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**NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	14204/17
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 - Analysis of the final compromise text with a view to agreement

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1. The first and final trilogue on the Directive on Gas was held on 12 February 2019, and a provisional agreement was reached on the basis of the text as reflected in Annex.
2. The Permanent Representatives Committee is thus invited to:
  - endorse the annexed compromise text as agreed in the trilogue, and
  - mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise package contained in the Annex to this document (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

Texts added in trilogue are in **bold underline** and deletions are ~~strikethrough~~. All previous additions are **bold** and deletions [ ].

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 Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

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.

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (2) Directive 2003/55/EC of the European Parliament and of the Council<sup>3</sup> and Directive 2009/73/EC of the European Parliament and of the Council<sup>4</sup> 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 [ ].
- (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.

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<sup>3</sup> 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).

<sup>4</sup> 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).

**(4a) A pipeline connecting a third-country oil or gas production project to a processing [ ] plant or, [ ] to a final coastal landing terminal within [ ] 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.**

[ ]

**(4b) Transmission system operators should be free to conclude [ ] 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 [ ] Union law.**

**(4c) 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 or of an agreement between the Union and the 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 territory [ ] of the Member States. [ ] As regards offshore [ ] gas transmission lines, it should be applicable in the territorial [ ] sea [ ] of the Member State [ ] where the first interconnection point with the Member States' network is located.**

**(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)  With regard to agreements or parts of  agreements  with third countries which may affect common rules of the 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 or an upstream pipeline network between the Member State and a third country.  The procedure should not delay the implementation of this Directive.**

**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.**

**(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 rules<sup>5</sup>, the Network Code on capacity allocation mechanisms in gas transmission systems<sup>6</sup>, Commission Decision on conditions for access to the natural gas transmission networks<sup>7</sup>, as well as chapter III, V, VI, Article 28 and chapter IX of the Network code on harmonised transmission tariff structures for gas<sup>8</sup> 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 Balancing<sup>9</sup> applies exclusively to balancing zones within the borders of the Union.

**(5e) In order to adopt decisions authorising or refusing to authorise a Member State to amend, extend, adapt or renew or conclude an agreement with a third country, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and the Council<sup>10</sup>.**

**(5f) Since the objectives of this Directive, namely consistency of the legal framework within the Union while avoiding distortion of competition in the internal energy market in the Union, cannot be sufficiently achieved by the Member States alone, but can rather, by reasons of scale be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives.**

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<sup>5</sup> Commission Regulation establishing a Network Code on interoperability and data exchange rules (703/2015/EU)

<sup>6</sup> Commission Regulation (EU) 2017/459 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013

<sup>7</sup> Commission Decision on conditions for access to the natural gas transmission networks [2012/490/EU]

<sup>8</sup> Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas

<sup>9</sup> Commission Regulation establishing a Network Code on Gas Balancing of Transmission Networks (312/2014/EU)

<sup>10</sup> **Regulation (EU) No 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).**

**(5g) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a Directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.**

(6) 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 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 [ ] of the Member States or the territorial sea of the Member State [ ]**;

(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 [ ] transmission system connecting a Member State with a third country**, between the border of **that Member State [ ]** and the first [ ] connection point with **that Member State's [ ]** 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 [ ] transmission system connecting a Member State with a third country** between the border of **that Member State [ ]** and the first [ ] connection point with **that Member State's [ ]** 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 [ ] transmission system connecting a Member State with a third country** between the border of **that Member State [ ]** and the first [ ] connection point with **that Member State's [ ]** 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 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 the Member State where the first entry point to the Member States' network is located shall consult the [ ] concerned third country[ ] 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. [ ]**

(5) Article 36 is amended as follows:

**(aa) in paragraph 1, point (e), the following changes are made:**

- (e) the exemption must not be detrimental to competition **in the relevant markets which are likely to be affected by the investment**, to the effective functioning of the **Union's** internal market in natural gas, the efficient functioning of the **concerned** regulated **systems, or to security of supply of natural gas within the Union.**

(a) paragraph 3, **is replaced with the following text**~~the following second sentence is added:~~

**Before adopting the decision, the national regulatory authority, or where appropriate other competent authorities shall consult:**

- (a) the national regulatory authorities of the Member States the markets of which are likely to be affected by the new infrastructure; and**

**(b) the relevant authorities of the third countries, 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.**

~~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, [ ] do not respond to the consultation within a reasonable time frame or a [ ] set deadline not exceeding 3 months, 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 before a decision is adopted, the national regulatory authorities [ ], or where appropriate, other competent authorities of the Member State [ ] where the first interconnection point with the Member States' network is located, 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 [ ] of the Member States and, where applicable, in the territorial sea of the Member State [ ]. Where the consulted third-country authorities [ ] do not respond to the consultation within a reasonable time or a [ ] set deadline not exceeding 3 months, 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.

For infrastructure to and from third country, **the regulatory authority of the Member State where the first interconnection point with the Member States' network is located may cooperate** with the relevant authorities of the third country **after consulting the regulatory authorities of other concerned Member States**, aiming at, as regards this infrastructure, consistent application of the provisions of this Directive **in the territory**  of  **the Member States**

(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** .

(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. These agreements shall be notified to the 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* [ ]:

*Article 49a (new)*

*Derogations in relation to transmission lines to and from third countries*

[ ] In respect of gas [ ] **transmission lines between a Member State and a third country** [ ] completed before [PO: date of entry into force of this Directive], **the Member State**[ ] **where the first connection point of the said transmission line with a Member State's network is located** may decide, [ ], 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, [ ], for objective reasons [ ], such as enabling the recovery of the investment made or due to reasons of security of supply**, provided that the derogation would not (*end of the paragraph is reverted to COM original proposal*) be detrimental to ~~+~~ **negatively affect in significant way** competition ~~in~~ on ~~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 based on objective justification, renewable if justified** and may be subject to conditions which contribute to the achievement of the above conditions.

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

Where the gas **transmission line** [ ] 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 **with the Member States' network** is located shall decide on a derogation for the [ ] **gas transmission line [ ] 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.~~

**Upon request by the Member States concerned, the Commission may decide to act as an observer in the consultation between the Member State in the territory of which the first connection point is located and third countries related to the consistent application of this Directive in the territory and territorial sea of the Member State where the first interconnection point is located, including the granting of derogations for such transmission lines.**

**Any decision on a derogation in accordance with this paragraph shall be taken within one year after the entry into force of this Directive. Member States shall notify the decision to the European Commission and publish it.**

(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 or an upstream pipeline network 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, [ ], to open formal negotiations with a third country for the part which may affect Union common rules [ ] unless it [ ] 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 [ ] Union with a third country;
  - d) be discriminatory.
- 1bis. When performing the assessment under paragraph 1, the Commission shall take into account whether the intended agreement concerns a transmission line or an upstream pipeline that contributes to the diversification of gas supplies and supplier through new gas sources. ~~Without prejudice to the above, the Commission shall authorise the Member State to open such negotiations in case the intended agreement concerns a transmission line that contributes to the diversification of gas supplies through new gas sources.~~
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 [ ] notification referred to in paragraph 01. [ ] [Such decisions shall be adopted in accordance with the advisory procedure referred to in Article 51a of this Directive.
- 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. 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 [ ]182/2011}.~~
3. The Commission may propose guidance [ ] and may request the inclusion of particular clauses in the envisaged agreement in order to ensure compatibility with Union legislation in accordance with the new IGA Decision 2017/684.
4. The Commission shall be kept informed of the progress and results of the negotiations to amend, extend, adapt, renew or to conclude [ ] agreement throughout the different stages and may request to participate in the negotiations [ ] between the Member State and the third country in accordance with the new IGA Decision 2017/684.
5. The Commission shall inform the European Parliament and the Council about the decisions taken pursuant to paragraph 1.
6. Before signing an agreement between a Member State and a third country, the Member State concerned shall notify the Commission of the outcome of negotiations and shall transmit the text of such an agreement to the Commission.
7. Upon notification the Commission shall make an assessment as to whether the negotiated agreement conflicts with the requirements of paragraph 1. Where the Commission finds that the negotiations have resulted in an agreement which fulfils the requirements of paragraph 1, it shall authorise the Member State to sign and conclude such an agreement.
8. The Commission shall adopt a decision to authorise the Member State to sign and conclude the agreement with a third country or a decision on the refusal to authorise a Member State to sign and conclude the agreement with a third country within 90 days of receipt of the request referred to in this paragraph. Where additional information is needed to take a decision, the 90-day period shall run from the date of receipt of the additional information.



- 9. Where the Commission grants an authorisation pursuant to paragraph 7, the Member State concerned shall notify the Commission of the conclusion and entry into force of the agreement, and of any subsequent changes to the status of that agreement.**
- 10. In the event that the Commission does not grant the authorisation pursuant to this paragraph, it shall inform the Member State concerned thereof and state the reasons thereof.**

(11) The following Article is inserted:

***Article 51a***

- 1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.**
- 2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.**

*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~~ **9 months** 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.**

**In addition, Cyprus and Malta, as a result of their geographical situation, shall not be obliged to bring into force measures which are necessary to comply with this Directive for as long as they do not have any infrastructures connecting them with third countries, including upstream pipelines.**

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*

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