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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)

{SWD(2017) 368 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The creation of an integrated gas market is a cornerstone of the EU's project to create an Energy Union. The internal gas market is considered to function well when gas can flow freely between Member States to where it is needed most and at a fair price. A functioning gas market is a prerequisite for enhancing security of gas supply in the Union. Since gas is transported mainly through pipelines, the interconnection of gas networks between Member States and non-discriminatory access to these networks are the basis for the market to function efficiently. It is also a prerequisite for gas deliveries during emergencies, both between Member States and with neighbouring third countries. The EU is to large extent dependent on gas imports from third countries and it is in the best interest of the EU and gas customers to have as much transparency and competitiveness also on pipelines from those countries.

While EU law in general applies in the territorial waters and the exclusive economic zone of EU Member States, Directive 2009/73/EC¹ (hereafter "the Gas Directive") does not explicitly set out a legal framework for gas pipelines to and from third countries. As a result, following legal analysis, it has been concluded that the rules applicable to gas transmission pipelines connecting two or more Member States, which fall within the scope of the definition of "interconnector", are not applicable to such pipelines entering the EU. However, there is an practice of applying core principles of the regulatory framework set out by the Gas Directive in relation to third countries, notably via international agreements concerning gas pipelines entering the European Union. It is considered that legislative action is henceforth required in order to define and specify in an explicit and coherent manner the regulatory framework applicable to all gas pipelines to and from third countries.

With the proposed amendments, the Gas Directive in its entirety (as well as the related legal acts like the Gas Regulation, network codes and guidelines, unless otherwise provided in those acts) will become applicable to pipelines to and from third countries, including existing and future pipelines, up to the border of EU jurisdiction. This includes the respective provisions on third-party access, tariff regulation, ownership unbundling and transparency. It will also enable new pipelines to and from third countries to apply for an exemption from the above rules pursuant to Article 36 Gas Directive. As regards existing pipelines, which fall outside the scope of Article 36, Member States will be enabled to grant derogations from the application of the main provisions of the Directive, provided that the derogation would not be detrimental to competition, effective market functioning or the security of supply in the Union.

Pipelines to and from third countries would thus be subject to at least two different regulatory frameworks. Where this results in legally complex situations, the appropriate instrument for ensuring a coherent regulatory framework for the entire pipeline will often be an international agreement with the third country or third countries concerned. In the absence of such an agreement, an exemption for new infrastructure or derogation for infrastructure already in operation, the pipeline may only be operated in line with the requirements of Directive 2009/73/EC within the borders of EU jurisdiction.

¹ 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 of 14 August 2009, p.94.

- **Consistency with existing policy provisions in the policy area**

The proposal renders the rules currently applicable to EU-internal pipelines also applicable to pipelines to and from third countries. As such, it is consistent with existing provisions in the policy area. Additional clarifications are included where necessary to take account of the specific requirements in relation to third countries.

- **Consistency with other Union policies**

The proposal seeks to implement key objectives of the Energy Union, as defined in the Framework Strategy for a resilient Energy Union with a forward-looking climate change policy, especially in the dimension of energy security (whereas one of the key drivers of energy security is the completion of the internal energy market).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for the proposed measure is Article 194 of the Treaty on the Functioning of the European Union (TFEU), which consolidated and clarified the competences of the EU in the field of energy. According to Article 194 TFEU, the main aims of the EU's energy policy are to: ensure the functioning of the energy market; ensure security of energy supply in the Union; promote energy efficiency and energy savings and the development of new and renewable forms of energy; and promote the interconnection of energy networks.

The present proposal also builds upon a comprehensive set of legislative acts that have been adopted and updated during the past two decades. With the objective of creating an internal energy market, the EU has adopted three consecutive legislative packages between 1996 and 2009, with the overarching aim of integrating markets and liberalising national gas and electricity markets. In this connection, the present proposal would ensure that there is no discrimination between the operators of gas pipelines to and from the EU and other market participants to whom the Gas Directive fully applies, for instance operators of gas pipelines connecting different Member States or operators of transmission systems within Member States.

The current proposal should also be seen as part of an ongoing effort to ensure the integration and effective operation of Europe's gas markets.

- **Subsidiarity (for non-exclusive competence)**

The proposed changes to the Gas Directive are necessary to achieve the purpose of an integrated EU gas market and cannot be reached at national level, on the basis of fragmented national rules, in an equally efficient manner. Evidence has shown that isolated national approaches have led to delays in the implementation of the internal energy market rules, leading to sub-optimal and incompatible regulatory measures, unnecessary duplication of interventions and delays in correcting market inefficiencies². Furthermore, pipelines to and from third countries are in most cases of a capacity which is capable of impacting the internal gas market and security of supply in several Member States.

² As set out in detail in the evaluation of the recast legislative acts under the Electricity Market Design Initiative (Commission Proposals COM(2016)864 final).

- **Proportionality**

The proposed amendment is strictly oriented on what is indispensable to achieve the necessary progress for the internal market, while leaving appropriate competences and responsibilities for Member States, national regulators and national actors. It includes the possibility for derogations for existing infrastructure (i.e. pipelines to and from third countries which are completed before the entry into force of this Directive), to take account of complex legal structures already in place which may require a case-specific approach, provided that the derogation would not be detrimental to competition, effective market functioning or the security of supply in the Union.

- **Choice of the instrument**

The proposal amends the Gas Directive, a key element of the Third Energy Package. The choice of an amending Act reflects the limited character of the current proposal.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The content of the current proposal is limited to providing clarification in an area where applicable EU law (or the lack thereof) and applied practice diverge. The proposal builds on established practice. To take account of nevertheless existing situations created as a result of lack of explicit rules under the current framework, Member States are enabled to provide for derogations for existing operating infrastructure. In view of the above, it is considered that the amendment of the Gas Directive can be carried out without a separate evaluation process.

- **Impact assessment**

The present initiative does not require a detailed impact assessment as the changes proposed reflect the practice of applying core principles of the regulatory framework set out in the Gas Directive in relation to third countries. This is particularly evidenced by the fact that these principles are reflected in several international agreements between Member States and third countries or the EU and third countries and that they are consistently applied to onshore pipelines to and from third countries.

- **Regulatory fitness and simplification**

The proposal may increase administrative requirements, however only to a very limited extent. As through the amendments the Gas Directive will, within the EU's jurisdiction, be applicable in its entirety to pipelines to and from third countries, it will also enable new pipelines to and from third countries to apply for an exemption for new infrastructure pursuant to Article 36 Gas Directive. Therefore, the number of exemption requests might increase which implies requirements for engagement at administrative level on the part of national regulatory authorities and the Commission in taking additional exemption decisions. However, this is not a new burden, but is already a core task defined in the Third Energy Package (Article 36 Gas Directive).

4. BUDGETARY IMPLICATIONS

No budgetary implications are expected from the proposed amendments of the Gas Directive.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will monitor the transposition and compliance of the Member States and other actors with the measure that shall be ultimately adopted, and shall take enforcement measures if and when required. Existing national regulatory authorities and other competent national authorities will ensure implementation of the proposal at a national level.

- **Detailed explanation of the specific provisions of the proposal**

The current proposal specifies the exact scope of application of the Gas Directive and consequently the Gas Regulation³ to pipelines to and from third countries up to the border of EU jurisdiction. This includes the respective provisions on third-party access, tariff regulation, ownership unbundling and transparency. It will enable new pipelines to and from third countries to apply for an exemption pursuant to Article 36 Gas Directive. It also includes the possibility for Member States to grant derogations for existing import infrastructure already in operation. In order to ensure a coherent legal framework for pipelines passing through more than one Member State, it is necessary to establish which Member State should decide on such a derogation.

³ Which Article 3(2) cross-refers to the definition in Article 2 of the Gas Directive

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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 Committee⁴,
Having regard to the opinion of the Committee of the Regions⁵,
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, competitive prices, efficient investment signals and a higher standard of service, and to contribute to security of supply and sustainability.
- (2) Directive 2003/55/EC of the European Parliament and of the Council⁶ and Directive 2009/73/EC of the European Parliament and of the Council⁷ 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 pipelines to and from third countries. The amendments introduced by this Directive will ensure that the rules applicable to gas transmission pipelines connecting two or more Member States, are also applicable to pipelines 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. It will also enhance transparency and provide legal certainty as

⁴ OJ C , , p. .

⁵ OJ C , , p. .

⁶ 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).

⁷ 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).

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 pipelines to and from third countries, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such pipelines 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 pipelines to and from third countries.
- (5) The applicability of Directive 2009/73/EC for gas pipelines to and from third countries remains confined to the territorial limit of Union's jurisdiction. As regards offshore pipelines, it should be applicable in the territorial waters and exclusive economic zones of the Member States.
- (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 or between Member States and third countries up to the border of Union jurisdiction;"

- (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 infrastructure to and from third countries between the border of Union jurisdiction and the first interconnection 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 infrastructure to and from third countries between the border of Union jurisdiction and the first interconnection point with the Union 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 infrastructure to and from third countries between the border of Union jurisdiction and the first interconnection 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.";

(3) 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 up to the border of Union jurisdiction."

(4) Article 36 is amended as follows:

(a) in paragraph 3, the following second sentence is added:

"Where the infrastructure in question is under the jurisdiction of a Member State and one (or more) third countries, the national regulatory authority 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 is also under the jurisdiction of one or 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.";

(5) 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, 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 jurisdiction;"

(6) in Article 42, the following paragraph 6 is added:

"6. Regulatory authorities shall consult and cooperate with the relevant authorities of third countries in relation to the operation of gas pipelines to and from third countries 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."

(7) in Article 49, the following paragraph 9 is added:

"In respect of gas pipelines to and from third countries completed before [PO: *date of entry into force of this Directive*], Member States may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such pipelines between the border of Union jurisdiction and the first interconnection point, provided that the derogation would not be detrimental to competition on 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 and may be subject to conditions which contribute to the achievement of the above conditions.

Where the gas pipeline in question is located in the jurisdiction of more than one Member State, the Member State in the jurisdiction of which the first interconnection point is located shall decide on a derogation for the pipeline.

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."

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. 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