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OPINION OF THE LEGAL SERVICE¹

From: Legal Service

To: Energy Working Party

Subject: **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
- compatibility with UNCLOS

On 13 November 2017, the Commission presented 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

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² COM(2017) 660 final, doc.14204/17.

At the meeting of the Working Party on Energy on 11 January 2018, the Council Legal Service was asked by the Presidency to put in writing its opinion on whether the application of the proposal to the exclusive economic zone of the Member States is compatible with the UN Convention on the Law of the Sea ("UNCLOS")³ and the impact of its adoption on the allocation of competences between the Union and its Member States. This opinion answers the first question of that request. A separate opinion will address the other issues raised by delegations during the meeting.

I. Introduction

1. The objective of the draft Directive is to apply the substantive *"rules applicable to gas transmission pipelines connecting two or more Member States"* to gas *"pipelines to and from third countries"*.⁴
2. For this purpose, it is proposed to amend the definition of an interconnector in Article 2(17) of Directive 2009/73/EC⁵ ("Gas Directive") and to include in its scope transmission lines which cross or span a border between Member States and third countries *"up to the border of the Union jurisdiction"*. Recital (5) indicates that *"(t)he applicability of Directive 2009/73/EC for gas pipelines to and from third countries remains confined to the territorial limit of Union's jurisdiction"* but, as regards offshore pipelines, this should apply *"in the territorial waters and exclusive economic zone of the Member States."*

³ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁴ Recital 3; see also the Explanatory memorandum, page 2, 3rd paragraph.

⁵ Directive 2009/73/EC 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.

3. In other words, the proposal intends to make Union energy law on unbundling, transparency, third-party access and regulated tariffs applicable not only to gas pipelines to and from third countries which are in the territory of Member States but also to offshore pipelines situated in their internal waters as well as in their exclusive economic zone (EEZ), as long as the offshore pipeline has an interconnection point with the Union network. Although the latter condition is not expressly mentioned, it may be deduced from the text of some amendments⁶ and from the fact that it is very unlikely that the application of common rules to offshore pipelines merely transiting through the EEZ of the Member States without any interconnection with the Union network might contribute to the completion of the internal market in natural gas.⁷
4. The Explanatory Memorandum of the proposal lacks any reasoning on the regulatory power of the Union over offshore pipelines in the EEZ of Member States and only states that "*EU law in general applies in the territorial waters and the exclusive economic zone of EU Member States*". According to the explanation given by the Commission during the Working Party on Energy of 12 December 2017, the pipeline's onshore landing in a Member State would trigger the Union jurisdiction to adopt legislation on offshore pipelines in the EEZ. Reference was made to Article 79(4) of UNCLOS allowing coastal States to establish conditions for pipelines entering the territory or territorial sea of a Member State.

⁶ Member States would be entitled to take a number of decisions "*as regards infrastructure to and from third countries between the border of the Union jurisdiction and the first interconnection point with the Union network*" under Article 9(8)(b) and (9)(b), 14(1)(b) and 49(9).

⁷ This has also been confirmed by the Commission in its presentation to the Working Party on Energy on 20 February 2018.

II. Legal analysis

5. Extending the scope of the Gas Directive to the EEZ of the Member States would result in treating an offshore pipeline passing through the EEZ of a Member State like a pipeline crossing its territory, even if the transmission line is not connected to its national transmission system.
6. This would have significant consequences that are not clearly set out in the text of the draft Directive or mentioned in the Explanatory Memorandum. For example, the application of Article 11 of the Gas Directive⁸ to the section of the pipeline located in the EEZ would imply that the regulatory authority of each coastal State whose EEZ is involved has to certify a transmission system operator owned or controlled by a third country for the section of the pipeline situated in its EEZ. Similarly, to ensure that the provisions of the Gas Directive are "*applied consistently up to the border of Union jurisdiction*", exemptions for new infrastructures under Article 36 would have to be agreed by all the national regulatory authorities concerned and, where they are not able to reach an agreement, under certain conditions, by the Agency for the Cooperation of Energy Regulators.⁹ The Commission would, in any case, be entitled to exercise an "ex post" control of the derogation under Article 36(9) and require the regulatory authority "*to amend or withdraw the exemption decision within a period of one month*".

⁸ Article 11 of the Gas Directive extends the application of the Union unbundling rules to persons from third countries where they own or operate energy infrastructures within the European Union.

⁹ Although this is not spelled out in the draft Directive in clear terms, the sentence added in the second subparagraph of Article 36(4), according to which "*[w]here the infrastructure in question is also under the jurisdiction of one of more third countries, the national regulatory authorities of the Member States shall 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 jurisdiction*", points in the direction of a decision by all the national regulatory authorities of the Member States whose EEZ is in the Union jurisdiction.

7. The draft Directive employs the concept of Union jurisdiction in an axiomatic way to extend the geographical application of Union law to maritime areas, in particular by referring to the EEZ in a recital.
8. Determining the scope of Union law requires a more rigorous legal analysis. While Article 52 TEU, as further specified in Article 355 TFEU, provides that the Treaties apply to Member States, it is accepted that the rule-making authority of the Union also extends to matters over which the Member States have sovereignty or jurisdiction under international law, including in maritime areas.¹⁰ However, under the principle of conferral enshrined in Article 5 TEU, the Union can only act within the limits of the competences conferred to it by the Member States and the latter can only confer powers that they have. An analysis of the UNCLOS Convention and of the case law of the ECJ is required to determine whether the coastal State jurisdiction, and as a consequence the Union jurisdiction, may legally be extended to the EEZ of the Member States in the case of the type of regulation contained in the Gas Directive.
9. The Union is a contracting party to UNCLOS¹¹ and therefore its provisions form an integral part of the Union legal order and are binding upon the Institutions¹².

¹⁰ Judgment of 24 November 1993, *Etablissements Armand Mondiet SA v Armement Islais SARL*, Case C-405/92, EU:C:1993:906, paragraph 12.

¹¹ Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

¹² Article 216(2) TFEU. For UNCLOS in particular, see Judgment of 3 June 2008, *Intertanko*, Case C-308/06, EU:C:2008:312, paragraph 53, and Judgment of 30 May 2006, *Commission v Ireland*, Case C-459/03, EU:C:2006:345, paragraph 82.

10. UNCLOS lays down a framework with regard to the construction, operation and protection of pipelines. The legal status of offshore pipelines is determined not only by the legal regime governing the rights and jurisdiction of coastal States and the rights and freedoms of other States in different maritime zones, such as the territorial sea, the exclusive economic zone (EEZ), the continental shelf and the high seas, but also by the nature of the pipeline. In fact, UNCLOS makes a distinction between pipelines that are an integral part of offshore installations or are used for the exploitation of the coastal State's resources, which fall under the coastal State jurisdiction,¹³ and other long-distance transmission pipelines, whose status is determined by the regime of the relevant maritime area.
11. Under Article 2 of UNCLOS, the sovereignty of a coastal State extends to the territorial sea as well as to its bed and subsoil, although a coastal State's exercise of rights in the territorial sea is not absolute but "subject to this Convention and other rules of international law".¹⁴ Similarly, the Court of Justice has considered that the national territory of the Member States also includes the territorial sea.¹⁵ Therefore, the application of Union energy law in the territorial sea of the Member States would be permitted under UNCLOS¹⁶, under the condition of respecting UNCLOS and other international law.
12. The EEZ, on the other hand, is subject to the specific legal regime established in Part V of UNCLOS, which is intended to strike a balance between the traditional freedoms of the high seas for all States and a limited set of sovereign rights and jurisdiction for coastal States.¹⁷

¹³ Article 79(4) recognises the jurisdiction of coastal States over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operation of artificial islands, installations and structures.

¹⁴ Article 2(3) UNCLOS.

¹⁵ Judgment of 29 March 2007, Case C-111/05, *Aktiebolaget NN v. Skatteverket*, EU:C:2007:195, paragraph 57.

¹⁶ See Doc. 14498/13, Opinion of the Legal Service, paragraphs 11-13, on the possibility to apply Union law to the territorial sea of Member States.

¹⁷ Article 55 of UNCLOS. See also Case C-308/06, *Intertanko*, cited in footnote 2, at paragraph 58.

13. The specificity of the legal regime of the EEZ is that the sovereign rights of the coastal State are not associated with the zone in a territorial sense, but derive from its economic potential. The subject matters with regard to which the coastal State is entitled to exercise sovereign rights and jurisdiction in the EEZ are exhaustively listed in Article 56(1). The coastal State enjoys sovereign rights with respect to the exploration and exploitation of natural resources in the EEZ and the preservation of the environment. The economic exploitation includes production of energy from water, currents and winds. Coastal States also have jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment, which are also functionally linked to the economic exploitation of the EEZ.¹⁸
14. In accordance with these rights and jurisdiction, there is Union legislation in force applicable to the EEZ and the continental shelf of the Member States,¹⁹ and the case law of the Court of Justice confirms that Union law may apply there insofar as Member States enjoy sovereign rights or jurisdiction under the relevant provisions of UNCLOS.²⁰

¹⁸ Articles 60 to 68 UNCLOS further develop the pertinent jurisdiction of the coastal State in the EEZ.

¹⁹ See, for example, Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, OJ L 140, 5.6.2009, p. 114, Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC OJ L 178, 28.6.2013, p. 66, Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 amending Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive OJ L 195, 01/08/2000 p. 41 and Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause, (2014/415/EU), OJ L 192, 1.7.2014, p. 53.

²⁰ See, for example, for the conservation of natural resources and in particular for the transposition of the habitat Directive, the Judgment of 20 October 2005, *Commission v United Kingdom*, Case C-6/04, EU:C:2005:626, paragraphs 115-117; for the application of Union law to work carried out on fixed and floating installations positioned on the continental shelf, Judgment of 27 February 2002. *Herbert Weber v Universal Ogden Services Ltd.*, Case C-37/00, EU:C:2002:122, paragraphs 31-36 and Judgment of 17 January 2012, *Salemink*, Case C-347/10, EU:C:2012:17, paragraphs 33-36.

15. The fact that the coastal State is entitled to exercise exclusive, but at the same time functionally limited, powers in the EEZ is reflected in Article 58(1). According to its provisions, all States enjoy the freedoms referred to in Article 87 of navigation and overflight and of laying of submarine cables and pipelines and other lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines.
16. Under Article 58(3) those freedoms can only be exercised in compliance with the laws and regulations adopted by the coastal State following the provisions of UNCLOS or public international law. Since national regulations are permitted "*in so far as they are not incompatible*" with Part V of the Convention, the obligation to respect them exists only to the extent that they are within the scope of the sovereign rights and jurisdictions recognised under Article 56(1). In this respect ITLOS held that the prohibition of certain activities by Guinea in its EEZ, which were characterised by that State as activities affecting the economic interest or entailing fiscal losses for it, would be incompatible with the provisions of Articles 56 and 58 of UNCLOS.²¹
17. It follows that the Union cannot rely on Article 58(3) to apply the Gas Directive to the EEZ of Member States even for reasons of security of supply, since the Gas Directive would not qualify as a measure compatible with Part V of UNCLOS in the absence of a direct connection with any of the subject matters listed in Article 56(1).

²¹ *The M/V 'Saiga'* (St. Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), paragraph 131.

18. As far as the freedom to lay submarine pipelines is concerned, Article 79 constitutes the relevant UNCLOS provision referred to in Article 58(1).²² The continental shelf regime in Part VI governs largely the same geographical area of seabed as the EEZ. Article 79 of UNCLOS reaffirms the right of all States to lay pipelines on the continental shelf of any State²³ and sets out the extent to which the coastal State can regulate such activity: it may take reasonable measures for the exploitation of natural resources and for the prevention of pollution from pipelines and has to consent to the delineation of the course of the pipelines. The coastal State also has jurisdiction over pipelines used in connection with the exploitation of resources in the continental shelf or connected to the operation of artificial islands or installations under its jurisdiction.

²² Under Article 56(3) of UNCLOS the rights given to the coastal State in the EEZ in relation to the seabed and subsoil are to be exercised in accordance with Part VI of UNCLOS.

²³ The obligation not to impede the laying and maintenance of pipelines on the continental shelf seabed was considered to be part of customary international law by the International Court of Justice in the *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, paragraph 65.

19. Article 79(4) also addresses the right of the coastal State to establish conditions for pipelines entering its territory or territorial sea. The wording of the provision merely reserves the right of the coastal State to establish additional conditions beyond resource related matters for pipelines within its territory or territorial sea in accordance with the principle that the coastal state enjoys sovereignty in those areas. This was confirmed by the ECJ in *Kik*,²⁴ where it held that the jurisdiction which Article 79(4) confers on a coastal State in respect of the continental shelf is limited to pipelines constructed in connection with the exploitation of the continental shelf resources and does not extend to other kinds of pipelines.²⁵ For these reasons, the interpretation that additional conditions established for pipelines in the territorial sea or territory of the coastal State could extend to apply to the part of the submarine pipeline lying on the continental shelf cannot be accepted.

²⁴ Judgment of 19 March 2015, *Kik*, Case C-266/13, EU:C:2015:188, paragraph 41.

²⁵ After finding that the work carried out on board a pipe-laying vessel cannot be treated as work carried out on the territory of a Member State, the Court dismissed any possible jurisdictional link based on UNCLOS, by concluding that "*[i]n any event, there is no indication in the order for reference that the pipelines laid by the vessel on which Mr Kik was working during the periods when it was above the part of the continental shelf adjacent to certain Member States were intended for the exploration of the continental shelf or the exploitation of its resources.*" *Ibid.*, paragraph 41.

20. The ECJ has also underlined the "merely functional" and "limited" sovereignty of a Member State in its EEZ and continental shelf with respect to its limited rights under the international law of the sea. According to the ECJ,

*"the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State. That finding is confirmed by Articles 58(1) and 79(1) of the Convention, which permit, subject to certain conditions, any State to lay undersea cables in those zones."*²⁶

III. Conclusion

21. The Union does not have jurisdiction to apply energy law on unbundling, transparency, third-party access and regulated tariffs, which is unrelated to the economic exploitation of the EEZ, to pipelines crossing the EEZ of Member States. The application of the Gas Directive to the EEZ would be contrary to Articles 56 and 58 of UNCLOS as interpreted by the Court of Justice.

²⁶ Case C-111/05, *Aktiebolaget*, cited in footnote 15, at paragraph 59. For an explicit confirmation by the ECJ of "the functional and limited sovereignty" of the Member State over its continental shelf, see Judgment of 17 January 2012, *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Case C-347/10, EU:C:2012:17, paragraph 35, with explicit reference to C-111/05, *Aktiebolaget*, paragraph 59.