member States representing at least 65% of the population)

Formalities

Legislative competence:	Art. 194 TFEU (Energy)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

An obligatory **ex-ante assessment of IGAs** during the negotiations between Member States and third countries **as well as the obligation** for Member States **to take "utmost" account of the Commission's opinion** in the final IGA, **may prevent** Member States from concluding **IGAs** with third countries **which are in breach of EU law. This increases legal certainty** and reduces the risk of failure – e.g. in the planning of cross-border gas infrastructure projects. An ex-ante assessment may also prevent Member States from being put under pressure by third countries to sign IGAs which do not comply with EU law due to their dependency on energy imports from such third countries.

Impact on Efficiency and Individual Freedom of Choice

The twelve-week period for ex-ante assessment may prevent delays in realising e.g. infrastructure projects due to legal disputes following final conclusion of IGAs.
Since non-binding agreements between Member States and third countries may run counter to a coherent EU external energy policy, coordination between Member States and the Commission may be worthwhile. Since they are non-binding, however, it is sufficient for the Commission – as it suggests – simply to support cooperation between Member States and carry out an ex-post assessment.
The possibility for the Member States to designate parts of an IGA as confidential, protects contractual secrecy and increases the acceptance of ex-ante assessments in the Member States.

Impact on Growth and Employment

Negligible.

Impact on Europe as a Business Location

Negligible.

Legal Assessment

Legislative Competency

Unproblematic. The EU may take measures to safeguard the energy supply and a functioning internal energy market (Art. 194 TFEU).

Subsidiarity

To ensure the uniformity of the interpretation and application of EU law, the authoritative assessment and decision as to whether IGAs are compatible with EU law can only take place at EU level. In addition, support for coordination among Member States by the Commission may have added value for EU action – e.g. when coordinating a coherent external EU energy policy or preparing multi-lateral IGAs and non-binding agreements involving several Member States or the EU as a whole. Corresponding rules do not breach the principle of subsidiarity.

Proportionality with respect to Member States

Although, **an obligatory ex-ante assessment of IGAs** by the Commission is basically appropriate for recognising and preventing breaches of EU law at an early stage, when **combined with the obligation** for Member States **to take "utmost" account of the Commission's opinion** in the final IGA, it **represents drastic intervention in the sovereignty of the Member States and is therefore disproportionate** (Art. 5 (4) TEU). This is because it means that Member States can only exercise their right to negotiate and conclude international agreements in the energy sector, independently with third countries, subject to a de facto right of veto on the part of the Commission.

This sort of limitation on the Member States' scope for action under international law in an area where competence is shared between the EU and its Member States (Art. 2 (2) and Art. 4 (2) TFEU) can only be justified in exceptional cases in order to protect particularly important legal interests. Thus, although the Treaty establishing the European Atomic Energy Community – EURATOM Treaty – does provide for a comparable ex-ante right of assessment and veto for treaties made by Member States with third countries (Art. 103 EURATOM Treaty), such intervention seems justified in view of the danger presented by atomic energy, especially since all parties expressly agreed to it on conclusion of the EURATOM Treaty. By comparison, potential infringements by IGAs of EU energy law, EU competition law or EU rules on public procurement have less serious consequences. The Commission already has the ability to deal with these by way of the ex-post assessment of IGAs and introduction of infringement proceedings in the ECJ (Art. 258 TFEU). An additional "less harsh method" would also be e.g. voluntary agreement between the Commission and Member States.

Conclusion

An ex-ante check of IGAs may prevent them from infringing EU law. This will increase legal certainty. However, an obligatory ex-ante check of IGAs, in conjunction with the obligation to take "utmost" account of the Commission's opinion, represents drastic intervention in the sovereignty of the Member States and is therefore disproportionate.