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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. Cion doc.:	14204/17
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas

Delegations will find in annex **the third revised** text of the above draft Directive, amended in light of the discussions in the Energy Working Party, COREPER and the written comments received.

For clarity reasons, the changes in the document are in comparison to the first revision (doc.6851/18) while preserving elements from the second revision (doc.14560/18). New text is indicated in **bold underlined**; deletions are marked with ~~strikethrough text~~. Changes compared to the Commission proposal are indicated in **bold text**; deletions are marked with [].

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/73/EC concerning common rules for the internal market in natural gas

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 194 (2) 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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The internal market in natural gas, which has been progressively implemented throughout the Union since 1999, aims to deliver real choice for all consumers in the Union, be they citizens or businesses, new business opportunities **and fair conditions of competition**, competitive prices, efficient investment signals and a higher standard of service, and to contribute to security of supply and sustainability.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) Directive 2003/55/EC of the European Parliament and of the Council³ and Directive 2009/73/EC of the European Parliament and of the Council⁴ have made a significant contribution towards the creation of the internal market in natural gas.
- (3) This Directive seeks to address ~~the remaining~~ obstacles to the completion of the internal market in natural gas resulting from the non-application of Union market rules to gas [] **transmission lines** to and from third countries. The amendments introduced by this Directive will ensure that the rules applicable to gas transmission [] **lines** connecting two or more Member States, are also applicable to [] **gas transmission lines** to and from third countries within the Union. This will establish consistency of the legal framework within the Union while avoiding distortion of competition in the internal energy market in the Union **and negative security of supply impacts**. It will also enhance transparency and provide legal certainty as regards the applicable legal regime to market participants, in particular investors in gas infrastructure and network users, **noting that an international agreement in accordance with Article 218 TFEU might prove necessary to resolve potential incompatibilities resulting from the application of Union market rules to a given gas transmission system and the rules of a third country.**

³ Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas (OJ L 176, 15.7.2003, p. 57).

⁴ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14.8.2009, p. 94).

- (4) To take account of the previous lack of specific Union rules applicable to gas [] **transmission lines** to and from third countries, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such [] **gas transmission lines** which are completed at the date of entry into force of this Directive. The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas [] **transmission lines** to and from third countries.
- (4a) A pipeline connecting a third-country processing terminal, as part of a production system, to a final landing point of a Member State should be considered as an upstream pipeline. In order to facilitate access to upstream pipelines connected to a third country, this Directive should be understood as not imposing any new rules on upstream pipelines beyond the provisions regarding upstream pipelines set out in the Directive 2009/73/EC.**
- (4b) Transmission system operators should be free to conclude arrangements with transmission system operators in third countries on issues concerning the operation and interconnection of transmission systems, provided the content of such agreement is compatible with the Union law.**
- (5) The applicability of Directive 2009/73/EC [] to gas [] **transmission lines** to and from third countries remains confined to the territorial limit of Union's jurisdiction. As regards offshore [] **gas transmission lines**, it should be applicable in the territorial [] **sea** [] of the Member States.

(5a) Having regard to Article 2(1) TFEU, with regard to agreements or part of the agreements, with third countries falling within the scope of this directive and within exclusive competence of the European Union, a coherent and transparent procedure should be established to authorise a Member State, upon its request, to amend, extend, adapt, renew or conclude an agreement with a third country, in particular where the Union itself has not indicated its intention to amend, extend, adapt, renew or conclude an agreement by way of an already existing or envisaged authorisation to open negotiations.

This procedure should be without prejudice to the respective competencies of the European Union and of the Member States.

(5b) The agreements concluded between a Member State and a third country as well as technical agreements of the operators already in force, would not be affected by the current proposal, provided that they comply with the Union law or a derogation has been granted by the Member State concerned.

(5c) Recalling that the Network Code on interoperability and data exchange rules⁵, the Network Code on capacity allocation mechanisms in gas transmission systems⁶, Commission Decision on conditions for access to the natural gas transmission networks⁷, as well as chapter III, V, VI, Article 28 and chapter IX of the Network code on harmonised transmission tariff structures for gas⁸ apply to entry points from and exit points to third countries, subject to the decision of the relevant National Regulatory Authority whereas the Network Code on Gas Balancing⁹ applies exclusively to balancing zones within the borders of the Union.

⁵ Commission Regulation establishing a Network Code on interoperability and data exchange rules (703/2015/EU)

⁶ Commission Regulation (EU) 2017/459 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013

⁷ Commission Decision on conditions for access to the natural gas transmission networks [2012/490/EU]

⁸ Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas

⁹ Commission Regulation establishing a Network Code on Gas Balancing of Transmission Networks (312/2014/EU)

(6) Directive 2009/73/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2009/73/EC is amended as follows:

(1) in Article 2, point (17) is replaced by the following:

(17) 'interconnector' means a transmission line which crosses or spans a border between Member States **for the purpose of connecting the national transmission system of those countries** or **a transmission line** between a Member State and a third country [] up to the border of Union [] territory;

(2) Article 9 is amended as follows:

(a) in paragraph 8, the first subparagraph is replaced by the following:

8. A Member State may decide not to apply paragraph 1:

(a) where the transmission system belonged to a vertically integrated undertaking on 3 September 2009;

(b) as regards [] **a transmission system connecting a Member State with a** third country between the border of Union [] territory and the first [] connection point with the Union network, where the transmission system belonged to a vertically integrated undertaking on [PO: date of adoption of this proposal]";

(b) paragraph 9 is replaced by the following:

9. Where there are arrangements in place which guarantee more effective independence of the transmission system operator than the provisions of Chapter IV, a Member State may decide not to apply paragraph 1:

(a) where the transmission system belonged to a vertically integrated undertaking on 3 September 2009;

(b) as regards [] **a transmission system connecting a Member State with a third country** between the border of Union [] **territory** and the first [] connection point with the Union network, where the transmission system belonged to a vertically integrated undertaking on [PO: date of adoption of this proposal].";

(3) in Article 14, paragraph 1 is replaced by the following:

1. Member States may decide not to apply Article 9(1) and designate an independent system operator upon a proposal from the transmission system owner:

(a) where the transmission system belonged to a vertically integrated undertaking on 3 September 2009;

(b) as regards [] **a transmission system connecting a Member State with a third country** between the border of Union [] **territory** and the first [] connection point with the Union network, where the transmission system belonged to a vertically integrated undertaking on [PO: date of adoption of this proposal].

Such designation shall be subject to approval by the Commission";

(4) In Article 34, paragraph 4, the following third sentence is added:

Where the network concerned is covered by at least one Member State and at least one third country, the Member States concerned shall consult each other and shall consult the third countries concerned, with a view to ensuring, as regards the network concerned, that the provisions of this Directive are applied consistently **to a transmission system** up to the border of Union [] territory.

~~Where the upstream pipeline network originates from one third country and connects to at least one Member State, the Member States concerned shall consult each other and shall consult the said third countries, with a view to ensuring, as regards the network concerned, that the provisions of this Directive are applied consistently up to the border of Union jurisdiction.~~

(5) Article 36 is amended as follows:

(a) in paragraph 3, the following second sentence is added:

Where the infrastructure in question is **connected with the Union network** under the jurisdiction of a Member State and **originates from or ends in** one (or more) third countries, the national regulatory authority, **or where appropriate other competent authorities**, shall consult the relevant authorities of the third countries prior to adopting a decision.

Where the third-country authorities, subject to such consultation, do not respond to the consultation within the set deadline, the national regulatory authority concerned may take the necessary decision.

(b) in the second subparagraph of paragraph 4, the following second sentence is added:

Where the infrastructure in question [] **originates from or ends in** one or more third countries, the national regulatory authorities of the Member States, **or where appropriate other competent authorities, may []** consult the relevant authorities of the third countries prior to adopting a decision with a view to ensuring, as regards the concerned infrastructure, that the provisions of this Directive are applied consistently up to the border of Union [] **territory. Where the third-country authorities subject to such consultation do not respond to the consultation within the set deadline, the national regulatory authority concerned may take the necessary decision.**

(6) in Article 41 (1), point c) is replaced by the following:

(c) cooperating in regard to cross-border issues with the regulatory authority or authorities of the Member States concerned and with the Agency, as well as, for infrastructure to and from third **country, the regulatory authority may cooperate** with the relevant authorities of the third country aiming at, as regards this infrastructure, consistent application of the provisions of this Directive up to the border of Union [] **territory**;

(7) in Article 42, the following paragraph 6 is added:

6. Regulatory authorities, **or where appropriate other competent authorities, may []** consult and cooperate with the relevant authorities of third countries in relation to the operation of gas [] **infrastructure** to and from third countries with a view to ensuring, as regards the concerned infrastructure, that the provisions of this Directive are applied consistently up to the border of Union [] **territory**.

(8) in Article 49, the following paragraph 9 is added:

9. In respect of gas **transmission line** to and from third countries completed before [PO: date of entry into force of this Directive], Member States may decide, **up to their discretion**, to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such **gas transmission line** between the border of Union **territory** and the first connection point, **for reasons such as enabling the recovery of the investment made or due to reasons of security of supply**, provided that the derogation would not **negatively affect in significant way competition in the Union** or the effective functioning of the internal market in natural gas in the Union, or the security of supply in the Union **and under the condition that the Member State has jurisdiction over the first interconnection point of the said transmission line and a system in the Union in the meaning of Article 2, point 13.**

The derogation shall be limited in time **up to 20 years, renewable** and may be subject to conditions which contribute to the achievement of the above conditions.

This derogation is not applicable to interconnectors completed before [PO: date of entry into force of this Directive] to and from third countries which apply Article 36 of this Directive in their legal order.

Where the gas **transmission system** in question is located in the **territory** of more than one Member State, the Member State in the **territory** of which the first connection point is located shall decide on a derogation for the **gas transmission system after consultation with all concerned Member States.**

Member States shall publish any decision on a derogation in accordance with this paragraph within one year after the entry into force of this Directive.

The Commission may adopt Guidelines for the application of the conditions laid down in this paragraph. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 51 (3).

Article 49 a

Empowerment procedure

1. The Commission shall authorize the Member State, following prior request, to open formal negotiations with a third country to amend or renew an existing agreement or part of the agreement with a third country concerning matters falling, entirely or partly, within the scope of this Directive, unless it concludes that the opening of such negotiations would:

 - a) be in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States;
 - b) be detrimental to the functioning of the internal gas market, competition or security of supply in a Member State or the Union;
 - c) undermine the objectives of pending negotiations of intergovernmental agreements by the European Union with third country;
 - d) be discriminatory.
2. The Commission shall adopt such authorization decisions or decisions on refusal to authorize a Member State to amend, extend, adapt or renew an agreement with a third country within 90 days of receipt of the request referred to in paragraph 1. Where additional information is needed to take a decision, the 90-day period shall run from the date of receipt of the additional information. [The decision shall be adopted in accordance with the advisory procedure referred to in Article 4 of Regulation 192/2011].
3. The Commission may propose negotiating guidelines and may request the inclusion of particular clauses in the envisaged agreement in order to ensure compatibility with Union legislation.
4. The Commission shall be kept informed of the progress and results of the negotiations to amend or to conclude a bilateral investment agreement throughout the different stages and may request to participate in the negotiations concerning investment between the Member State and the third country.

- 5. The Commission shall inform the European Parliament and the Council about the decisions taken pursuant to paragraph 1.**
- 6. In the event that the Commission does not grant an authorisation pursuant to paragraph 1, it shall inform the Member State concerned thereof and state the reasons.**

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [PO: one year after the date of entry into force] at the latest, **without prejudice to possible derogations according to article 49(9)**. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*