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Proposal for a

DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy

EXPLANATORY MEMORANDUM

The European Council of 4 February 2011 concluded that there is a need for better coordination of Union and Member States' activities with a view to ensuring consistency and coherence in the EU's external energy relations with key producer, transit, and consumer countries. The Council therefore invited Member States to inform from 1 January 2012 the Commission of all their new and existing bilateral energy agreements with third countries.¹

This proposal transforms the conclusions of the European Council into a mechanism with detailed procedures for the exchange of information between Member States and the Commission with regard to intergovernmental agreements, i.e., legally binding agreements between Member States and third countries which are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union.

The proposal accompanies the Commission Communication on security of energy supply and international cooperation - "The EU Energy Policy: Engaging with Partners beyond Our Borders."²

1. POLICY OBJECTIVE

The share of imported energy in the Union is constantly rising.³ The Member States and energy companies consequently seek new energy sources outside of the EU. Negotiations with powerful energy suppliers in third countries typically demand political support in the form of the conclusion of intergovernmental agreements between Member States and third countries. These intergovernmental agreements are normally negotiated bilaterally and are often the basis for more detailed commercial contracts.

Following the liberalisation of the electricity and gas markets in the European Union, in particular with the implementation of the Third Energy Package⁴, the Member States have introduced significant changes in their energy legislation. Complying with these legislative changes is not always in the commercial interest of third country energy suppliers. Facing a possible supply shortage, Member States are under increasing pressure to accept regulatory concessions in their intergovernmental agreements with third countries which are incompatible with Union energy law. Such regulatory concessions threaten the operation and proper functioning of the Union internal market for energy.

For example, when an intergovernmental agreement is concluded to support a specific gas pipeline project, it should not include any clauses that reserve the right of a particular shipper to contract for the full capacity or part of the capacity of the pipeline, unless such a clause is allowed under Union law subsequent to a favourable decision taken by the relevant authorities at national and Union level concerning an exemption from the third party access requirements of the Union energy legislation and subject to conditions specified in this legislation.

¹ This conclusion was confirmed by the Energy Council of 28 February 2011: "Improved and timely exchange of information between the Commission and Member States including Member States information to Commission on their new and existing bilateral energy agreements with third countries".

² COM(2011) 539

³ According to scenarios for 2030, total imports of energy from third countries may reach 57%.

⁴ OJ L 211, 14.8.2009

Otherwise, the agreement will be contrary to Union law and as a result it will not provide legal certainty for investors. Furthermore, the pipeline project will not be eligible for possible EU funding. As Member States cannot simply unilaterally modify intergovernmental agreements concluded with third countries in case certain provisions therein are found to infringe internal market rules, intergovernmental agreements that contain unlawful provisions put Member States into a situation of conflicting legal obligations and threaten the operation and proper functioning of the Union internal market for energy. Such agreements shall therefore not be signed by the Member States.

Furthermore, as was demonstrated during the gas dispute between the Russian Federation and Ukraine in January 2009, when the internal market is not functioning properly, the EU is more vulnerable to security of supply risks. Therefore it is important that the Member States and the Commission are aware of the amount and sources of energy imported.

To address these problems, it is important to improve the exchange of information between Member States and between Member States and the Commission on existing, provisionally applied and future intergovernmental agreements. This will facilitate the coordination at Union level and the effective implementation of the energy policy of the Union. In addition it will enhance the negotiating position of individual Member States vis-à-vis third countries to ensure security of supply, the proper operation and functioning of the Union internal energy market and create legal certainty for investment decisions and make possible potential EU funding of the project. Improved transparency with regard to intergovernmental agreements will also ultimately increase consistency and coherence, in a spirit of solidarity, in the Union's external energy relations and allow Member States to better benefit from the political and economic weight of the Union and the expertise of the Commission with respect to Union law. For this reason it is foreseen that Member States may request assistance from the Commission during the negotiations. The new instrument will therefore allow the Commission to support the Member States effectively.

2. POLICY OPTIONS AND CONSULTATIONS WITH INTERESTED PARTIES

Given the limited economic and social impacts of this proposal, it was not considered necessary to carry out a formal impact assessment. Taking into account the stated policy objectives, the Commission nevertheless evaluated a number of options to achieve the proper transposition of the European Council conclusions. A public consultation on the external dimension of the EU energy policy took place between 21 December 2010 and 7 March 2011. The consultation raised questions concerning the need for coordination between Member States and the Commission with regard to intergovernmental agreements to ensure security of supply and the proper operation and functioning of the Union internal energy market. In total, over 90 replies were received. The responses received highlighted the important role of the Union in promoting a reliable legal and institutional framework in order to achieve mutually advantageous relations with its main energy suppliers and transit countries. A meeting with energy experts was also held on 6 April 2011 in Brussels.

The status quo

The Commission is currently not aware of most intergovernmental agreements between Member States and third countries as no obligation exists to inform the Commission

comprehensively about these agreements.⁵ The Commission very roughly estimates that around 30 intergovernmental agreements may exist between Member States and third countries on oil and around 60 on gas.⁶ These are likely to relate either to the volumes of oil or gas imported into the Union from third countries or to the conditions for the supply of these volumes through fixed infrastructure. With regard to intergovernmental agreements between Member States and third countries on electricity, the total number is estimated to be lower. These agreements include the so called BRELL RING agreement between Belarus, Russia, Estonia, Lithuania and Latvia) on operating and use of the networks in the Baltic States. Similar agreements are likely to exist also with Balkan countries where the networks of third countries are synchronously connected with the Union Member States. A precise approximation on how regularly these intergovernmental agreements are modified or how many new ones may be concluded is not possible. The Member States also lack a mechanism to keep abreast of developments in the 27 Member States in this field. While some transparency requirements have already been adopted,⁷ these only relate to the gas sector (existing intergovernmental agreements and new agreements when concluded) and to information exchange between the Commission and the Member States (no exchange between the Member States themselves) and, already for these reasons, fall short of transposing the European Council conclusions. The status quo is therefore unsatisfactory and the Commission considers it necessary to suggest the establishment of a new more detailed and comprehensive information exchange mechanism.

A legal instrument or voluntary measures

Only clear obligations with regard to exchange of information on intergovernmental agreements between the Member States and between the Member States and the Commission are capable of ensuring the necessary transparency required for coordination at Union level. While the proposed mechanism also incorporates soft law elements such as the joint development of standard clauses, voluntary measures on their own have so far not proven to be sufficient to guarantee the type of exchange of information necessary to ensure that agreements concluded between Member States and third countries are lawful and do not threaten the proper operation and functioning of the Union internal energy market. A legal instrument for mandatory exchange of information is therefore the only option that will guarantee that the stated policy objectives are met, most appropriately in the form of a Decision.⁸

⁵ The only obligation which exists so far is foreseen in Article 13 (6) of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (Security of Gas Supply Regulation), OJ 295, 12.11.2010, p. 1 - 22. That provision imposes on Member States the obligation to notify intergovernmental agreements in the area of gas to the Commission. Existing intergovernmental agreements only need to be notified before 3 December 2011.

⁶ Taking into account the few known IGAs between the Member States and third countries, for example concerning the South Stream gas pipeline, this very conservative assessment is made under the assumption that a number of Member States have such IGAs with main suppliers of oil and gas, in particular when the oil or gas is delivered through pipelines.

⁷ See Article 13 (6) of the Security of Gas Supply Regulation.

⁸ Although both a Regulation and a Decision appear possible, a Decision is deemed more appropriate as the legal instrument will not have direct effect on individuals but is exclusively addressed to Member States.

Scope

In order to accurately transpose the Council conclusions, it is proposed that the Decision covers all existing, provisionally applied and new intergovernmental agreements which are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union as these two issues are intrinsically linked. It is particularly important that the Decision comprises all intergovernmental agreements which have an impact on the supply of gas, oil or electricity through fixed infrastructure (such as pipelines and networks) or on the overall amounts of energy imported into the EU.

Appropriate timing for exchange of information

Early information to the other Member States and to the Commission on future intergovernmental agreements appears to be crucial. Full knowledge of the content of the intergovernmental agreements already in force is also necessary. It is therefore considered pertinent that Member States first of all inform the Commission of their intention to open negotiations and communicate the ratified version of the intergovernmental agreement. The Commission should have a central role in promptly disseminating this information to the other Member States taking into account requests of Member States for confidential treatment.

However, without exchange of information already during the course of the negotiations, it will be difficult to influence future intergovernmental agreements towards conformity with the Union energy legislation and the Union policy on security of supply. Importantly, there would be a missed opportunity to provide the necessary legal certainty concerning the status and validity of intergovernmental agreements for major energy projects and consequent funding. This would be detrimental for Union investments and therefore Union security of energy supply.

The existing ex-post control mechanism in the form of infringement procedures does not address this problem in the most efficient way.⁹ This is because, once intergovernmental agreements have been signed and even more once they are ratified, Member States cannot unilaterally modify them in case certain provisions therein are found to infringe internal market rules but would need to renegotiate the intergovernmental agreements with the third countries in question. Continuous contacts and exchange of information during the negotiations and the possibility for a compatibility check on request of the Member State concerned or of the Commission before the intergovernmental agreement is signed is therefore considered essential. In addition, it is proposed that the Member States may request the assistance of the Commission services during the negotiations. The experience gained through these exchange mechanisms should enable the joint development of voluntary standard clauses that Member States can use in future intergovernmental agreements. The use of such standard clauses would help preventing conflicts of intergovernmental agreements with Union law.

Mandatory ex-ante control or more flexible compatibility check

It is not proposed to create an exhaustive mandatory ex-ante control mechanism applicable to all relevant intergovernmental agreements as such a mechanism would put a too heavy burden

⁹ It should be noted that the notification of existing intergovernmental agreements would not prevent the Commission from starting infringement procedures if necessary, i.e., if it can be shown in a given case how a particular agreement infringes the internal market rules.

on Member States and would delay the conclusion of all future intergovernmental agreements by at least a few months.

Instead, it is considered sufficient to provide a more flexible compatibility control mechanism where the Commission, on its own request or on request of the Member State that is negotiating the intergovernmental agreement, assesses the compatibility of the negotiated agreement with Union law before the agreement is signed. In case a compatibility check has been done on request of the Member State concerned or of the Commission, in order not to unduly delay the negotiation, in the absence of an explicit opinion by the Commission within four months, the Commission would be deemed not to have raised objections.

The proposed option will significantly increase the ability of the Union to maintain the proper operation and functioning of its internal energy market and safeguard security of energy supply and the realisation of major energy projects through a coordinated and therefore efficient use of the Union bargaining power. In this respect, the positive impacts of the proposal outweigh the rather limited extra burden in terms of transparency obligations put on Member States when negotiating intergovernmental agreements with third countries.

3. LEGAL ELEMENTS OF THE PROPOSAL

The aim of this proposal is to transform the 4 February 2011 European Council conclusions into a mechanism with detailed procedures for the exchange of information between Member States and the Commission with regard to intergovernmental agreements in order to facilitate coordination at Union level to ensure security of supply, the proper operation and functioning of the Union internal energy market and create legal certainty for investment decisions.

On an individual level, it is difficult for Member States to ensure that these policy objectives are met. Member States do currently not have sufficient information to judge the overall implications of their intergovernmental agreements on the security of supply situation in the EU. Member States' own assessments concerning the proper implementation of the Union energy rules in relation to these intergovernmental agreements also do not bring sufficient legal certainty for investors. Union coordination will on the other hand benefit all the stated objectives. As the proposed exchange of information will increase the Member States' negotiating position vis-à-vis third countries, it will ensure the proper implementation of the Union rules and policies. It will allow taking the perspective of the collective security of supply situation in the EU, instead of a national perspective. The use of commonly developed standard clauses and the proposed compatibility check will furthermore provide investors with increased legal certainty as regards the likely compatibility of the intergovernmental agreement with EU legislation. The proposal is therefore justified on grounds of subsidiarity. The proposal also respects the proportionality principle as the voluntary alternatives examined do not guarantee that sufficient exchange of information takes place to ensure that the policy objectives are met.

Intergovernmental agreements are defined as all legally binding agreements between Member States and third countries which are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the EU.

To avoid duplication, intergovernmental agreements for which a specific notification to the Commission is already foreseen in other acts of Union legislation are excluded from the proposal, except intergovernmental agreements which must be submitted to the Commission

according to the Security of Gas Supply Regulation.¹⁰ It is also proposed that the new mechanism shall not concern agreements between commercial operators except and only as far as the intergovernmental agreement explicitly refers to these commercial agreements.

Member States shall send all existing and provisionally applied intergovernmental agreements between them and third countries to the Commission at the latest three months after the entry into force of the proposed Decision. The Commission shall also be informed as early as possible of their intention to open negotiations on future intergovernmental agreements or to amend existing intergovernmental agreements. The Commission shall be regularly informed on the negotiations. On request, the Commission shall participate as an observer to the negotiations. In this context, Member States also have the right to ask the Commission for assistance during their negotiations with third countries.

Once the intergovernmental agreement is ratified, the ratified text shall be sent to the Commission. Intergovernmental agreements shall be submitted in their entirety, including their annexes, other texts they refer to and all amendments thereto. The Commission will make all information received available to the Member States via a database. When providing information to the Commission, a Member State may indicate whether any part of the information in the agreements submitted is to be regarded as confidential.

The Commission shall facilitate the coordination among Member States with a view to reviewing developments in relation to intergovernmental agreements, identifying common problems and solutions, and developing standard clauses that Member States can use in future intergovernmental agreements.

In addition, the Commission shall, on its own initiative at the latest within four weeks after it has been informed that negotiations have been closed, or on request from the Member State which has negotiated the intergovernmental agreement, have the right to assess the compatibility of the negotiated agreement with Union law in order to ensure that the agreement is lawful. In this case, Member States have to submit the fully negotiated intergovernmental agreement to the Commission before the intergovernmental agreement is signed. The Commission has an assessment period of four months. If such compatibility check has been requested, in the absence of an opinion of the Commission within this examination period, the Commission is deemed not to have raised any objections.

The Commission shall prepare a report on the application of the proposed Decision four years after its entry into force.

The proposed decision will enter into force 20 days following its publication in the Official Journal.

4. BUDGETARY IMPLICATIONS OF THE PROPOSAL

The proposal has no implication for the Union budget. The limited additional administrative burden for the European Commission does not imply any additional costs.

¹⁰ Duplications are as well avoided in the case of the Security of Gas Supply Regulation as a notification in accordance with the more detailed rules foreseen in this proposal would fulfil the requirements set out in the Security of Gas Supply Regulation.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹¹,

Having regard to the opinion of the Committee of the Regions¹²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The European Council has asked Member States to inform from 1 January 2012 the Commission on all their new and existing bilateral energy agreements with third countries. The Commission should make this information available to all other Member States in an appropriate form, having regard to the need for protection of commercially sensitive information.
- (2) Union-law requires Member States to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Member States should therefore avoid or eliminate any incompatibilities between Union law and international agreements concluded between Member States and third countries.
- (3) The proper functioning of the internal energy market requires that the energy imported into the Union from third countries, is fully governed by the rules establishing an internal energy market. An internal energy market that is not functioning properly puts the EU in a vulnerable position with regard to security of energy supply. A high degree of transparency with regard to agreements between Member States and third countries in the field of energy would allow the Union to take coordinated action, in a

¹¹ OJ C, p. . .

¹² OJ C, p. . .

spirit of solidarity, in order to ensure that such agreements are in accordance with Union legislation and effectively secure the supply of energy.

- (4) The new information exchange mechanism should only cover intergovernmental agreements which are likely to have an impact on the internal market for energy or on the security of energy supply as these two issues are intrinsically linked. It should comprise in particular all intergovernmental agreements which have an impact on the supply of gas, oil or electricity through fixed infrastructure or which have an impact on the amount of energy imported into the Union from third countries.
- (5) Intergovernmental agreements which need to be notified in their entirety to the Commission on the basis of other Union acts such as [Regulation (EU) No .../... of the European Parliament and of the Council of ... establishing transitional arrangements for bilateral investment agreements between Member States and third countries¹³] should be excluded from the information exchange mechanism established by this Decision.
- (6) The exemption from the notification obligation mentioned should not apply to intergovernmental agreements which must be submitted to the Commission in accordance with Article 13(6) of Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC.¹⁴ Such intergovernmental agreements with third countries which have an impact on the development and use of gas infrastructure and gas supplies should henceforth be notified according to the rules laid down in this Decision. To avoid duplication, a notification submitted in accordance with this Decision should be considered to fulfil the notification obligation set out in Regulation (EU) No 994/2010.
- (7) This Decision should not concern agreements between commercial entities, except and only as far as the intergovernmental agreements refer explicitly to such commercial agreements. Commercial operators negotiating commercial agreements with operators from third countries may nevertheless seek guidance from the Commission in order to avoid potential conflicts with Union law.
- (8) Member States should submit to the Commission all existing, provisionally applied within the meaning of Article 25 of the Vienna Convention¹⁵ and new intergovernmental agreements.
- (9) Member States should already notify the intention to open negotiations to the Commission with regard to new intergovernmental agreements or amendments to existing intergovernmental agreements. The Commission should be kept informed regularly on the ongoing negotiations. It should have the right to participate as an observer in the negotiations. Member States may also request the Commission to assist them during their negotiations with third countries.
- (10) The Commission should, on its own initiative or on request from the Member State which has negotiated the intergovernmental agreement, have the right to assess the

¹³ [COM 2010 (344) final, not yet adopted]

¹⁴ OJ L 295, 12.11.2010, p. 1

¹⁵ Vienna Convention on the Laws of the Treaties 1969

compatibility of the negotiated agreement with Union law before the agreement has been signed.

- (11) All final, ratified agreements covered by this Decision should be transmitted to the Commission in order to allow for full information of all other Member States.
- (12) The Commission should make all received information available to all other Member States in electronic form. The Commission should respect requests from Member States to treat information, in particular commercial information, submitted as confidential. Requests for confidentiality should however not restrict access of the Commission itself to confidential information as the Commission needs to have comprehensive information for its own assessment. The requests for confidentiality are without prejudice to the right of access to documents as provided for in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.¹⁶
- (13) A permanent exchange of information on intergovernmental agreements at Union level should allow to develop best practices. On the basis of those best practices the Commission should recommend standard clauses for the use in intergovernmental agreements between Member States and third countries. The use of these non-binding standard clauses should exclude conflicts of intergovernmental agreements with Union law.
- (14) The improved mutual knowledge of existing and new intergovernmental agreements should allow for a better co-ordination in energy matters between the Member States themselves and between the Member States and the Commission. Such improved co-ordination should enable Member States to fully benefit from the political and economic weight of the Union.
- (15) The mechanism for the exchange of information provided for in this Decision should be without prejudice to the application of the Union rules on infringements and competition.

HAVE ADOPTED THIS DECISION:

Article 1
Subject matter and scope

1. This Decision establishes a mechanism for the exchange of information between Member States and the Commission with regard to intergovernmental agreements.
2. Intergovernmental agreements which are already in their entirety subject to other specific notification procedures under Union law, except for intergovernmental agreements which shall be submitted to the Commission in accordance with Article 13(6) of Regulation (EU) No 994/2010, shall not be covered by this Decision.

¹⁶ OJ L 8 of 12.01.2001, p. 28

Article 2
Definitions

For the purposes of this Decision the following definitions apply:

- (1) "intergovernmental agreements" means any legally binding agreements between Member States and third countries which are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union;
- (2) "existing intergovernmental agreements" means intergovernmental agreements which have entered into force prior to the entry into force of this Decision.

Article 3
Exchange of information between Commission and Member States

1. Member States shall submit all existing and provisionally applied intergovernmental agreements between them and third countries in their entirety, including their annexes and other texts they refer to explicitly and all amendments thereto to the Commission at the latest three months after the entry into force of this Decision. The Commission shall make the received documents accessible in electronic form to all other Member States. Existing or provisionally applied intergovernmental agreements which have already been communicated in accordance with Regulation (EU) No 994/2010 to the Commission at the date of entry into force of this Decision, which are fulfilling the requirements of this paragraph, shall be considered as communicated for the purposes of this Decision.

2. When a Member State intends to enter into negotiations with a third country in order to amend an existing intergovernmental agreement or to conclude a new intergovernmental agreement, the Member State shall inform the Commission in writing of its intention at the earliest possible moment before the envisaged opening of the negotiations. The information provided to the Commission shall include the relevant documentation, an indication of the provisions to be addressed in the negotiations, the objectives of the negotiations and other relevant information. In case of amendments to an existing agreement, the provisions that are to be renegotiated shall be indicated in the information provided to the Commission. The Commission shall make the received information accessible to all Member States in electronic form. The Member State concerned shall keep the Commission informed regularly of the ongoing negotiations. On request of the Commission or the Member State concerned, the Commission may participate as an observer in the negotiations.

3. Upon ratification of an intergovernmental agreement or of an amendment to an intergovernmental agreement, the Member State concerned shall submit the agreement or the amendment of the agreement, including their annexes and other texts these agreements or amendments refer to explicitly, to the Commission which shall make the received documents, with the exception of confidential parts identified according to Article 7, accessible to all other Member States in electronic form.

Article 4
Assistance from the Commission

When a Member State informs the Commission pursuant to Article 3(2) of its intention to enter into negotiations in order to amend an existing intergovernmental agreement or to

conclude a new intergovernmental agreement, the Member State may request the assistance of the Commission in the negotiations with the third country.

Article 5

Ex-ante compatibility control

The Commission may on its own initiative until four weeks after it has been informed of the closure of the negotiations at the latest or on request from the Member State which has negotiated the intergovernmental agreement, assess the compatibility of the negotiated agreement with Union law before the agreement has been signed. In case the Commission or the Member State concerned ask for such an ex-ante assessment of the negotiated intergovernmental agreement with Union law, the negotiated but not yet signed draft intergovernmental agreement shall be submitted to the Commission for examination. The Member State concerned shall refrain from signing the agreement for a period of four months following the submission of the draft intergovernmental agreement. In agreement with the Member State concerned, the examination period might be prolonged. When a compatibility control has been requested, in the absence of an opinion by the Commission within the examination period, the Commission shall be deemed not to have raised objections.

Article 6

Coordination with Member States

1. The Commission shall facilitate the coordination among Member States with the view to:

- (a) review developments in relation to intergovernmental agreements;
- (b) identify common problems in relation to intergovernmental agreements and to consider appropriate action to address these problems;
- (c) on the basis of best practice, develop standard clauses the use of which would ensure full compliance of future intergovernmental agreements with Union energy legislation.

Article 7

Confidentiality

When providing information to the Commission in accordance with Article 3, the Member State may indicate whether any part of the information, in particular commercial information, is to be regarded as confidential and whether the information provided can be shared with other Member States. The Commission shall respect these indications. Requests for confidentiality do not restrict access of the Commission itself to confidential information.

Article 8

Review

1. Four years after its entry into force, the Commission shall submit a report on the application of this Decision to the European Parliament, the Council and the European Economic and Social Committee.

2. The report shall in particular assess whether this Decision provides for a sufficient framework in order to ensure full compliance of intergovernmental agreements with Union law and a high level of coordination between Member States with regard to intergovernmental agreements.

Article 9
Entry into force

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 10
Addressees

This Decision is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President