# EC Consultation on the review of the Intergovernmental Agreements Decision

Enagás comments

22 October 2015

## Main comments

Enagás believes that:

- IGAs might play an important role in securing access for the EU to reliable and competitively priced energy sources. Such agreements underpin long term strategic investments, trade and can provide valuable protection of confidential commercial information.

- Any revision of the IGA Directive[1] should be founded on principles of freedom to conduct business and trade, the right of good administration as well as on European law for protection of commercially sensitive information.

- Full compliance with EU law of all agreements related to the gas import from non-EU suppliers is necessary, notably by reinforcing transparency of such agreements and compatibility with EU energy security provisions.

- IGAs which are not in line with EU law, represent an unfair competition and discriminatory treatment for those Member States which have signed IGA fully complying with EU law.

- If an IGA already signed is not in full compliance with the EU law, the EU Commission should be empowered to oblige the Member State(s) concerned to start a negotiation and amend the IGA as soon as possible, and not later than an already pre-defined period of time.

- While the current IGA decision 994/2012/EU is useful for receiving information on existing IGAs and for identifying problems posed by them in terms of their compatibility with EU law, it is however not sufficient to solve such problems. In practice, we have seen that renegotiating such agreements is very difficult and becomes highly politicised. The positions of the signatories have already been fixed, which creates political pressure not to change any aspect of the agreement.

- Existing reporting obligations under EU law provide ample opportunities for ex-post assessment of IGAs. However, mandatory ex-ante control mechanisms are also appropriate, provided that these are well designed and implemented on such a way that trade is not discouraged and is not in breach of already established European legal principles.

[1] Decision 994/2012/EU establishing an information exchange mechanism with regard to intergovernmental agreements (IGAs) between Member States and third countries in the field of energy (link)

## Consultation Questions

**Question 1:** How could the current information mechanism with regard to IGAs be strengthened in terms of contributing to security of energy supply and ensuring the proper functioning of the internal energy market?

1. Enagás notes that IGAs are "legally binding agreements between one or more Member States and one or more third countries having an impact on the operation or the functioning of the internal energy market or on the security of supply in the Union". Commercial contracts, either between Governments and private undertakings or between different private undertakings, are thus not covered, and they are not subject of this public consultation.

2. Since the adoption of the IGA Decision in 2012, 124 IGAs have been notified by Member States to the Commission. Almost all these IGAs were concluded before the entry into force of the IGA Decision.

3. After analysing the notified IGAs, the Commission has expressed doubts on the compatibility with EU law of 15 IGAs, mainly in relation to the Third Energy Package. Letters were consequently sent to the 9 Member States concerned in 2013. These Member States were invited to amend or terminate the IGAs in question in order to resolve the identified incompatibilities. However, to date, no Member State has managed to renegotiate or terminate the IGAs in question.

4. Enagás believes that all the IGAs must be compliant with the EU law. This should be the cornerstone principle of the revised IGA decisions, and any new measures should be oriented to ensure that this condition is fulfilled.

5. In order to prevent IGAs not compliant with EU law, two main options are possible: ex-ante measures to prevent non-compliant IGAs are signed, and ex-post measures to ensure that the Commission is empowered to force an amendment or cancellation of non-compliant IGAs.

6. Regarding ex-post measures, if an IGA already signed is not in full compliance with the EU law, the EU Commission should be empowered to oblige the Member State(s) concerned to start a negotiation and amend the IGA as soon as possible, and not later than an already pre-defined period of time.

7. Regarding ex-ante measures, Enagás notes that inspiration could be taken, for instance, from the well-functioning verification mechanism set by Article 103 of the EURATOM Treaty, which provides a 4 weeks obligatory ex-ante control prior to final signature of agreements concerning matters within the purview of this Treaty. A similar approach could be deployed for IGAs in other

sectors, such as gas, although the specificities of those markets (e.g. gas business is different from nuclear) should be taken into account.

8. The Commission should be given powers to facilitate and assist the achievement of IGAs which are aligned to the achievement of EU Energy and Climate Policy targets.

**Question 2:** What incentives or mechanisms could you envisage that would reinforce the transparency of IGAs? How could we enhance the exchange of information on IGAs prior to their signature?

9. It is important that an information exchange mechanism does not create obligations as regards to agreements between commercial entities. Where member states, on a voluntary basis wish to inform the Commission and other member states about commercial agreements that are referred to explicitly in their IGAs, they should be required to have obtained the consent of the commercial parties involved.

10. A way to increase transparency of IGAs prior to their signature would be to keep regularly informed the EU Commission about progress being made, conditions being negotiated and expected date of signature. If requested, the Commission could offer their experience to the involved Member States. In any case, within its monitoring role, the Commission should always provide a compatibility check to the Member State, and the Member State should be obliged to ensure that IGA contractual terms are aligned with EU law.

11. A way to facilitate IGA negotiations according to EU law, and minimise the intervention of the commission in the negotiation phase would the use of model clauses. The Commission would set out best practices and model clauses whose application should be used in IGAs, unless it is duly justified not to do so by the Member States involved (previous approval of the Commission). It should also be recognised that in addition to the Commission, the Energy Charter as well as specialised law firms can assist in providing model clauses.

12. The Commission is today required to make the information it receives on new and existing bilateral agreements with third countries in the field of energy available to all other member states. In all cases, special consideration should be given to the sharing of any associated commercially sensitive information, requiring the consent of commercial parties involved and the option to request the Member States and the Commission to enter into non-disclosure agreements.

**Question 3:** What incentives or mechanisms could you envisage that would reinforce the compatibility of IGAs with EU energy security provisions? Should a mandatory ex-ante verification mechanism be introduced?

13. Compliance checks for Intergovernmental Agreements (IGAs) are currently carried out after a Member State and a non-EU country have concluded an agreement. In future, the Commission should be informed about the negotiation of intergovernmental agreements from an early stage, so that a better ex ante assessment of IGAs' compatibility with in particular internal market rules and security of supply criteria is ensured.

14. Enagás is of the opinion that an ex-ante verification mechanism should be introduced. However, this ex-ante mechanism should not discourage trade and it should not be in breach of already established European legal principles. The mechanism should incentivise/oblige Member States to take care of fulfilling the EU law during the whole IGA negotiations. Commission should be informed regularly about conditions being negotiated. Commission monitoring and surveillance should be non-invasive or obstructive, providing always compatibility checks and always under strict confidentiality rules. In any case, before signing any IGA, it would be always necessary that Commission verifies that the new IGA fulfils the EU law and approves it.

**Question 4:** If a mandatory ex-ante verification mechanism were introduced:

a) What should be the scope of the ex-ante assessment in terms of the criteria against which IGAs should be assessed?

b) How should the assessment mechanism be set up? Do you think that the ex-ante verification mechanism that exists for IGAs in the nuclear field (Article 103 Euratom) would be the right model?

c) At what stage in negotiations should Member States inform the Commission about the planned conclusion of an IGA?

15. The scope of the ex-ante assessment in terms of the criteria against which IGAs should be assessed should be the EU treaties, the EU competition rules, the regulation on enhanced transparency (e.g. REMIT, EIR, MIFID2, etc.) and the internal energy market rules, including the security of supply regulations.

16. The ex-ante verification mechanism that exists for IGAs in the nuclear field (Article 103 Euratom) could be a good inspiration, but it is also advisable to remember that international trade in oil, coal, natural gas and electricity is of different nature than trade in nuclear fuel material. In the case of gas for instance, large infrastructure projects (i.e. high pressure pipelines crossing borders) are involved which is not the case for nuclear.

**Question 5:** Do you think that mandatory assistance from the Commission in the negotiation of IGAs would be a suitable way of ensuring the compliance of future IGAs with EU law? Please provide reasons for your point of view.

17. Enagás is in favour of preventive measures (i.e. ex-ante measures) than of corrective measures (i.e. post-ante measures). Once the IGA is signed, the experience shows that it is highly difficult to change it and that the problem becomes highly political one. That's why Enagás advocates for ex-ante assistance/verification before an IGA is signed.

18. Thus, mandatory surveillance and monitoring of the Commission, within reasonable and effective terms, would be appropriate.

19. Any new IGA should be previously verified and approved by the Commission, in order to ensure that it fulfils the EU law.

**Question 6:** What should the content of any model clauses be? What areas should they cover?

20. Enagás will not comment on which specific content or sections should be included in the model.

21. Enagás believes that it would be advisable that the Commission set out best practices and model clauses whose application should be used in IGAs, unless it is duly justified not to do so by the involved parties (previous approval of the Commission). It should also be recognised that in addition to the Commission, the Energy Charter as well as specialised law firms can assist in providing model clauses.

**Question 7:** Should such model clauses serve as a guide for Member States? Or should their use have consequences for the assessment process by the Commission?

22. See answer to question 6 (paragraph 18).