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Subject: Recommendation from the Commission to the Council to authorise the Commission to negotiate an agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on the legal framework for a Trans-Caspian (Natural Gas) Pipeline System (doc. 9698/11 RESTREINT UE)

- Legal assessment of the Union competence

Delegations will find attached the partially declassified version of the above-mentioned document.



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THE EUROPEAN UNION

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OPINION OF THE LEGAL SERVICE*

to : Energy Working Party

Subject : Recommendation from the Commission to the Council to authorise the Commission to negotiate an agreement between the Republic of Azerbaijan, the Republic of Turkmenistan and the European Union on the legal framework for a Trans-Caspian (Natural Gas) Pipeline System (doc. 9698/11 RESTREINT UE)

- Legal assessment of the Union competence

1. During its meeting of 24 May 2011, the Energy Working Party has asked the Council Legal Service for a legal assessment of the above mentioned Recommendation from the Commission. Several delegations expressed doubts as to the Union's (sole) competence to negotiate the agreement on the terms proposed by the Commission. Some have asked for options to be considered which would limit the Union's implication to parts of the agreement which clearly fall into Union competence - provided that such parts do exist.

* **This document contains legal advice protected under Article 4(2) of 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, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.**

2. The present opinion sets out in writing and further develops the explanations given by the representative of the Legal Service during the meeting of the Energy Working Party on 7 June 2011.

I. LEGAL ANALYSIS

3. The following analysis is based on the elements provided by the Commission in its explanatory memorandum and the proposed negotiating directives. The conclusions of this analysis may have to be reviewed in the light of the outcome of the negotiations on the agreement.

A. Union competence to conclude the future agreement

4. Article 5(1) TEU provides that "*[t]he limits of Union competences are governed by the principle of conferral*". The Union's competences are laid down in the treaties and divided into the categories described and listed in Articles 2 to 6 TFEU. These provisions *inter alia* distinguish between exclusive competences, shared competences, and supporting/coordinating/supplementing competences. Article 4(1) TEU provides that "*competences not conferred upon the Union in the Treaties remain with the Member States*".
5. According to Article 216 TFEU, "*the Union may conclude an agreement with one or more third countries [...] where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*".
6. It follows from point 2 of the proposed negotiating directives, that the purpose of the agreement is to "*facilitate and support the establishment of a TransCaspian Pipeline System for the transport of natural gas from the territory of [TU] to the territory of [AZ], and thence to connect into the Southern Corridor*".

7. Articles 171(3) and 194(1)(b) TFEU set objectives for the Union in the context of the ensuring the security of energy supply in the Union and the cooperation with third countries to promote projects of mutual interest in the field of trans-European networks, including in the area of energy infrastructures.
8. In pursuit of these objectives, the Union has expressed its strategic interest in accessing the Caspian natural gas resources, for which the necessary infrastructure (Southern Gas Corridor) has yet to be developed, at several occasions.
9. The Decision of the European Parliament and the Council on the trans-European energy networks (TEN-E Decision)¹ identifies the gas network "*Caspian Sea countries - Middle East - EU*" as a priority project².
10. Article 6(6) of the TEN-E Decision states the following:

"Where parts of projects of common interest are situated within the territory of third states, the Commission may, in agreement with the Member States concerned, put forward proposals, where appropriate within the framework of the management of agreements between the Community and those third states [...], for the projects also to be recognised as being of mutual interest by the third countries concerned, in order to facilitate their implementation."

¹ Decision No 1364/2006/EC of 6 September 2006 laying down guidelines for trans-European energy networks, OJ L 262 of 22 September 2006, page 1.

² Annex I point NG.3; Annex II on projects of common interest point 9, 11th indent; Annex III point 9.12.

11. **NOT DECLASSIFIED**

12. According to the **European Council** conclusions of 4 February 2011, the Union "*should take initiatives in line with the Treaties in the relevant international fora and develop mutually beneficial energy partnerships with key players and around strategic corridors, covering a wide range of issues, including regulatory approaches, on all subjects of common interest, such as energy security [...], the investment environment [...]. It should encourage neighbouring countries to embrace its relevant internal market rules, notably by extending and deepening the Energy Community Treaty and promoting regional cooperation initiatives. [...] Europe needs to diversify its routes and sources of supply. The Commission is accordingly invited to continue its efforts to facilitate the development of strategic corridors for the transport of large volumes of gas such as the Southern Corridor.*"

13. **NOT DECLASSIFIED**

14. **NOT DECLASSIFIED**

B. Union competence to conclude the future agreement alone vs. mixed agreement

15. The ability of the Union to conclude agreements with third states without the involvement of Member States depends on the nature of the relevant competences. Three situations can be distinguished:

- Where all matters covered by an agreement fall into exclusive Union external competence, the Union (and only the Union) is competent to conclude the agreement.
- Where all matters covered by an agreement fall into Union competence, but some (or all) "only" into the Union's potential competence (i.e. competences shared with Member States), there is a choice: Either the Union decides to exercise its potential competence by concluding the agreement alone (see Article 2(2) TFEU), or the agreement is concluded by both the Union and the Member States as a mixed agreement.
- Where the matters covered by an agreement fall partially within Union (exclusive or potential) competence and partially within exclusive Member State competence, the agreement must be concluded by the Union and the Member States together (mixed agreement).

Exclusive Union competence?

16. According to Article 3(2) TFEU, the Union has **exclusive competence** to conclude an international agreement in three situations:

- When its conclusion is provided for in a legislative act of the Union;
- When the conclusion is necessary to enable the Union to exercise its internal competence; or
- In so far as its conclusion may affect common rules or alter their scope.

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