



12 November 2015

BUSINESSEUROPE position on Intergovernmental Agreements in the field of energy

Key messages

- BUSINESSEUROPE stresses the role of Intergovernmental Agreements (IGAs) in the field of energy in securing access for European businesses to reliable and competitive sources. Such agreements underpin long term strategic investments and trade.
- European businesses are confident that governments and industry have already at their disposal the necessary guidance and expertise under existing EU law. We strongly believe that existing reporting obligations provide ample opportunities for ex-post assessment of IGAs and commercial contracts.
- EU business community has not received an analysis by the Commission that explains the need and reasons for a revision of the Decision on information exchange mechanism with regard to IGAs in the field of energy. It remains unclear how serious the problem is, to what extent competition is hindered and security of energy supply is undermined.
- BUSINESSEUROPE believes that any revision of the Intergovernmental Agreements Decision (IGAD) 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 business secrets.
- If revised, an IGA information mechanism needs to be based on several principles, in particular:
 - Facilitate commercial entities in entering into investment and supply arrangements and provide adequate protection of commercial interests;
 - Avoid a mandatory ex-ante control mechanism that would be disproportionate, discourage trade and be in breach of with established European legal principles;
 - Target solely IGAs with an impact on the internal energy market or on the security of energy supply in the Union as assessed by member states;
 - Require business consent prior to the disclosure of sensitive private information and does not create obligations as regards to agreements between commercial entities;
 - Provide best practice examples and model clauses by the European Commission whose application should remain optional.



The role of IGAs in the energy sector

IGAs are, alongside host government agreements (HGA), important in establishing a stable framework for businesses to undertake long term strategic investments in that they typically:

- Set out the general obligations of governments and defines the applicable law and the relationship of the agreements with international law as well as with national law;
- Establishes obligations and mechanisms for exchange of information;
- Provides a constructing and operating entity where the agreements support an infrastructure project. In the construction phase such agreements sets out rights on land and requirements for security, standards, and local content. It also governs rules of access, taxes, handling of disputes and liabilities once the project is in operation.

European businesses strongly believe the EU growth agenda requires an investment-friendly regulatory and legal framework for IGAs and cautions against a centralist approach stifling competition, investments and undermining the principles of commercial freedom and protection of confidential business information and trade secrets¹.

BUSINESSEUROPE believes it is important that IGAs and HGAs can continue to provide strong trade secrets protection in all sectors of the economy, including energy. As shown in a study carried out for the Commission in 2013² providing such protection is important because trade secrets are:

- valuable business assets and play an important role in economic growth and fostering innovation;
- complementary and supplementary to patent and other formal protection rights and means;
- important to most, if not all, industries.

BUSINESSEUROPE is confident that governments and industry have at their disposal the necessary guidance and expertise under existing EU law. There is today a number of model IGAs, HGAs and project agreements available to energy sector participants, notably those of the Energy Charter³, that have the capability to support governments and industry alike in designing such agreements in line with national, EU and international law.

¹ Trade secrets result from the combination of different types of technical and commercial information. Technical secrets may include project and process related information whereas commercial secrets may consist of customer and supplier information, business methods and strategies, and cost and price information.

² Baker & McKenzie, http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf

³ Energy Charter – Agreements on Oil and Gas Pipelines.



Despite this, the Commission has still established that of the 124 IGAs reported under the IGAD there were doubts with regard to compatibility with EU law for 15 of them (12%). While the Commission has said little about the degree of incompatibility, it could be caused by the IGAs in question having been agreed prior to changes to EU law, and that their provisions might be too rigid to fully comply with these changes⁴.

The above-referenced trade secrets study concludes that “*the number of decisions adopted by National Competition Authorities in relation to trade secrets is very limited*” and that this “*suggests that only in very exceptional cases are trade secrets considered the cause of serious competition problems.*” It is questionable if any incompatibility observed by the Commission relates to the commercial agreements associated with the IGAs. It remains the case that the EU business community has not received analysis by the Commission that can provide a solid understanding of how serious the problem is, to what extent competition is hindered and security of energy supply is undermined. This lack of information undermines the business community’s ability to provide the Commission with an industry perspective on the pitfalls and merits of revising the existing IGAD.

Guiding Principles

In view of a possible revision of the IGAD, BUSINESSEUROPE stresses the need to recall that i) the freedom to conduct business, the right to property and the right to good administration are enshrined in the European Charter of Fundamental Rights and ii) settled case law establishes as general principles of European Union law the right to property; the freedom to pursue a trade or business; as well as the protection of business secrets. Accordingly BUSINESSEUROPE believes any revision of the IGAD must be guided strictly by the principles of:

- Fair processing of data for specified purpose and on the basis of consent of the party concerned;
- Compliance with rules subjecting EU institutions to control by an independent authority;
- Respect for the legitimate interests of confidentiality and of professional and business secrecy⁵;
- The liability of any damage caused by its institutions or by its servants in the performance of their duties⁶.

⁴ While an IGA could respect the Second Energy Package, the Third Energy Package could have made parts of the IGA invalid. Normally though such problems should be dealt with in the provisions that determines the applicable law and the relationship of the agreements with both international and national laws.

⁵ Because there is no uniform legal regime applicable to trade secrets in the EU, nor a common definition of trade secrets the IGAD will need to acknowledge the various ways national laws establishes such protection.

⁶ Such damage could amount to loss of sales; costs of internal investigations; increased future expenditure for protection; costs for negotiating settlements; and costs for prosecuting and litigating.



BUSINESSEUROPE also recalls the principles and provisions set out in Decision 2015/443 on security in the Commission whereby:

- Security in the Commission shall be based on the principles of legality, transparency, proportionality and accountability;
- Security of information covers all information handled by the Commission and shall, regardless of its form, balance transparency, proportionality, accountability and efficiency with the need to protect information from unauthorised access, use, disclosure, modification or destruction. Furthermore, security of information means that confidentiality, integrity and availability should be protected;
- Information shall only be released to those individuals who have a “need-to-know”;
- All information stored on Communication and Information Systems shall be protected in compliance with Decision C(2006) 3602.

BUSINESSEUROPE believes that disclosure of IGAs or HGAs could cause varying degrees of prejudice to the interest of the EU or of one or more of its member states. These agreements and commercial agreements and the terms referenced in them are trade secrets and likely to classify as at least “sensitive non-classified information” as defined in Decision 2015/443, the disclosure of which would undermine the protection of commercial interests of involved undertakings.

BUSINESSEUROPE would support a stipulation in the IGAD that any individual who is responsible for compromising or losing such information would be, as under Decision 2015/443, liable to legal or criminal proceedings by competent national authorities of the member states in accordance with their laws and regulations and to contractual remedies.

Finally, in relation to the principle of compliance with the EU data protection framework being controlled by an independent authority, European businesses believe that any revision of the IGAD requires the active involvement of the European Data Protection Supervisor (EDPS) to advise on the fair balance of public interests and the fundamental rights set out above. European business community also believes that revision of the IGAD must account for the final outcome of on-going talks between the European Parliament and the Council of the European Union to adopt the General Data Protection Regulation⁷.

Reinforcing transparency of IGAs and their compatibility with EU law

BUSINESSEUROPE recalls that a high degree of transparency on commercial contracts already exist by means of EU legislation:

- Regulation (EU) No 994/2010 requires all gas contracts with a duration longer than a year to be submitted to member states in which the contracting parties are registered.
- Regulation (EU) No 1227/2011 sets out in Article 8 that market participants shall provide ACER with a record of wholesale energy market transactions.

⁷ 2012/0011 (COD)



- Decision 994/2012/EU does not prevent Member States from communicating to the Commission, on a voluntary basis, commercial agreements that are referred to explicitly in intergovernmental agreements.
- In addition, a number of financial market legislation (EMIR, MIFID2, MIFIR, MAR) have bearings on reporting obligations in the energy sector.

European businesses believe that existing reporting obligations are robust and complete. They provide member states and the Commission with sufficient oversight to assess compliance of contractual practises in the European gas sector with EU law. The opportunities for ex-post assessment are ample and the additional need for a mandatory ex-ante control mechanism is disproportionate, will discourage trade and be out of line with the general principles set out above.

BUSINESSEUROPE reiterates that the Commission has presented little analysis upon which to establish recommendations for changes to the IGAD, but wishes to share the following observations in alignment with the above guiding principles:

- Security of energy supply and proper functioning of the internal energy market hinges on appropriate levels of investment in infrastructure, and on commercial entities entering into lawful competitive contractual arrangements for supplies. An IGA information mechanism should facilitate commercial entities in entering into investment and supply arrangements and provide adequate protection of commercial interests.
- International trade in oil, coal, natural gas and electricity is of different nature than trade in nuclear fuel material. Given the increasing market transparency that follows the reporting obligations under a number of internal energy market legislative acts, a framework for enhanced transparency on modelled on the Euratom mechanism is not required and neither is mandating the Commission to assist member states in carrying out negotiations. It is important that an information exchange mechanism:
 - Targets IGAs with an impact on the internal energy market or on the security of energy supply in the Union (the supply of coal, gas, oil or electricity through fixed infrastructure) and it should be the responsibility of member states to carry out the initial assessment of such impacts;
 - Does not create obligations as regards to agreements between commercial entities and allows the Commission to request participation as a voluntary observer to IGA negotiations. 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;
 - Allows for member states and commercial operators alike to seek guidance from the Commission in order to avoid potential conflicts with Union law and, as per today, set out timelines for the Commission to deliver such guidance. The Commission's involvement should continue to be consultative and voluntary;



- Allows for the Commission to set out best practices and model clauses whose application should remain optional. It should also be recognised that in addition to the Commission, the Energy Charter can assist member states and commercial parties in providing model clauses.
- 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, possibly also including in Article 4 (IGAD) a paragraph requiring the consent of commercial parties involved and the option to request the member states and the Commission to enter into non-disclosure agreements.

* * *