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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee

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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
- Mandate for negotiations with the European Parliament

I. **INTRODUCTION**

1. On 8 November 2017, the Commission submitted to the Council a 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.

2. In the European Parliament, these proposals were referred to the Industry, Research and Energy Committee (ITRE) which appointed on 17 November 2017, Mr. Jerzy Buzek as rapporteur. The ITRE Committee voted on its report on 11 April 2018.

II. **PRESIDENCY PROPOSAL FOR A NEGOTIATING MANDATE**

3. The Energy Working Party has considered the proposal of the Commission and related Presidency compromise suggestions during the course of 2018 and beginning of 2019. Following these discussions, a number of modifications were inserted in the text by the Presidency.

4. With the view to negotiations with the European Parliament, delegations will find in the Annex the final consolidated text reflecting the current state of play of discussions in the Council Working Party.
5. The Presidency has examined carefully all comments provided by delegations and considered that the text as it stands, represents a careful balance between those Member States which supported the initial Commission proposal and those Member States which needed further clarity within the text.
6. In the text, in comparison to the original Commission proposal, additions from previous revisions (6851/2018, 14560/2018, 5088/2018) are indicated as **bold**, and [] indicates deletions. **Bold and underlined** indicates new text elements, and ~~striketrough~~ indicates new deletions.

III. **CONCLUSION**

7. On that basis the Permanent Representatives Committee is invited to:
 - confirm the agreement on the text as set out in the Annex I to this Note,
 - give the Presidency a general mandate for negotiating a first-reading agreement with the European Parliament on the basis of the compromise as set out in the Annex I to this Note.

The Presidency will report to the Committee on the outcome of negotiations and submit, where necessary, an adjusted text for analysis and possible agreement by this Committee.

2017/0294 (COD)

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 [] 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 oil or gas production project to a processing terminal plant or, as part of a production system, to a final coastal landing terminal within point of a Member State should be considered as an upstream pipeline.**

A pipeline connecting an oil or gas production project in a Member State to a processing plant or to a final coastal landing terminal within a third country should not be considered as upstream pipeline for the purpose of this Directive, since such pipelines are unlikely to have a significant impact on the internal energy market.

~~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~~ technical agreements with transmission system operators or other entities 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.**

(4c) *(modified ex 5b)* **Technical agreements regarding the operation of transmission lines, between transmission system operators or other entities should remain in force, provided that they comply with Union law and the respective decisions of the national regulatory authority.**

(4d) **When such technical agreements are in place, the conclusion of an international agreement between a Member State and a third country regarding the operation of the transmission line in question is not required by this Directive.**

(5) The applicability of Directive 2009/73/EC [] to gas [] transmission lines to and from third countries remains confined to the territorial limit of the Member States, limit of Union's jurisdiction. As regards offshore [] gas transmission lines, it should be applicable in the territorial [] sea [] of the Member States.

(5a) Existing agreements concluded between a Member State and a third country on the operation of transmission lines can be maintained in force, in accordance with the rules of this Directive.

(5b) ~~Having regard to Article 2(1) TFEU, w~~ With regard to agreements or parts of the agreements, with third countries which may affect common rules of the Union 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 on the operation of a transmission line between the Member State and 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 and it should apply to existing and new agreements.

~~(5b) —(modified version is in 4c) 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) Where it is apparent that the subject matter of an agreement falls partly within the competence of the Union and partly within that of a Member State, it is essential to ensure close cooperation between the Member States and the Union institutions.**
- (5d) 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.**
- (6) Directive 2009/73/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

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)

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 **territory and territorial sea of the Member States** ~~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 [] **the part of the a transmission system connecting a Member State with a third country,** between the border of **that Member State** ~~Union~~ [] ~~territory~~ and the first [] connection point with **that Member State's** ~~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 [] **the part of the a transmission system connecting a Member State with a third country** between the border of **that Member State** ~~Union~~ ~~territory~~ and the first [] connection point with **that Member State's** ~~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 [] **the part of the a transmission system connecting a Member State with a third country** between the border of **that Member State** ~~Union~~ ~~territory~~ and the first [] connection point with **that Member State's** ~~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 a third country and connects to at least one Member State, the Member States concerned shall consult each other and shall consult the said concerned third countries where the upstream pipeline originates, with a view to ensuring, as regards the network concerned, that the provisions of this Directive are applied consistently in the territory of the Member States. 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 **those** third countries prior to adopting a decision.

Where the consulted third-country authorities, ~~subject to such consultation, do not respond to the consultation within a reasonable time frame or a 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 [] **is a transmission line between a Member State and a third country** ~~originates from or ends in one or more third countries~~, the national regulatory authorities ~~of the Member States~~, **or where appropriate other competent authorities of the Member States**, 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 **in the territory and territorial sea of the Member States** ~~up to the border of Union [] territory~~. **Where the consulted third-country authorities ~~subject to such consultation~~ do not respond to the consultation within a reasonable time or a ~~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, f~~**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 **in the territory and territorial sea of a Member State** ~~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 **in the territory and territorial sea of a Member State** ~~up to the border of Union [] territory~~.

(8) New Article 48a is added:

Article 48a (new)

Technical agreements regarding the operation of transmission lines

This Directive does not affect the freedom of transmission system operators or other economic operators to maintain in force or to conclude technical agreements on issues concerning the operation of transmission lines between a Member State and a third country, insofar as these agreements are compatible with Union law and relevant decisions of the national regulatory authorities of the Member States concerned.

(9) From paragraph 9 of Article 49, a new Article 49a is created entitled: Derogations in relation to transmission lines to and from third countries in Article 49, the following paragraph 9 is added:

Article 49a (new)

Derogations in relation to transmission lines to and from third countries

~~9.~~ In respect of gas [] transmission lines between a Member State and a third country ~~to and from third countries~~ completed before [PO: date of entry into force of this Directive], the Member States where the first connection point of the said transmission line with a Member State's network is located 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 located in its territory and territorial sea, ~~between the border of Union [] territory and the first [] connection point~~, for objective reasons duly justified, 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 based on objective justification, renewable if justified** and may be subject to conditions which contribute to the achievement of the above conditions.

This derogation is not applicable shall not apply to gas transmission lines between a Member State and a third country which has the obligation to transpose and effectively implement this Directive in its legal order under an agreement concluded with the European Union. 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 line 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 line 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).**~~

(10) New Article 49aa is added:

Article 49 aa (new)
Empowerment procedure

0. Without prejudice to other obligations under Union law, and to the respective competencies of the Union and its Member States, existing agreements between a Member State and a third country on the operation of a transmission line may be maintained in force until another agreement between the Union and the same third country enters into force or the procedure under the following paragraphs applies.

01. Without prejudice to the respective competencies of the Union and its Member States, where a Member State intends to enter into negotiations with a third country in order to amend, extend, adapt, renew or conclude an agreement on the operation of a transmission line with a third country concerning matters falling, entirely or partly, within the scope of this Directive, it shall notify the Commission of its intention in writing.

The notification shall include relevant documentation and an indication of the provisions to be addressed in the negotiations or to be negotiated, the objectives of the negotiations and any other relevant information and shall be transmitted to the Commission at least 5 months before the intended start of negotiations.

1. Further to a notification pursuant to paragraph 01, the Commission shall authorise the Member State, ~~following prior request,~~ to open formal negotiations with a third country for the part which may affect Union common rules ~~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~~ considers 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 a third country;
- d) be discriminatory.
2. The Commission shall adopt such authorisation decisions or decisions on refusal to authorise a Member State to amend, extend, adapt or renew or conclude an agreement with a third country within 90 days of receipt of the request notification referred to in paragraph 01. *(moved as 2aa)* ~~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].~~
- 2a. 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.
- 2aa. *(ex second part of 2)* 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~~182/2011].
3. The Commission may propose guidance ~~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, extend, adapt, renew 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.

By way of derogation from the first subparagraph of paragraph 1 of this article, landlocked Member States which have no geographical border with third countries and no transmission lines with third countries, shall not be obliged to bring into force measures which are necessary to comply with this directive.

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*
