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NOTE

From:	General Secretariat of the Council
To:	Delegations
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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

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

Changes compared to the previous version (doc.6851/18) are indicated in **bold underlined text**; deletions are marked with ~~[striktthrough text]~~. Changes compared to the Commission proposal are indicated in **bold text**; deletions are marked with [].

It should be noted that the revised text of the draft Directive presented herewith includes an “**additonal element**” as discussed in principle at the Energy Working Party on 12 November 2018. This additional element draws on a well established, longstanding procedure, i.e. **the projects of common interest (PCI) process**¹.

¹ See REGULATION (EU) No 347/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 and related acts.

N.B.: At the meeting of the Energy Working Party on 12 November 2018 issues related to the application of the Gas Regulation and network codes to gas trade with third countries were discussed, given the existent interlinkage between the Gas Directive and the Gas Regulation. The question was raised whether it was useful to apply also the rules of the Gas Regulation and network codes to pipelines to and from third countries or to limit the rules applicable to such pipelines rather to internal market essentials (third-party access, tariff, regulation, unbundling and transparency in particular). So far, these discussions have not been conclusive. Some delegations also felt the need for further legal clarification.

It should be noted that if the application of internal market rules to pipelines to and from third countries were to be limited to those of the Gas Directive (i.e. excluding related legal acts like the Gas Regulation and network codes), legal means would have to be sought to arrive at this result. Against this backdrop the revised text of the draft Directive as presented herewith does not yet cover this issue, given the current status of the discussions.

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 Committee²,

Having regard to the opinion of the Committee of the Regions³,

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.

² OJ C , , p. .

³ OJ C , , p. .

- (2) Directive 2003/55/EC of the European Parliament and of the Council⁴ and Directive 2009/73/EC of the European Parliament and of the Council⁵ 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 of an internal market dimension** 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 of an internal market dimension** 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 Intergovernmental Agreement might prove necessary to resolve potential incompatibilities resulting from the application of Union market rules to a given gas transmission system of an internal market dimension and the rules of a third country.**
- (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 of an internal market dimension** [] which are completed at the date of entry into force of this Directive. **N.B.: Eventually to be adapted in the light of discussions on options 1 and 2 in footnote 6.** The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas **transmission lines of an internal market dimension** [] to and from third countries.

⁴ 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).

⁵ 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).

- (5) The applicability of Directive 2009/73/EC [] to gas transmission lines of an internal market dimension [] to and from third countries remains confined to the territorial limit of Union's jurisdiction. As regards offshore gas transmission lines of an internal market dimension [] it should be applicable in the territorial [] sea [] of the Member States.
- (6) In order to identify transmission systems of an internal market dimension, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of adopting the Union list of International Transmission Systems of an Internal Market Dimension. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts. [standard clause, see IIA of 13 April 2016]
- ~~(6)~~(7) 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 [] **system** which crosses or spans a border between Member States or **a transmission system of an internal market dimension** between **a** Member States and **a** third country [] ~~for the sole purpose of connecting the national transmission system of those countries,~~ up to the border of Union **territory** [];"

(2)°in Article 2, point (37) is added:

"(37) 'transmission system of an internal market dimension' means a transmission system which crosses or spans a border between a Member State and a third country and is part of the Union list of International Transmission Systems of an Internal Market Dimension referred to in Article 51a.

(2)(3)°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 of an internal market dimension** 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** ~~line~~ **of an internal market dimension** **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)~~**(4)**°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 systems** **of an internal market dimension** **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)~~**(5)**°[] 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 of an internal market dimension** 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.~~ **See Article 51a instead.**

~~(5)~~⁽⁶⁾ [] 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 **and is a transmission system of an internal market dimension**, the national regulatory authority, **or where appropriate other competent authorities**, shall consult the relevant authorities of the third countries prior to adopting a 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 **and is a transmission system of an internal market dimension**, 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** [].";

~~(6)~~⁽⁷⁾ [] 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 countries **qualifying as a transmission system of an internal market dimension**, 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)~~(8) [] 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 **qualifying as a transmission system of an internal market dimension** 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)~~(9)^o [] in Article 49, the following paragraph 9 is added:

"In respect of gas **transmission system []** to and from third countries **of an internal market dimension** completed⁶ before [PO: date of entry into force of this Directive], Member States may decide, **up to their discretion and in close consultation with the Commission**, to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such **[] gas transmission system of an internal market dimension** 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.

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.

⁶At this point two options are put up for discussion:

Option 1:

to limit the delegation clause to pipelines completed before the date of entry into force of this Directive (this option corresponds to the text above)

Option 2:

to insert in this place the wording „**or for which start of works took place**” before the date of entry into force of this Directive

Hence, under option 2 the delegation clause would cover both, completed pipelines and pipelines under construction.

Where the gas **transmission system of an internal market dimension** [] 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 of an internal market dimension** 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."

(10)°The following new Article 51a is added:

“Article 51a

Union list of International Transmission Systems of an Internal Market Dimension

- 1. This Directive establishes a Group on International Transmission Systems of an Internal Market Dimension (‘Group’).**
- 2. The Group shall be composed of representatives of the Member States, national regulatory authorities, transmission system operators, as well as the Commission, the Agency for the Cooperation of Energy Regulators and the ENTSO for Gas.**
- 3. Decision-making powers in the Group shall be restricted to Member States and the Commission, who shall, for those purposes, be referred to as the decision-making body. Decisions of the decision-making body shall be taken by consensus.**
- 4. The decision-making body shall adopt the Group’s rules of procedure.**
- 5. The decision-making body shall adopt a draft list of International Transmission Systems of an Internal Market Dimension. Before adopting this draft list, the Group shall invite promoters of transmission systems potentially eligible for selection as an international transmission system of an internal market dimension to present their view. The decision-making body may also decide to invite other parties.**
- 6. Proposals for transmission systems which cross or span a border between a Member State and a third country potentially eligible for the draft list of International Transmission Systems of an Internal Market Dimension can be submitted to the Group by Member States, the Commission or project promoters. Each individual proposal for a transmission system to be included in the draft list shall require the approval of the Member States, to whose territory the transmission system relates; if a Member State decides not to give its approval, it shall present its substantiated reasons for doing so to the Group.**

7. On the basis of the draft list of International Transmission Systems of an Internal Market Dimension adopted by the decision-making body, the Commission is empowered to adopt delegated acts in accordance with Article 51c concerning the establishment of the Union list of International Transmission Systems of an Internal Market Dimension. The Union list shall take the form of an annex to the directive.
8. The Commission shall, when adopting the Union list of International Transmission Systems of an Internal Market Dimension, ensure that
- (a) for each transmission system included in the draft list of Transmission Systems of an Internal Market Dimension, an assessment according to Article 51b was undertaken and made available to the Group at least [two months] before the decision-making body adopts the draft list,
 - (b) the Union list of International Transmission Systems of an Internal Market Dimension is based on the assessments undertaken for all transmission systems included in the list according to Article 51b.”

(11)°The following new Article 51b is added:

“Article 51b

For a transmission system to be included in the Union list of International Transmission Systems of an Internal Market Dimension an assessment must be undertaken. In this assessment the transmission system and the impact of including the transmission system in the Union list of International Transmission Systems of an Internal Market Dimension on the following parameters shall be analysed:

- the proper functioning of the single gas market,
- the competitive environment and fair conditions of competition in the single gas market,
- the security of gas supply in the Union and its Member States,
- the feasibility or economic performance of the transmission system,
- the level of interconnection capacity between Member States,
- the requirements of legal certainty as well as clear and stable framework conditions.”

(12)^o The following new Article 51c is added **[see IIA of 13 April 2016]**:

“Article 51c Exercise of the delegation

- 1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.**
- 2. The power to adopt delegated acts referred to in Article 51a paragraph 7 shall be conferred on the Commission for a period of four years from [XX/YY/ZZZZ]. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of this four-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.**
- 3. The delegation of power referred to in Article 51a paragraph 7 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.**
- 4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.**
- 5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.**
- 6. A delegated act adopted pursuant to Article 51a paragraph 7 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.”**

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
