The role of the Commission in Intergovernmental Agreements in the field of energy. A foot in the door technique?

Acknowledgements

The author would like to thank the participants to *Panel 505: Integration in European Energy Governance II: Actors* at the UACES 48th Annual Conference, University of Bath, UK, 3-5 September 2018. The author would also like to thank the anonymous reviewers for their most helpful comments as well as the Politics and International Relations Group at the University of Hertfordshire for their support, especially Dr Benjamin Nutt for proofreading the first draft of this paper. All errors remain the author's alone.

Introduction

Intergovernmental agreements (IGAs) are legally binding energy agreements between one or more member states of the European Union (EU) and one or more third countries. These agreements, signed between governments, are often used to support commercial contracts signed between energy companies and, as such, often concern regulatory matters such as third-party access to energy networks or energy prices. Instances of IGAs are those concluded bilaterally between 2009 and 2010 by the governments of Russia on the one hand and of Austria, Bulgaria and Hungary on the other, in the context of South Stream (Prontera, 2017b, p. 116).

Although they have long been a feature of the EU energy market, the regulation of IGAs at the EU-level is recent. Some general provisions on IGAs were only included in the Regulation No 994/2010 concerning measures to safeguard the security of gas supply and in 2011 the Commission (2011) put forward a proposal for a compulsory *ex ante* assessment of

all new IGAs concluded by member states as well as an *ex post* assessment on the existing ones. Since then, legislation has been developing in the face of conflict between the Commission and the member states where the former has been pushing forward its preferences for an *ex ante* control mechanism on IGAs facing the reluctancy of the latter. This paper aims to explain the extent to which the Commission has been able to achieve its objective of an *ex ante* control mechanism on IGAs as well as the conditions that made this possible. The paper proposes a twofold argument. First, the Commission has made an effective use of its agenda setting power, pushing its preference for an *ex ante* control mechanism through two consecutive proposals, one in 2011 leading to Decision 994/2012 and one in 2016 for the revision of the latter. In 2016 the Commission had already 'a foot in the door' and tried to capitalize on what had been achieved up to that point. Second, whether member states have similar or divergent preferences on IGAs has an impact on the ability of the Commission to achieve its own preferences on this matter.

The paper is structured as follows. The next section offers some background on IGAs as well as the initiative of the Commission in this field. It starts with the first regulation mentioning IGAs on gas issued in 2010, before moving to the controversial Decision 994/2012 and finishing with Decision 2017/684. The second section consists of a literature review together with a discussion of the theoretical and methodological framework of this study. The Principal-Agent Model (PAM) of delegation is used as middle-range theory providing relevant concepts, as well as hypotheses to investigate the role of the Commission and the dynamics of its relationship with the member states. The process-tracing method is also presented as the most suitable approach to analyse the principal agent interactions and the behaviour of the Commission on IGAs. The third section analyses the empirical data and unpacks the effect of the agenda setting power of the Commission as well as of the preference alignment across the member states on the ability of the Commission to push for an *ex ante*

control mechanism on IGAs. Finally, a concluding section summarizes the main findings and reflects upon the main empirical and theoretical implications of this study.

Intergovernmental Agreements in the field of energy. Balancing compliance with EU energy law and energy security.

Traditionally, the energy security of the EU has been mainly addressed through long-term bilateral contracts between EU and non-EU energy companies. IGAs have often been concluded between governments as umbrella agreements to facilitate commercial contracts between companies. In the early 2000s, for instance, when the gas contract of the French, Italian and German companies with Gazprom were about to expire, Chirac, Prodi and Schroder accompanied their champions to sign contracts of supply for the next 20-25 years (Furfari, 2012, pp. 399–400). Therefore, IGAs have enabled EU member states to secure their energy supply for decades, often importing heavily from one single supplier and through a single route.

The first involvement of the European Commission in the field of IGAs – although only limited to gas – was triggered by the energy crises of 2006 and 2009 during which disputes between Russia and Ukraine led to gas disruptions causing significant economic damage to the member states who relied on supplies through these pipelines (Stern, Yafimava, and Pirani 2009). It was in this context that a first step towards a sharing of information on IGAs was made with Regulation No 994/2010 concerning measures to safeguard the security of gas supply. This Regulation aimed to promote greater transparency on gas contracts and IGAs, requiring gas undertakings to report standard information such as duration, contracted annual volumes, delivery points and maximum daily volumes in case of emergency, on gas contracts with suppliers from third countries and a duration of more than 1 year. The information was to be sent to the Commission in an aggregated way (Beyer, 2012, p. 128). Additionally, the regulation required member states to communicate existing IGAs as well as the new ones

when concluding them (Beyer, 2012, p. 129). It is important to note that the original Commission proposal had foreseen the *ex ante* notification of IGAs. During the negotiations, however, some member states were strictly opposed to the Commission being given a role in assessing the compliance of IGAs with internal market legislation. Italy, Greece, France and Germany expressed the strongest opposition while 'new' member states, which usually consult the Commission before the conclusion of new intergovernmental pipelines contracts, were supportive of the proposal (Beyer, 2012, p. 129).

According to the Commission (2011, p. 1) however, the transparency requirements adopted under Regulation 994/2010 were not enough to impact on a scenario defined as 'unsatisfactory'. The Commission was not aware of most IGAs and member states themselves lacked a mechanism to 'keep abreast of developments' in the energy field (European Commission, 2011, p. 1). 'A legal instrument for a mandatory exchange of information' was therefore deemed the 'only option' to ensure transparency as well as compatibility of IGAs with EU law (European Commission, 2011, p. 3). The proposal was strongly opposed by most of the member states which could not accept an involvement of the Commission in what they considered sensitive national matters.

Decision 994/2012 was adopted only after a long and complicated process of negotiations and put in place an *ex post* control mechanism on IGAs meaning that member states had to notify their existing IGAs in the field of energy. Building on a report on the application of the Decision, in 2016, the Commission published a proposal for a Decision repealing the existing one (European Commission, 2016a) with the argument that while 'useful for receiving information on existing IGAs and for identifying problems posed by them in terms of their compatibility with EU law', it was 'not sufficient to solve such incompatibilities' (European Commission, 2016a, p. 2). This is so because, once signed, even if found incompatible with EU law, IGAs are very difficult, if not impossible, to amend or renegotiate because member

states have to respect the agreement already taken with third countries. This proposal also met the reluctance of the member states and led to tense negotiations in the Council. The resulting Decision 2017/684 finally establishes an ex ante control mechanism on IGAs. While the objectives set in the proposal were met only partially, some progress can be seen if the entire process of evolution of the EU legislation on IGAs is considered.

Theoretical and methodological approach: tracing the impact of the Commission agenda setting power and the member states preference alignment on the legislative processes

Academic work on the role of the Commission on IGAs is not abundant. On the one hand, recent literature on the EU energy policy aims to contribute to the conceptualisation of the EU in this policy area. Indeed, the EU has been defined as a regulatory state (Goldthau and Sitter 2014), a catalytic one (Prontera 2017a, 2017b) and as a global actor (Batzella 2018a, Schunz and Damro 2019). While some of these studies mention the attempt of the Commission to introduce legislation on IGAs (Prontera 2017a, Andersen, Goldthau, and Sitter, 2017) they do not aim to provide a thorough analysis of the role of the Commission in regulating this specific matter. On the other hand, interesting insights come from the literature on decision making in the EU, which explores different theoretical frameworks to illustrate how the EU's political agenda is shaped by the Commission as well as by the member states (see, for instance Tosun et al. 2015). More recently, and not necessarily looking at energy policy, this literature has investigated the role of formal and informal institutional structures in which negotiations of legislative amendments take place (Cross and Hermansson 2017), the politicisation of the role of the Commission (Nugent and Rhinard 2019) but also the impact of the internal organizational structure of the latter on agenda setting and policy making (Hartlapp et al. 2010). While these studies are useful, this paper aims to explore the role of the Commission on IGAs by looking at its interactions with the

member states. Recent studies have started to use principal agent literature to unpack the relations between the Commission and the member states in this policy area, suggesting that the preference alignment across the member states as well as the preference alignment between the Commission on the one hand and the member states on the other are key explanatory factor of the behaviour of the Commission in the legislative process leading to Decision 994/2012 (Batzella 2018b).

This paper therefore builds on the theoretical and methodological premises of the Principal Agent Model of delegation (PAM) which has been used extensively in EU studies to conceptualise the Commission as an agent and the member states as principals (See, for instance, Damro, 2007; Delreux and Laloux, 2018; Delreux, 2011; Delreux and Adriansen, 2017; Egan, 1998; Franchino, 2001; Garrett, 1992; Garrett and Weingast, 1993; Kassim and Menon, 2003; Moravcsik, 1993, 1998; Pierson, 1996; Pollack, 1997, 2003, 2006). The model assumes that the principals delegate some powers to the agent with the expectation that the latter would act according to their desires (Moe, 1984, p. 756). The relations between a lawyer and their clients or between a doctor and their patients are good illustrations of principal agent relations: the clients as well as the patients, delegate some power to the lawyer and the doctor respectively, with the expectation that they will satisfy their interests. One of the main assumptions of the model is that at some point, the agent will develop their own interests and preferences which they will try to satisfy instead of those of the principals. This problem is known as 'agency losses' (Pollack, 2003). The principal agent relation then is all about striking a balance between the powers and autonomy granted to the agent on the one hand and the control mechanisms used by the principals to keep an eye on the agent on the other. Principals can use control mechanisms before the delegation takes place – namely establishing administrative procedures to be followed by the agent, such as rules on the agenda setting role of the Commission – but also after the delegation has taken place by, for

instance, establishing procedures to monitor and influence agent behaviour such as the examination of reports issued by the Commission on the implementation of legislation (McCubbins and Page 1987; Pollack 1997; 2003).

Rather than as a fully-fledged theory, the model has been used as a middle-range theory (Pollack 2003) or 'heuristic tool' helpful to 'reduce complexity in real-life political processes' and to 'make sense of certain aspects of EU policy-making' (Delreux and Adriaensen 2017, p. 10). This literature is helpful to understand the divisions of power within the EU (Delreux and Adriaensen 2017) but also the dynamics of the relations occurring between the Commission and the member states. A Principal Agent (PA) analysis is therefore expected to shed light on whether, when it comes to IGAs, the Commission satisfies the preferences of the member states or its own preferences instead. The literature has developed several hypotheses about the behaviour of the agent after delegation has taken place and two factors seem particularly helpful for this analysis. First, the literature argues that the Commission has important agenda setting powers which will use to push its interests further. The Commission is often understood as a competence maximizer with a strong preference for European integration (Pollack, 2003). Amongst the power delegated to the Commission[1], agenda setting is the most relevant for the analysis conducted in this paper. The sole right of initiative for most of EU legislation is an 'extraordinary' delegation of power to the Commission (Pollack 2003, p. 84 quoting Majone, 2001). Indeed, 'any legislation adopted by the Council, or by the Council and the Parliament, must proceed on the basis of a proposal from the Commission' (Pollack, 2003, p. 84). According to Pollack (2003, p. 85), 'in those cases where the Council can adopt legislation by qualified majority, the Commission's proposal is much easier to adopt than to amend, and its agenda-setting power is

[1] According to Pollack (2003), principals may delegate four key functions or powers to their agents: monitoring of individual compliance with agreements between them, solving problems of incomplete contracting in institutional agreements, adopting regulations and setting the agenda.

enhanced accordingly'. The first hypothesis of this paper is therefore that the Commission will use its agenda setting power to satisfy its preference for an *ex ante* control over IGAs. Second, PA literature argues that the preference alignment across member states, as well as the preference alignment between the Commission on the one hand and the member states on the other, is likely to affect the opportunity for the agent to deviate from the preferences of the principals (Delreux, 2011, p. 55; Da Conceição, 2010, p. 1109; Elsig, 2007, p. 931; Batzella, 2018b). When the preferences of the principals are heterogenous, the Commission's discretion is more likely to increase, making it more able to deviate from the preferences of the member states and to satisfy its own preferences instead (Elsig 2010, Da Conceição-Heldt 2011, 2017, Batzella 2018b). The second hypothesis of this paper is therefore that when the preferences across the member states are heterogeneous, the Commission is more likely to push forward its preferences on IGAs.

The paper applies a process-tracing method (George and Bennett, 2005) which is often used to identify the intervening causal process between an independent variable – or variables – and the outcome of the dependent variable. More precisely, process tracing is applied to see how the agenda setting power of the Commission and the preference alignment of the member states (causes) affect the ability of the former to push its preferences forward (outcome of interest). In line with PA literature, the analysis aims to 'observe [the] hypothesized causal mechanisms at work' and to 'disaggregate'[s] the evolution of EU legislation on IGAs 'into a number of principal-agent interactions' (Pollack, 2003 p.70). The evolution of legislation on IGAs is analysed in detail to see not only the final outcome (i.e. the extent to which the Commission attains its preferences) but also a) how the Commission actually tries to take advantage of its agenda setting power with consecutive proposals and b) how the preference alignment of the member states in the Council actually makes them more or less able to push back on Commission demands. The analysis expects to find evidence of

the behaviour of the Commission and the member states trying to satisfy their respective preferences. The former mainly issuing ambitious proposals and the latter trying to amend those proposals in the Council.

In conducting the analysis, the paper relies on a wide range of sources. First, it considers documents produced in the framework of the legislative processes analysed, such as official Commission documents, legislative texts, European Council conclusions, and documents produced by the Council, as well as opinions and documents produced by individual member states. In addition, it builds on data collected through six interviews conducted with EU officials working in DG Energy of the Commission, in the Council Secretariat and in some Permanent Representations. Interviews have been conducted by the author in the periods May-July 2013 and May-June 2018.

Analysing the evolution of legislation on IGAs: attempting the 'foot in the door' technique?

This section analyses the evolution of EU legislation on IGAs to explain the extent to which as well as the conditions under which the Commission has pushed forward its preferences for an *ex ante* control mechanism on IGAs. Developing across two consecutive legislative processes, the analysis aims to unpack the effect of two potential explanatory factors offered by PA literature, namely the agenda setting power of the Commission and the preference alignment across the member states. The analysis also reflects upon the extent to which the preferences of the Commission and those of the member states are reflected in the final Decisions. Table 1 summarises the main objectives of the Commission for both proposals as well as the extent to which those objectives have been achieved in the respective Decisions.

<Table 1. Evolution of legislation on IGAs>

In September 2011, the Commission (2011) issued a proposal for a Decision setting up an information exchange mechanism with regard to IGAs in the field of energy[2]. In its proposal, the Commission referred to the European Council Conclusions of 4 February 2011 inviting the former to submit 'a communication on security of supply and international cooperation aimed at further improving the consistency and coherence of the EU's external action in the field of energy' as well as inviting member states to inform the Commission 'on all their new and existing bilateral energy agreements with third countries' (European Council, 2011, p. 4). In PA terms, the Conclusions of the European Council can be seen as an act of delegation (Bocquillon and Dobbels 2013) with which member states have tasked the Commission to coordinate and ensure exchange of information on IGAs. Building on these Conclusions, the Commission issued a very ambitious proposal calling for a 'legal instrument for a mandatory exchange of information' covering 'all existing, provisionally applied and new intergovernmental agreement' in oil, gas and electricity (European Commission 2011, pp. 3-4). The mechanism would have given the Commission additional competences on IGAs, notably the opportunity to assess their compatibility with EU law before their signature (European Commission, 2011, p. 5) as well as the opportunity to participate as an observer in the negotiations (recital 9). The Commission was aware that some of the IGAs signed by the member states were not in conformity with internal market rules in terms of, for instance, third party access or price establishment (Interview No 3, 2013). In line with the first hypothesis, using its agenda setting power, the Commission built on the Council Conclusions to propose a fully-fledged mandatory mechanism for an *ex ante* control mechanism on IGAs. This proposal was met with 'strong opposition from a large number of the member states'(Council of the European Union, 2012, p. 2) which were opposed to a compulsory legal mechanism. The legislative process was particularly conflictual with considerable

[2] For an in-depth analysis of the legislative process leading to Decision 994/2012 see Batzella (2018b).

attention from the press stressing the opposition of the member states to the proposal (Euractiv, 2012) as well as suggesting that the Commission was trying to get more control on IGAs (European Voice, 2011). Member states opposed the obligatory nature of some of the provisions contained in the proposal especially the obligation to inform the Commission before the start of any negotiations as well as the right of the Commission to be present during negotiations (Council of the European Union, 2012, p. 2). The preference alignment of the member states was rather homogenous with the majority of them being against the proposal (Council of the European Union, 2012, p. 2). Italy and France possibly assumed the strongest position (Interview 7, 2013) being rather reluctant in such an involvement of the Commission. They were supported by Germany, Belgium and the UK, which were also concerned about the inappropriate involvement of the Commission as well as with the protection of their commercial interests (Batzella, 2018b). The only large country supporting the proposal was Poland (Euractiv, 2012 see also Polish Minister of the Economy, 2011), followed by Lithuania. It took the Council around five months to reach a common position and be ready for the trilogues. In line with the second hypothesis, the fact that member states shared similar preferences on IGAs allowed them to push back the proposal and prevented the Commission from being able to set up an *ex ante* control mechanism. Indeed, Decision 994/2012 contains an *ex post* one. The obligation on member states is to submit existing IGAs while they *may*, on a voluntary basis, inform the Commission before or during the negotiations of new IGAs. The Commission can participate in the negotiations at the request of a member states or at its own request with the written consent of the member state involved. Overall, at that time, across the member states and within the Commission alike, the feeling was that few of the Commission's aims had been achieved (Interview 3 and 7, 2013). This proposal was, however, a first stage – or 'a step in the door' – in the legislation on IGAs, which gave the Commission the competence to look at the existing IGAs in the

field of energy and assess their compatibility with EU energy law. The Decision also established that by January 2016 the Commission should have published a report (Art. 8(1)) meant to assess the extent to which the Decision promoted compliance of IGAs with Union law and a high level of coordination between member states as well as the impact of the Decision on member states' negotiations with third countries, 'together with the appropriateness of the scope and procedures of the Decision' (Art. 8(2)). In PA terms, the report is an example of ex post control mechanism used by member states to control the Commission but has also been a tool used by the Commission to justify the need for further legislation on IGAs.

Towards Decision 2017/684. Opening the door.

The application of Decision 994/2012 confirmed that member states had been signing IGAs that were incompatible with EU energy law. The Commission claimed, for instance, that IGAs concluded between Russia and some European countries in the framework of South Stream were in breach of EU law and needed to be renegotiated (Euractiv 2013). Indeed, the agreements did not seem to comply to EU rules in terms of unbundling (i.e. an operator, such as Gazprom, cannot simultaneously own production capacity and its transmission network), non-discriminatory access of third parties (there cannot be an exclusive right for an operator to be the only shipper), and tariff structure (Euractiv 2013). This also gave the Commission ground for further action on this matter. Building on the results of the report published in 2016 as foreseen by the Decision and unsatisfied with the *ex post* control mechanism, the Commission used again its agenda setting power to issue a proposal for a new Decision repealing Decision 994/2012 trying again to push forward its preferences for an *ex ante* control mechanism on IGAs.

According to the Commission the existing Decision was not meeting the final objective of enduring compliance of IGAs with EU law for three reasons: a lack of any *ex ante* notification of IGAs to the Commission, resulting in a risk of IGAs being developed that are non-compliant with EU law; as well as the lack of adequate legal mechanisms in some IGAs allowing for their amendment or termination; and third, the lack of transparency in ongoing IGA negotiations (European Commission, 2016a, p. 2). Therefore, with the revision of the Decision, the Commission had two aims: first, to increase the compliance of IGAs with EU law, thereby ensuring the proper functioning of the internal energy market and enhancing competition; and second, to improve the transparency of IGAs to increase the cost effectiveness of EU energy supply and increase solidarity between Member states (European Commission, 2016a, p. 2). To achieve those aims, and in line with the first hypothesis of this paper, the Commission issued a new proposal for an *ex ante* assessment of IGAs. The latter called for two main changes. First, it again tried to introduce an *ex ante* control mechanism requiring member states to inform the Commission of their 'intent to enter into negotiations with third countries regarding conclusion of new intergovernmental agreements or amending existing ones' (European Commission, 2016a, p. 7). Second, the proposal also suggested that member states 'should' have submitted to the Commission 'existing and future non-binding instruments (NBIs)' such as Memoranda of Understanding and joint statements, with all accompanying documents for their *ex post* assessment (European Commission, 2016a, p. 8). This was so because NBIs could have similar effects to IGAs' (European Commission, 2016a, p. 11) which were not contemplated in Decision 994/2012.

The preferences of the member states over this second proposal were rather scattered across three main groups: countries strongly against the proposal (which soon formed a blocking minority), countries that wanted to make the proposal even stronger and countries fine with the proposal as it was (Interview 2, 2018).

Countries in the first group were strongly against the *ex ante* assessment and proposed instead an *ex post* assessment with an obligatory termination clause which member states may use after a negative *ex post* assessment by the Commission. These member states were against giving the Commission the power to look at draft IGAs as well as giving the Commission any real right to be present during negotiations. The group included countries like Italy, France and Germany that have been signing IGAs for centuries and feel perfectly capable, in terms of resources, experience and negotiating power, to conclude their own deals without the interference – or 'power grab' – of the Commission (Interview 2, 2018, see also European Parliament 2016a). Greece, Cyprus, Hungary and Malta were also opposed (Interview 2, 2018, see also European Parliament 2016b). These countries would have accepted – most of them reluctantly – an *ex post* assessment but would have utterly refused an *ex ante* one. This first group very soon emerged as a 'blocking minority' (Interview 2, 2018).

Countries in the second group instead, around 8-9 member states, not only strongly supported the *ex ante* assessment but wanted to even reinforce the Commission proposal proposing changes such as reference to the Union's energy policy objectives and the assessment of NBIs by the Commission (Art. 7) (Council of the European Union, 2016a) making it obligatory for the Commission to attend negotiations of IGAs (Interview 2, 2018). This group included countries which had already received assistance from the Commission in their negotiations with Russia like Poland and the Baltic states (Interview 2, 2018). Countries in the third group were happy with the proposal as it was (Interview 2, 2018) possibly because IGAs were not their priority.

Negotiations in the Council were very difficult. The blocking minority was resolute in the opposition to the *ex ante* examination by the Commission (Council of the European Union, 2016b). Some flexibility was shown only at the very last moment when the Dutch Presidency threatened to end up with a progress report instead of a general approach needed to start

negotiation with the Parliament. It was enough for one country to show this flexibility for the blocking minority to cease to exist. The other countries in that group were presented with a *fait accompli* but negotiations could go ahead (Interview 2, 2018). A compromise was reached when member states accepted the proposal coming from the blocking minority to restrict the scope of the *ex ante* assessment by the Commission to gas-related IGAs only, with IGAs relating to other types of energy only remaining the subjects of *ex post* assessment (Council of the European Union, 2016b). An agreement on a general approach within the Council was finally reached in June 2016 (Council of the European Union, 2016c, p. 2). In line with the second hypothesis of this study therefore, the fact that the member states had heterogeneous preferences weakened their ability to push back on the *ex ante* control mechanism proposed by the Commission.

During the negotiations between the Parliament and the Council, while the former wanted to make the Decision even more ambitious than as proposed by the Commission with positions close to the Eastern European Countries (Interview 5, 2018), the Council was resolute in sticking to the general approach defined as a 'very delicate political balance' that would have been 'hard to alter' (Council of the European Union, 2016c, p. 3). As a result of this, as far as the most contentious issues are concerned – notably the scope and the inclusion of NBIs – the final Decision is closer to the preferences of the member states rather than to the amendments proposed by the Parliament. First, regarding NBIs, while the Parliament proposed an obligatory *ex ante* assessment by the Commission, the Council pushed for a voluntary *ex post* notification of NBIs. Indeed, the Decision establishes that member states 'may' notify NBI after or before their adoption, but this is not compulsory. Second, with regard to the scope of the obligatory *ex ante* assessment by the Commission, whereas the Commission and Parliament insisted on covering all types of energy (i.e. gas, electricity, oil), many delegations within the Council maintained that they could not depart from the Council common position,

in which the scope of the *ex ante* assessment (not the *ex post* assessment) was limited to gas-related IGAs. Delegations in the Council made the argument that the energy market for electricity is more secure, with less chances of problems with external suppliers than for fossil fuels (Interview 4, 2018). As a result, an *ex ante* assessment was foreseen for IGAs relating to gas and oil but not for those relating to electricity for which the obligation of notification to the Commission applies only to 'existing intergovernmental agreements' (Art. 3). While the Parliament tried to push for a more compelling Decision with a more important role for the Commission and more obligation for the member states, the fact that the latter had heterogenous preferences made them unwilling to depart from the general approach they reached with great difficulty.

Overall, the legislative process leading to Decision 2017/684 seems to suggest that the agenda setting power of the Commission together with the preference alignment of the member states have impacted on the ability of the Commission to reach its objectives on IGAs. In 2016 the Commission built on the result of the report issued on the implementation of the first Decision to propose a second proposal, trying again to push its preferences for an *ex ante* control mechanism. In 2016, having a foot in the door with the first Decision, it was easier for the Commission to make a point about the need for an *ex ante* control mechanism. The Commission could also rely on the information gathered with the implementation of the first Decision which confirmed that several IGAs signed by member states were not compatible with EU law – and that very little could be done to compensate for this after signature – hence strengthening the Commission argument that an *ex ante* control mechanism was needed to ensure the functioning of the internal energy market. This time, however, the preferences of the member states were rather scattered and it was more difficult for member states to push back the Commission on the *ex ante* element of the mechanism. Nonetheless, the final Decision – although it is closer to the Commission's preferences than it was the first

Decision – reflects the preferences of the member states which took on board the *ex ante* requirement, for oil and gas, but pushed back on NBIs accepting only a voluntary ex-post control.

Conclusions

This paper has offered an analysis of the role of the Commission in the evolution of legislation on Intergovernmental Agreements (IGAs) in the field of energy across two consecutive legislative processes, the first leading to Decision 994/2012 and the second to Decision 2017/684. The analysis has explored the extent to which the Commission has been able to achieve its preferences for an *ex ante* control mechanism on IGAs as well as the conditions that made this possible. The paper has focused on two plausible explanatory factors borrowed from principal agent literature: the agenda setting power of the Commission and the preference alignment across the member states. As far as the former is concerned, the analysis offers support for the claim that this has been used strategically with two consecutive ambitious proposals to achieve the objective of an *ex ante* control on IGAs. The 2011 proposal set up a fully-fledged legal instrument for a compulsory *ex ante* assessment of IGAs forcing member states to deal on a very sensitive topic on which negotiations had always been difficult. In 2016, with a foot already in the door and strong of the results of the report of the implementation of the first Decision, the Commission called again for an *ex ante* control mechanism putting member states in front of another ambitious proposal to negotiate. As far as the preference alignment of the member states is concerned, the analysis has shown that when this is homogenous the Commission has less opportunity to push forward legislation unwanted by the member states because the latter would be strong and united defending their positions. When the preference alignment is heterogeneous, instead, it is more likely that the Commission will be able to exploit divergences across member states to push

its preferences forward. Overall, the analysis has provided support for the hypotheses presented in the paper, suggesting that PA can provide interesting insights on legislative decision making and on energy policy more broadly.

These findings also allow for some further considerations, both empirically as well as theoretically. Empirically, the paper offers interesting insights on the importance of IGAs which have so far been under looked in the literature. It shows that IGAs are not only a distinct feature of the internal energy market, but also the subject of an animated debate between the Commission and the member states on whether the competence over them should fall with the former or the latter. Indeed, the recent debate around the revision of the Gas Directive 2009/73/EC on common rules for the internal market in natural gas has shown this quite clearly. Aimed to set out a legal framework for gas pipelines to and from third countries, this revision re-opened the debate over whether the negotiations of IGAs in the field of energy should fall under the competence of the Commission or of the member states. The revised Directive[3] finally established that member states are allowed to negotiate new or revised agreements with third countries (or to extend existing ones) but the Commission will need to authorise the negotiations, it must be fully informed about their outcome, and its authorisation will be required before the member state(s) can sign and conclude an agreement (EPRS 2019). This means that IGAs are still expected to be an important component of the energy scenario.

Theoretically, the paper confirms that the Principal Agent Model is a helpful middle-range theory and heuristic tool which might be used to contribute to the development of the literature on legislative decision making in the EU and the role of the Commission therein.

[3] Directive (EU) 2019/692 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas

Looking at the interactions between the Commission and the member states, the model helps understanding what lies below the surface of decision making. Looking at factors such as the way in which the Commission uses its agenda setting power as well as the way in which the Commission and the member states try to satisfy their respective and often divergent preferences, has an impact on the evolution of legislation. In addition, a close analysis of the interactions between the Commission and the member states in key legislative processes, such as those on IGAs, might also contribute to the conceptualisation of the EU in this policy area which, so far, has developed in terms of regulatory (Goldthau and Sitter 2014), catalytic (Prontera 2017a, 2017b) and global actor (Batzella 2018a, Schunz and Damro 2019). Looking at the Commission as an agent with its own preferences and understanding which factors might constrain or facilitate the achievement of those preferences, can contribute to a better understanding of the role of the Commission and, in turn, to the ongoing debate about the conceptualisation of the Commission in energy policy and beyond.

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