



Council of the
European Union

Brussels, 18 June 2018
(OR. en)

10228/18

**Interinstitutional File:
2017/0294 (COD)**

**ENER 241
COEST 125
CODEC 1101**

NOTE

From:	Presidency
To:	Permanent Representatives Committee
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 - Guidance for further technical work

On 8 November 2017, the Commission proposed to amend the EU Gas Directive (2009/73/EC) in order to specify the scope of its application so that it expressly includes gas pipelines connecting Member States with third countries. The proposal sets out that within Union jurisdiction, pipelines to and from third countries are to be regarded as "interconnectors" and thus fall within the scope of the Gas Directive, establishing that such pipelines are subject to the rules set out therein. It will be applicable to all existing and potential future pipelines.

In January 2018, the Bulgarian Presidency asked the Council Legal Service (CLS) for a written opinion on whether the application of the proposal to the exclusive economic zones of the MS is compatible with the UN Convention on the Law of the Sea and what would be the impact of its adoption on the allocation of competencies between the Union and its Member States. The first part of the opinion was issued on 1st March and the second one in late March.

Based on Member States' comments and Council Legal Service's first opinion, a first revision of the file was proposed by the Presidency on the 6th of March and discussed subsequently in the Energy Working Party. In May a non-paper has been issued proposing how to clarify that the upstream pipelines are not impacted by this directive, that the application will be limited only to those pipelines that have a significant impact on the internal market, and proposing that Member States are empowered to amend or prolong existing inter-governmental agreements ('IGAs').

Despite these discussions, a fundamental issue needs to be solved. Since the Directive extends the EU competences to pipelines with third countries up to the limits of Unions jurisdiction (including territorial waters) the existing national agreements with third countries may be affected. In order to be able to proceed with the file, the issue arises to which extent Member States could derogate from the provisions of the Directive. The Commission proposed a possibility for Member States to derogate from the application of the main provisions of the Gas Directive on a case-by-case basis. Such derogations were subject to comments by the Member States. In addition, the Energy Working Party discussed in May an empowerment that would provide for the possibility of having Member States amend or prolong existing intergovernmental agreements on operational rules for gas pipelines, which would otherwise fall within the exclusive competence of the Union.

In light of the work carried out so far, the Presidency is of the view that guidance is needed on the following questions:

1. Given the existing regulatory framework already in place, and in particular the recently adopted Decision relating to the notification to the Commission of intergovernmental agreements with third countries in the fields of energy¹, the **proportionality of the proposal** should be assessed. In particular, whether rendering the gas internal market rules - including gas regulation, network codes and guidelines - applicable to interconnectors to and from third countries is a measure appropriate to achieve security of gas supply in the European Union ? Do you consider that they go beyond the limits of what is necessary ? Are there other policy options which are less onerous ?

¹ Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the fields of energy and repealing Decision No 994/2012/EU, JO L 99 of 12.4.2017.

2. Should the draft directive apply to all interconnectors with third countries or should its **scope** be limited and how ? Do the Delegations agree that the derogations proposed by the Commission should be modified subsequently in the revised text of the Directive and shall the procedure of empowerment be added to the Directive ? If so, which additional measures shall be added ?
3. Should the conclusion of **IGAs** become automatically necessary or could the current practice of concluding operational agreements between TSOs without recourse to IGAs be maintained and under which conditions ? Should upstream pipelines with third countries be included in the scope of the draft directive ?
4. Should **existing transmission lines** be regulated through the system of exemptions given by Member State or through an authorization to Member States to conclude IGAs in a domain which will become of exclusive external competence insofar as these IGAs may affect European Union common rules ? How should transmission lines be treated when an IGA was not concluded ?

COREPER is, therefore, invited to address the above issues in order to provide guidance for further technical work on this proposal.
