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INFORMATION NOTE

From: General Secretariat of the Council

To: Council

Subject: Any other business

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

- Information from the Presidency

Delegations will find in Annex an information note from the Presidency.

STATUS REPORT**from the AT EU Presidency on the Gas Directive**

On 21 November 2018, in a spirit of compromise, the Austrian Presidency tabled a second revised text of the Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas aimed at reconciling the persistent and fundamental differences in positions between Member States. According to this new text, internal energy market rules would apply to pipelines to and from third countries, provided that such pipelines would be of an “internal market dimension” – the latter to be determined in a criteria- and consensus-based process, mirroring the PCI process. So far, assessments of the revised text vary substantially and will require further analysis. For a broad compromise, further deliberations appear necessary.

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 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. All existing and potential future pipelines would be subject to the rules set out in the Gas Directive (and the related legal acts like the Gas Regulation, network codes and guidelines, unless otherwise provided in those acts). The Commission, however, also 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 with regard to existing pipelines.

At the meeting of the Working Party on Energy on 11 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 zone (EEZ) of the Member States was compatible with the UN Convention on the Law of the Sea (“UNCLOS”) and on the impact of its adoption on the allocation of competences between the Union and its Member States.

The first part of the opinion was issued on 1 March 2018.¹ Against this backdrop, legal concerns as to the compatibility of the proposal with UNCLOS were raised in the discussions among Member States.

The second part of the opinion was issued on 26 March 2018 and answered the other question of the Bulgarian Presidency's request relating to the allocation of competences. The assessment also included an examination of the proposal concerning its legal basis and the derogations for which a number of delegations had asked for.² During the following discussions among Member States, legal concerns as to the compatibility of the derogation regime envisaged in the proposal with Union law were expressed.

Based on Member States' comments, a first revision of the file was proposed by the Bulgarian Presidency on 27 March 2018 (doc. 6851/18) and discussed subsequently in the Energy Working Party. On 18 May 2018, a Bulgarian Presidency non-paper was issued (WK 5956/2018) proposing how to clarify that upstream pipelines would not be impacted by this directive, that its application would be limited only to those pipelines that have a significant impact on the internal market, and proposing the option to empower Member States to amend or prolong existing intergovernmental agreements.

In light of the work carried out so far and discussions at the Energy Working Party on 22 May 2018 in particular, the Bulgarian Presidency brought the file before COREPER. The latter was asked for guidance on four questions (cp. doc. 10228/18). The first referred to the regulatory framework already in place, and in particular the recently adopted Decision (EU) 2017/684 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. Against this background delegations were asked to comment on the proportionality, appropriateness and necessity of the proposal. The remaining questions related to the proposal's scope of application including the case of upstream pipelines, derogations, intergovernmental agreements and the procedure of empowerment.

¹ Cp. doc. 6738/18.

² Cp. doc. 7502/18.

Given discussions at the COREPER meeting on 20 June 2018 and continued substantial differences in opinion between Member States, the Bulgarian Presidency concluded that further technical work on this file was needed.

Against this backdrop, the Austrian Presidency put forward a paper (WK 11025/2018 INIT) for discussion at the Energy Working Party on 27 September 2018 and delegations were invited to submit written contributions until 18 October 2018. In total nine written contributions were received.

In a next step, the Austrian Presidency prepared an option paper (WK 13455/2018 INIT) as a background document for discussion at the Energy Working Party on 12 November 2018. With this option paper, a twofold objective was pursued:

First to identify whether Member States considered it useful to reflect on an “additional element” to the text to overcome the persistent differences in positions. The Austrian Presidency also sought to clarify whether a more targeted transfer of competences together with a more targeted scope of application could prove useful and attention was drawn to the alternative model in WK 12553/2018 INIT.

Second, notwithstanding possible fundamental concerns, delegations were invited to comment on whether the application of internal market rules to pipelines to and from third countries should be limited to those of the Gas Directive and internal market essentials in particular (third-party access, tariff regulation, unbundling and transparency) or whether it should also include the more detailed rules resulting from the Gas Regulation and the network codes. According to Article 2 paragraph 2 of the Gas Regulation³, definitions contained in the Gas Directive 2009/73/EC also apply to the aforementioned Gas Regulation in general. Consequently, with the proposed amendments not only the Gas Directive in its entirety, but also “the related legal acts like the Gas Regulation, network codes and guidelines, unless otherwise provided in those acts“ would become applicable to pipelines to and from third countries⁴. Against this background, the argument had been raised according to which the provisions of the Gas Regulation were too detailed to be applied to gas trade with third countries (see WK 12541/2018 INIT in particular). In addition the Commission was invited to provide some explanation as to the practical implications of the application of the Gas Regulation and network codes to pipelines to and from third countries as well as some information on any possible impact of such an approach on the need to conclude intergovernmental agreements.

In line with all other debates before, discussions at the Energy Working Party on 12 November 2018 confirmed a continued and substantial divergence of positions between Member States.

In principle, the file’s maturity remains disputed. Furthermore, it needs to be stressed that the aforementioned differences in positions also relate to the substance of the envisaged legislative act and concern:

- the necessity and the proportionality of the proposed measure together with the question of whether some further impact assessment is needed.

(In this context, also the compatibility of the legislative proposal with international law and with the requirement of legal certainty is called into doubt by some Member States and remains disputed.)

- the proposed transfer of competences (establishment of an exclusive Union competence, see below) and issues related to the principle of subsidiarity.

³ Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and Repealing Regulation (EC) No 1775/2005

⁴ Cp. Explanatory Memorandum, COM (2017)660 final, p. 1.

It may be expected that after the adoption of the proposed Directive only the Union would be able to conclude international agreements in the area covered by Directive 2009/73/EC, and Member States would no longer have the right to undertake obligations with third countries which affect these common rules even when there is no possible contradiction between those commitments and the Union common rules. Member States would be under the obligation to take all appropriate steps to eliminate the incompatibilities of the existing intergovernmental agreements with the Gas Directive. In so far as such intergovernmental agreements regulate areas covered to a large extent by the Gas Directive and are liable to alter its scope, they would fall within the sphere of Union exclusive competence. Member States would be under the obligation to terminate them whenever possible, and the competence to renegotiate them would lie with the Union.

- the question of whether the application of internal market rules to pipelines to and from third countries should be limited to those of the Gas Directive and internal market essentials in particular (third-party access, tariff regulation, unbundling and transparency) and what legal means there would be to arrive at such a more limited approach, if so wished.

Interlinked with the above key issues are diverging views on:

- the Directive's scope of application, inter alia a possible de minimis clause:

While such a clause seems key to some, others are more critical, are opposed to it or are of the opinion that at least some further legal analysis of this issue is needed (compatibility of such an approach with WTO law in particular). Inter alia it is doubted whether – with a view to „[l]imit the application of the Directive to only those pipelines with a significant impact on the Internal Market“ (cp. The BG Presidency's Non-Paper in WK 5956/2018 INIT) – a single criterion, e.g. the capacity, would suffice to determine a given pipeline's "Union dimension". Some feel that a more comprehensive analysis would be needed while others can support such a single criterion approach.

With a view to the Directive's scope of application, also clarification is sought as to upstream pipelines not being impacted by the proposed amendment (see e.g. WK 12806/2018 INIT).

- the derogation regime:

The debate covers the question of under which conditions and according to which procedure could derogations be granted. The need for legal coherence was pointed out in this context. Also the more general question as to which pipelines could be derogated from single market rules remains a critical issue.

- the procedure for empowerment of Member States for agreements falling into the exclusive competence of the Union:

Not only matters of legitimacy and how to comply with requirements of legal coherence seem disputed. Also the more general question as to which intergovernmental agreements (existing or also new) should be covered by any such a procedure seems unclear.

- Also the actual need for intergovernmental agreements (if the proposed amendment were adopted) remains an issue for which diverging assessments exist.⁵ Against this background in the discussions of the Energy Working Party, the question arose whether an intergovernmental agreement de jure and/or de facto would always be indispensable henceforth.

Against this backdrop and in a spirit of compromise, the Austrian Presidency prepared a second revised version (doc. 14560/18 of 21 November 2018; REV 2 in the following), seeking a balance between the different positions. REV 2 was put for discussion at the meeting of the Energy Working Party on 29 November 2018.

⁵ Cp. inter alia doc. 7502/18.

The essentials of REV 2 are:

- an “additional 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) process⁶ and is aimed at reconciling the most fundamental differences in opinion as outlined above. In doing so, it is envisaged that internal energy market rules would apply to pipelines to and from third countries, provided however, that such pipelines would be of an “internal market dimension” – the latter to be determined in a criteria- and consensus-based process, mirroring the PCI case.

- elements reflecting the status of discussions in two other key areas, i.e. the given interlinkage between the Gas Directive and the Gas Regulation as well as the derogation regime.

In the introductory note to REV 2 the caveat is to be found according to which the interlinkage between the Gas Directive and the Gas Regulation would need some further (also legal) reflection, given the statements made on this point at the last Working Group meetings on 12 and 27 November 2018. In the discussions also the question was raised whether a system in which the application of network codes to pipelines to and from third countries was subject to a decision of the relevant national regulatory authorities could risk to be in contradiction with obligations under international law.

In addition to limiting the derogation clause to pipelines completed before the date of entry into force of the Directive, a second option is put up for discussion, as suggested by some, which would allow both, completed pipelines and pipelines under construction, to be derogated from single market rules.

When REV 2 was discussed at the Energy Working Party on 29 November 2018 first reactions were mixed.

⁶ 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.