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A common EU framework regulating import pipelines for gas? Exploring the Commission's proposal to amend the 2009 Gas Directive

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This contribution investigates the form and content of a new and updated European Union (EU) legal framework intended to regulate third-country import pipelines for gas, including the 'upstream' component of the Nord Stream 2 pipeline. The article will first set the scene and examine the essential features of the current legal regime regulating import pipelines in the EU and explore its extraterritorial dimension, including the discussion of the allocation of competences between the EU and its Member States. Subsequently, the paper will explore the newly proposed EU legal framework for import pipelines as set out in the Commission's proposal to amend the 2009 Gas Directive. It will focus on three crucial, interlinked dimensions: (1) the proposed form of such legislation; (2) the applicability of the framework to existing and new pipelines entering the EU (scope); and (3) a potential derogation and exemption regime for import pipelines.

Keywords: gas; European Union; Nord Stream; Gas Directive; extraterritorial effect

1. Introduction

Recent analysis by the Legal Services of both the European Commission and the European Council have concluded that current European Union legislation on the internal market for gas (that is, the Gas Directive 2009/73/EC and Regulation 715/2009, as well as the relevant network codes) apparently cannot apply to third-country sub-sea import pipelines for gas, such as the planned Nord Stream 2.¹

The alleged legal uncertainty as to the appropriate regulatory framework for such pipelines has triggered the Commission to explore various options to apply common

¹ Council of the European Union, 'Opinion of the Legal Service, Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues' (12590/17, Brussels, 27 September 2017); 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 [2009] OJ L211/94 (hereinafter the Gas Directive); 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 [2009] OJ L211/36.

rules to gas pipelines entering the EU's internal gas market.² The underlying objective is claimed as being to ensure that all major pipelines in the EU and entering EU territory are operated under the same degree of transparency, are accessible to other operators and are operated efficiently. In November 2017, the Commission proposed what is now providing to be legally as well as politically controversial amendments to the current Gas Directive.

This contribution will investigate the form and content of a new and updated EU legal framework aimed at regulating third-country import (ie, external) pipelines for gas and, in particular, the controversial Nord Stream 2 pipeline bringing gas from Russia to Germany.³ The proposed amendments launched in November 2017 appear to be primarily targeted at regulating the 'upstream' component of this pipeline.⁴ The article will first set the scene and examine the essential features of the current legal regime regulating transmission as well as import pipelines in the EU.

Subsequently, the article examines the Commission's proposed amendment to the Gas Directive,⁵ and the subsequent amendments to it as put forward by the European Parliament and the Presidency of the Council. This section will focus on three crucial, inter-linked dimensions: the proposed form of such legislation (Section 2); the applicability of the framework to existing and new pipelines entering the EU (scope) (Section 3); and a potential derogation and exemption regime for import pipelines (Section 4).

The following section will then explore the extraterritorial dimension, including a discussion of the allocation of competences between the EU and its Member States in concluding intergovernmental agreements (IGAs) regulating import pipelines in the future, if the proposed amendments are indeed adopted. It will conclude that the Commission proposal could lead to a major transfer of competences to the EU.

The article aims to provide insight and clarity into the planned updated EU legal regime regulating import pipelines for gas, including an improved understanding of its scope and potentially contentious issues. It will assess whether the newly proposed regime will provide for a truly comprehensive EU common framework regulating import pipelines and thereby contribute to a better functioning EU internal energy market and increased security of supply in the EU.

2. The current EU regime for pipelines for gas

2.1. Overview of key legislation

The current legal regime for the regulation of gas pipelines is known as the 'Third Energy Package' (TEP) of internal gas market rules. The cornerstones of the regime

² See European Commission, 'Questions and Answers on the Commission Proposal to Amend the Gas Directive (2009/73/EC)' (Fact Sheet, 8 November 2017) http://europa.eu/rapid/press-release_MEMO-17-4422_en.htm accessed 15 December 2018.

³ Kai-Olaf Lang and Kirsten Westphal explain that the 'onshore' component is fully regulated according to EU internal market law; see 'Nord Stream 2 – A Political and Economic Contextualisation' (2017) SWP Research Paper No 3 (March 2017).

⁴ K Talus, 'Discriminatory Nature of the Proposed Changes to the Gas Market Directive – Extension to External Pipelines or Only One of Them?' (2018) Utilities Law Review (forthcoming), analyses the potential discriminatory impact of the draft amendments on the Nord Stream 2 project in detail.

⁵ European Commission, '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' COM(2017) 660 final, 2017/0294 (COD) (hereinafter: the Commission proposal).

are third-party access, ownership unbundling and market supervision.⁶ The Gas Directive 2009/73 builds on two previous directives. The first Gas Directive of 1998 was the initial and very tentative step towards the adoption of a harmonised set of rules for the EU's gas transmission infrastructure. Member States could elect to require the owners of gas pipelines to allow third parties to use their pipelines under regulated conditions (regulated third-party access (TPA)) or to require them to negotiate individual contracts with third parties (negotiated TPA). Notably, that measure did not contain any provisions on interconnectors between Member States although it did exclude 'upstream pipelines' from the limited access requirements for onshore pipelines. The second Gas Directive of 2003, however, extended the harmonisation of access regulation, and at the same time provided for the Member State to grant an exemption from the standard regime – that is, mandatory TPA and regulated tariffs – for interconnectors.⁷ A limited exemption for new infrastructure – that is, interconnectors, liquefied natural gas (LNG) and storage facilities – was available if certain conditions were met (inter alia, when proven not to be detrimental to competition, the functioning of the market and security of supply in the EU). The 2003 Directive also introduced a requirement that transmission functions should be legally unbundled from other functions.

The Gas Directive (2009/73/EC), part of the TEP, and adopted prior to the adoption of the new title on energy in the Treaty of Lisbon, remains the most important secondary legislation regulating the internal market for gas to date.⁸ This measure has further fleshed out the conditions of regulated TPA and regulatory oversight but in order to ensure effective competition in the EU's gas market, it introduced stricter unbundling requirements. In principle, transmission systems that were not part of a vertically integrated undertaking (VIU) before the entry into force of the Gas Directive must be 'ownership unbundled' as required by its Article 9. Moreover, the Gas Directive contains rules on the certification of transmission system operators (TSOs). EU Member States must ensure that their TSOs have been properly unbundled in accordance with one of the four models provided for in the Gas Directive. Article 11 provides for a specific certification procedure for the ownership/control of European transmission system operators by a third-country person or persons.⁹

The exemption regime – now contained in Article 36 – was maintained and extended to Article 9 (unbundling), but not Articles 10 and 11 (certification). The role of the Commission was strengthened so that it can now veto national decisions or impose binding conditions on the exemption. The definition of an interconnector

⁶ Gas Directive (n 1) Art 32 (Third-Party Access), Arts 9, 15, 26 and 31 (Unbundling), Chapter VII (Market Supervision); also see Kim Talus, *Introduction to EU Energy Law* (OUP 2016) 15.

⁷ For a detailed discussion, see further Leigh Hancher and Francesco Maria Salerno, 'Energy Policy after Lisbon' in Andrea Biondi, Piet Eckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012).

⁸ The Gas Directive (n 1); other relevant secondary legislation consists of, eg, the Security of Gas Supply Regulation, Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing regulation (EU) No 994/2010 [2017] OJ L280/1; the Capacity Allocation Regulation, Commission Regulation (EU) 2016/1719 of 26 September 2016 establishing a guideline on forward capacity allocation [2016] OJ L259/42; Regulation 715/2009 (n 1) and the relevant network codes, see European Commission, 'Gas Network Codes' <https://ec.europa.eu/energy/en/topics/markets-and-consumers/wholesale-market/gas-network-codes> accessed 15 December 2018.

⁹ Gas Directive (n 1) Art 11 (Certification in relation to third countries); the scope of Art 11 relates to the ownership and/or control of transmission system operators by owners from third countries.

remained unchanged (Article 2(17)). Upstream pipelines remained subject to a lighter regime (now renumbered as Article 34 in the Gas Directive).

2.2. *The Commission proposal in brief*

On 1 November 2017, the European Commission presented a proposal for a Directive¹⁰ of the European Parliament and the Council amending the existing Gas Directive 2009/73 on common rules for the internal gas market¹¹ (hereinafter the ‘Commission proposal’) to apply ‘the substantive rules applicable to gas transmission pipelines connecting two or more Member States to gas pipelines to and from third countries’.¹² The Commission proposal seeks to apply many of the Gas Directive’s key provisions to pipelines entering the EU from third countries and affects both existing and future pipelines, up to the border of EU ‘jurisdiction’ (including territorial waters and exclusive economic zones). If the Commission proposal is adopted, Gas Directive rules on third-party access, tariff regulation, ownership unbundling and transparency would fully apply to pipelines between the EU and third countries.

In choosing to update Gas Directive 2009/73 by way of a ‘minor amendment’, the Commission was no doubt aware that the latter route would immediately raise political controversy as well complex legal issues.¹³

The Commission’s stated objective is to create legal certainty as to the applicability of the principal components of the internal gas market regime to various categories of pipeline. It follows that it is preferable to amend the existing legal framework for ‘EU-internal pipelines’ and to provide legal clarity on the application of the rules on unbundling, transparency,¹⁴ third-party access and regulated tariffs to all ‘external’ pipelines to and from third countries as opposed to dealing with such pipelines on a case-by-case basis.

The Commission proposal would result in the application of the Gas Directive in its entirety as well as related legal acts including the Gas Regulation 715/2009 and insofar as relevant, the network codes¹⁵ and guidelines adopted under the Gas Directive and

¹⁰ The Commission proposal (n 5).

¹¹ The Gas Directive (n 1), Art 3(2) of the Gas Regulation 715/2009 cross-refers to the definition in Art 2 of the Gas Directive.

¹² We observe that this is similar to the approach proposed for electricity interconnectors in the revised Electricity Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ L 211*, 14.8.2009, which is currently being negotiated as part of the Commission’s Clean Energy Package.

¹³ See, however, European Commission, ‘Commission Staff Working Document, Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries’ SWD(2017) 368 final. The targeted nature of the Commission proposal was used as justification for the choice not to pursue a full impact assessment. However, the latter decision may also reflect the sudden urgency attached to a legislative proposal that was not foreseen either in the Commission’s energy union strategy of February 2015 or in subsequent updates on the state of energy union. In fact, the legislative proposal was first mentioned in Commission President Juncker’s 2017 State of the Union address to the Parliament and Council, see European Commission Speech, President Jean-Claude Juncker’s State of the Union Address 2017, Brussels, 13 September 2017 http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

¹⁴ A lack of transparency in the operation of pipelines to and from third countries can be a risk factor from a security of supply perspective. Therefore, it is important to ensure that information on the operation and maintenance of important infrastructure is made available to the market and can be used by relevant national and EU authorities.

¹⁵ Network codes, to a large extent, do not apply to pipelines to and from third countries. This is due to specific provisions clarifying their scope. By way of example, Art 2(1) of the Network Code on capacity

Regulation, to pipelines (also referred to as ‘transmission lines’) to and from third countries. The Commission proposal would in principle cover both existing and future pipelines, but only up to the border of EU jurisdiction, unless (i) an exemption has been applied for in the case of new pipelines; or (ii) a derogation had been granted for existing pipeline – also referred to as ‘existing import infrastructure’. Existing pipelines could be granted a *derogation* from the rules of the Gas Directive by the Member State where the first interconnection point is located (Article 49(9)). Such derogations must be limited in time and must not be detrimental to the competitive functioning of the EU. Major new infrastructure linking the EU and a third country would be eligible for an exemption provided that it meets the required conditions (Article 36).

2.3. Shared internal and external competence for energy

Before turning to a further examination of the Commission proposal and its reception in the European Parliament and in the Council, it is important to recall the allocation of competences between the EU and its Member States on energy matters. The Lisbon Treaty provides the EU for the first time with an energy-specific competence as the basis for EU-wide energy policy and legislation. This shared competence flows from Article 4(2)(i) of the Treaty on the Functioning of the European Union (TFEU).¹⁶ Article 194 of the TFEU, taken up in Title XXI, sets out its scope.¹⁷ Article 194(1) is now the legal basis for energy legislation and the Commission proposal is based on this Article.

The shared competence on the area of energy flows from Article 4(2)(i) of the TFEU.¹⁸ As this is what is known as a ‘complementary’ competence, both the Member States and the EU can develop national and, respectively, regional energy policy in parallel. However, pursuant to Article 4(3) of the Treaty on European Union (TEU), the Member States and the EU have a mutual duty to *sincerely cooperate* with each other in this endeavour. This implies that although the EU and its Member States may operate and develop energy policy in parallel, they should cooperate and coordinate with one another and not pursue policies that are contrary to their respective objectives.¹⁹

allocation mechanisms (Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (Text with EEA relevance.) C/2017/1660, *OJ L 72, 17.3.2017, p. 1–28*) expressly states that entry and exit points to third countries are only subject to its requirements where this has been decided by the relevant national regulatory authority. The non-application of this Network Code automatically results in non-application of major parts of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (Text with EEA relevance.) C/2017/1657, *OJ L 72, 17.3.2017, p. 29–56* (see Art 2(1) thereof) although certain provisions (notably Chapters I, II and IV) of this Commission Regulation do apply. The proposed amendments will therefore only have a limited impact on the applicability of network codes.

¹⁶ Article 4(2) of the Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (hereinafter: TFEU).

¹⁷ TFEU (n 16) Art 194: TFEU, Art 194(1) outlines the objectives of European energy policy: the EU shall aim to (a) ensure the functioning of the energy market; (b) ensure the security of supply of the EU; (c) promote energy efficiency and the development of renewables; and (d) promote the interconnection of energy networks; Art 194(2) subsequently determines that the European Parliament and the Council can establish the measures necessary to achieve these objectives.

¹⁸ TFEU (n 16) Art 4(2).

¹⁹ Article 4(3) of the Consolidated Version of the Treaty on European Union [2010] OJ C83/01 (hereinafter: TEU).

The EU acts externally to the extent it has competence to act internally, as this capacity is governed by the principle of conferral (Article 5 of the TFEU). This Article states that the EU shall act within the powers conferred on it by the Member States.²⁰ Currently, Member States have jurisdiction to regulate the operation of third-country import pipelines to which Gas Directive 2009/73/EC is not applicable. They retain the competence to conclude international agreements to regulate the operation of such pipelines following Article 2(2) of the TFEU.²¹

2.4. *The concept of 'territory'*

It is also important to understand what is meant by the legal concept of 'territory' in the debate on the scope of the Gas Directive, the Commission's request for a mandate to negotiate an IGA with Russia (see section 3.5 below), as well as the proposed amendments to the Gas Directive. Generally speaking, in addition to its land territory, the territorial sovereignty of a state is understood to extend to its internal waters, the territorial sea adjacent to its coast (and, where it concerns an archipelagic state, to its archipelagic waters), as well as the air space above this territory.²² A coastal state, moreover, has rights to certain activities beyond its territory, such as the exploration and exploitation of natural resources in its exclusive economic zone (EEZ) and on its continental shelf.²³ While the EEZs are not strictly territorial, and these areas are outside the territory of a state, they are relevant in connection with certain economic activities of a state.²⁴ The EU is, of course, not a state, but an international organisation fostering regional economic integration, made up of its Member States. This naturally raises the issue of what can be considered EU territory and to what extent EU law, and the Gas Directive in particular, can apply extraterritorially.²⁵

²⁰ TFEU (n 16) Art 5; the EU must do so in accordance with Chapter 1 of Title V of the Treaty on European Union, TFEU Art 205. See, on the existence of EU external competence in particular, Bart Van Vooren and Ramses A Wessel 'Existence of EU External Competence' in Bart Van Vooren and Ramses A Wessel, *EU External Relations Law: Texts, Cases and Materials* (Cambridge University Press 2014).

²¹ NB: there was no formal IGA between Germany/EU and Russia for Nord Stream 1, perhaps owing to the different political landscape. See Lang and Westphal (n 3) 13.

²² BH Oxman, 'Jurisdiction of States', para 13, *Max Planck Encyclopedia of Public International Law* <http://opil.ouplaw.com/home/EPIL> accessed 15 December 2018.

²³ Oxman (n 22) para 14. The EEZ is defined as a maritime zone beyond and adjacent to the territorial sea of a state, extending up to 200 nautical miles from the baseline of a coastal state where the coastal state has sovereign rights over the living and non-living resources of the suprajacent waters and its seabed and subsoil, see Arts 56 and 57 of the United Nations Convention on the Law of the Sea (UNCLOS) 10 December 1982, 1833 UNTS 397 and D Nelson, 'Exclusive Economic Zone', *Max Planck Encyclopedia of Public International Law* <http://opil.ouplaw.com/home/EPIL> accessed 15 December 2018.

²⁴ Oxman (n 22) para 14.

²⁵ See on this issue, and especially on the notion of 'extraterritorial extension' of EU law, Joanne Scott, 'The New EU Extraterritoriality' (2014) 51 *Common Market Law Review* 1343, 1355–64; TEU (n 19) Art 52, as further specified in TFEU (n 16) Art 355 provides that the Treaties apply to Member States, it is accepted that the rule-making authority of the EU also extends to matters over which the Member States have sovereignty or jurisdiction under international law, including in maritime areas, Judgment of 24 November 1993, Case C-405/92 *Etablissements Armand Mondiet SA v Armement Islais SARL*, EU:C:1993:906, para 12, see Council of the European Union, 'Opinion of the Legal Service, Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC – Compatibility with UNCLOS' (6738/8, 1 March 2018) 2017/0284 (COD) 2, para 8.

3. Does the current regime extend to import or offshore pipelines?

3.1. *No uniform legal framework*

In this section we explain that the Gas Directive 2009 itself does not provide an explicit answer to the question to what extent external – upstream, offshore and transmission – pipelines from third countries are within its scope (and are therefore subject, if at all, to, inter alia, unbundling and third-party access). The same applies to the question as to what exactly should be understood by the term ‘import pipelines’ or ‘import infrastructure’, as these terms have only become current relatively recently.²⁶

The Gas Directive 2009 does not provide for a uniform legal framework with regard to so-called ‘import pipelines’, nor does it make use of that term. The Gas Directive remains unclear regarding the potential extraterritorial application of EU law. It is silent on whether it covers pipelines within the EU’s territory only, or also extends its application to pipelines that enter the EU from a third country. Article 2(17) defines an ‘interconnector’ pipeline as a ‘transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States’, without any further elaboration on its scope.²⁷ ‘Upstream pipelines and networks’ are defined as pipelines and/or networks that convey natural gas from a production site to a processing plant or terminal, and it would appear irrelevant whether or not they should originate in the EU (or be either onshore or offshore) to be covered by the Gas Directive.²⁸

3.2. *The scope of the current exemption for new infrastructure*

As the exemption procedure in Article 36 of the Gas Directive 2009 is restricted to ‘interconnectors’ between Member States as opposed to transmission lines that cross the territory of a third country, import or ‘external’ pipelines cannot benefit from an Article 36 exemption. It is argued thus that the EU legislature cannot have intended to apply the Gas Directive to such pipelines, otherwise the inequitable situation would arise that import pipelines would be subject to the full burden of liberalisation without being able to obtain relief via Article 36. It would also result in discrimination between import and non-import pipelines, which again it can be argued cannot have been the intention of the legislature.²⁹ At the same time, other commentators have forcibly argued that

Drawing upon recital 35 and language versions which indicate that the classes of infrastructure capable of being subject to an exemption under Article 36 are not exhaustive, it can be compellingly argued that the Commission could apply the directive to import pipelines.³⁰

²⁶ See, eg, European Commission Fact Sheet (n 2).

²⁷ Gas Directive (n 1) Art 2(17) (Definitions). However, even here, it could be argued that, eg, Nord Stream 1, which runs from Russia through EU territorial waters could technically qualify as an ‘interconnector’ in the sense of the Article, as the pipeline does cross territorial seas and EEZs of several EU Member States before it lands in Greifswald, Germany.

²⁸ Gas Directive (n 1) Art 2(2).

²⁹ Council, Opinion of the Legal Service (n 25) para 42.

³⁰ Alan Riley, ‘A Pipeline Too Far? EU Law Obstacles to Nord Stream 2’ (31 January 2018) *International Energy Law Review* (March 2018) 14 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3114202

With the exception of the Nord Stream 2 project there appears to have been little concern in the past as to the (non-) application of EU law to import pipelines or import infrastructure. Existing import pipelines (including the Transmed, Medgaz, Greenstream or the planned Galsi pipeline) may be governed by IGAs or contractual agreements which may or may not incorporate elements of the EU energy ‘acquis’, depending on the individual agreements. That is a matter for the individual parties to agree upon.³¹ Pipeline projects such as TAP and the (now abandoned) Nabucco are considered as internal pipelines – even if they transport gas from third countries they connect the transmission systems of two or more Member States.³²

3.3. *Nord Stream 2 – an upstream or external sub-sea pipeline?*

Why then the sudden impetus to apply the TEP to external pipelines? Nord Stream 2 (NS2) is owned by Gazprom (and several European gas supply companies have financial interests in it). It will, if completed, extend over 1,200 kilometres across the EEZ of Finland and Sweden as well as the EEZ and territorial waters of Denmark and Germany. It will connect to the German onshore pipeline system at an exit point in Lubmin near Greifswald and would double the capacity of the current pipeline from Russia to Germany.³³ This project has proved controversial not least because it may have an adverse impact on the volumes of Russian gas currently transited through Ukraine to several Eastern European Member States, who are almost entirely dependent on Russian gas supply.³⁴ Furthermore, Gazprom, as the largest exporter of natural gas to Europe, has been the subject of a long-running investigation by the Commission’s services for alleged misuse of its dominant position on significant parts of the European gas market. The Commission has imposed binding commitments on Gazprom in order to address its alleged misconduct.³⁵

Although there is no doubt as to the extraterritorial application of TFEU competition rules, by proposing to amend the Gas Directive 2009/73, the Commission now confirms that the internal energy legislation would not currently apply effectively to NS2.

In our view, it follows that on a literal as well as a more purposive reading the coverage of the Gas Directive only extends to transmission pipelines (and interconnectors) within ‘the territory’ of the EU – that is, at the first interconnection point in an EU

accessed 15 December 2018. Also, see generally Alan Riley, ‘Nord Stream 2: A Legal and Policy Analysis’ (CEPS Special Report No 151/2016).

³¹ K Talus, ‘An Intergovernmental Agreement for Nord Stream 2: Rationale, Content and Impact’ *Oil, Gas and Energy Law* 1 (2018); Anna Herranz-Surrales, ‘Energy Diplomacy Under Scrutiny’ (2017) 40 *West European Politics* 183.

³² See Commission opinions on the application for exemption for Nabucco (2008 and 2009) and its decision of 2015 on TAP https://ec.europa.eu/energy/sites/ener/files/documents/exemption_decisions2018.pdf. accessed 31 January 2019

³³ Further details are available on www.nord-stream2.com accessed 15 December 2018.

³⁴ See ‘Tusk urges EU states to extend gas rules to Russia’s Nord Stream 2 pipeline’ *Financial Times*, November 16, 2017 www.ft.com/content/8445c30e-9963-31e9-8975-159b0aa04f2c. accessed 31 January 2019

³⁵ See European Commission, ‘Antitrust: Commission Imposes Binding Obligations on Gazprom to Enable Free Flow of Gas at Competitive Prices in Central and Eastern European Gas Markets’ (Press Release, 24 May 2018) http://europa.eu/rapid/press-release_IP-18-3921_en.htm accessed 15 December 2018.

Member State – the border of EU jurisdiction.³⁶ As a result, we subscribe to the generally agreed view that sub-sea external gas pipelines such as Nord Stream 1 and Nord Stream 2 bringing gas from Russia to Germany are not covered by the current legislation, nor are similar sub-sea pipelines bringing gas from Algeria, Libya or Norway. The application of the EU energy ‘acquis’ and the TEP can only commence once the pipeline has been connected to the EU transmission system.³⁷

3.4. *The security of supply dimension*

Although one of the justifications advanced for extending the current rules to external pipelines is to promote security of supply of gas into the EU, it is noteworthy that the recently adopted Security of Supply (SoS) Regulation 2017/1938, which entered into force on 1 November 2017,³⁸ does not extend to these pipelines. Regulation 2017/1938 contains a number of relevant provisions, which may have some impact on the regulatory treatment of new pipeline capacity in the EU. In particular, the Regulation provides for common risk assessments, preventative (regional) action plans and an information exchange mechanism with reference to gas supply contracts. These measures, which are designed to strengthen regional coordination of emergency planning in the event of gas shortages, may have some (albeit indirect) influence on the development and utilisation of new gas transmission capacity.

This SoS Regulation preserves earlier infrastructure and supply standards and introduces a new ‘solidarity’ measure.³⁹ As of 1 March 2019, a Member State that is directly connected to another Member State that has requested the application of this solidarity measure is obliged, under certain conditions, to take measures to ensure the gas supply to protected customers (other than ‘solidarity protected’ customers in its territory) in the requesting Member States (Article 13). Member States are obliged to adopt the necessary measures by 1 December 2018 and include them in their emergency plans. The requesting Member States must agree to pay fair and prompt compensation.

The SoS Regulation puts a premium on regional cooperation between Member States – and in particular coordination of responses to emergencies for four specified regional risk groups (see Article 3.7).⁴⁰ The competent authorities for the various risk groups are obliged to agree on a cooperation mechanism to conduct risk assessments, which must in turn include the identification and assessment of energy supply corridors. The Member States are then required to prepare a national risk assessment, which must be fully consistent with the common risk assessment (Article 7).

³⁶ Council, Opinion of the Legal Service (n 25); Kim Talus, ‘Application of EU Energy and Certain National Laws of Baltic Sea Countries to the Nord Stream 2 Pipeline Project’ (2017) 10 *Journal of World Energy Law and Business* 30, 34–37; Andreas Goldthau, ‘Assessing Nord Stream 2: Regulation, Geopolitics and Energy Security in the EU, Central and Eastern Europe and the UK’ (King’s College London Department of War Studies and King’s Russia Institute Strategy Paper No 10, 2016) 21–22; Kim Talus and Moritz Wüstenberg, ‘Risks of Expanding the Geographical Scope of EU Energy Law’ (2017) 26 *European Energy and Environmental Law Review* 138, 138–41.

³⁷ For a minority view, see Riley (n 30).

³⁸ Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1 (hereinafter SoS Regulation).

³⁹ SoS Regulation (n 38) Art 13.

⁴⁰ SoS Regulation (n 38) Art 3.7 and risk groups taken up in Annex I.

Notably, these risk assessments must take into account ‘risks relating to the *control of infrastructure*’ relevant to security of gas supply, including risks of underinvestment, undermining diversification, misuse of existing infrastructure or an infringement of EU law (Article 7.4e). Furthermore, the assessments must run various scenarios for exceptionally high gas demand and disruption of gas supply considering the probability of disruption, inter alie, of supplies from third-country suppliers, as well as where appropriate, geopolitical risk. The Member States on whose territory a new pipeline is to be built would be obliged to demonstrate the ways in which such risks could be addressed.

Although the SoS Regulation does not empower the EU or a Member State to prevent the construction or use of the new pipeline, the onus will be on the Member State in demonstrating how identified risks are to be mitigated to confirm that the pipeline is built and operated in accordance with the applicable ‘acquis’.

3.5. *The intergovernmental agreement solution?*

The Commission appeared to have already conceded that EU energy law is not applicable to external pipelines such as NS2 in May 2017. In order to fill what it claimed to be a ‘legal void’ as a result of the non-application of the Gas Directive 2009 to such projects, or to avoid a conflict of laws, the Commission first initiated a process to acquire a mandate from the Council to negotiate an intergovernmental agreement with Russia on NS2 (the IGA) to cover the offshore section of the pipeline, its building and operation on the basis of Article 218 of the TFEU.⁴¹ The IGA would be based on fundamental principles stemming from EU energy law.

3.6. *The Opinion of the Council Legal Services*

The Council Legal Services, in its Opinion of 27 September 2017 (Opinion 2017) on the requested mandate,⁴² concluded that the Gas Directive 2009/73/EC ‘does not set out a comprehensive framework for gas pipelines to and from third countries’.⁴³ It also rejected the Commission’s claims that a legal void existed. An international pipeline such as NS2 is regulated by international law, EU law and the national law of the relevant states:⁴⁴ ‘the offshore parts of the [NS2] pipeline would in any event be subject to the relevant rules of international law, including the law of the sea’ (para 16) and the

third state [Russia] ... and the Member State concerned [Germany] and the Union ... would in any event have jurisdiction to regulate the operation [of Nord Stream 2] at the respective points of departure and arrival of the pipeline on their territory, and there is no third point of entry or exit along the pipeline. (para 17)⁴⁵

⁴¹ European Commission Press Release, IP/17/1571, ‘Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2’, Brussels, 9 June 2017 http://europa.eu/rapid/press-release_IP-17-1571_en.htm accessed 31 January 2019.

⁴² Council, Opinion of the Legal Service 12590/17 (n 1).

⁴³ Council, Opinion of the Legal Service 12590/17 (n 1) paras 36–37.

⁴⁴ See Talus (n 36) 34–37 and Talus (n 31).

⁴⁵ Council, Opinion of the Legal Service 12590/17 (n 1) paras 16–17.

Furthermore, the Opinion 2017 reasoned, as the Gas Directive does not apply to offshore pipelines, there can be no issue of a ‘conflict of laws’ between the Gas Directive’s regulatory regime for internal pipelines and the rules applied, if any, by a third country.⁴⁶ The Legal Service’s assessment did not advise the Council against the decision to approve the mandate; it merely stated that as there was no legal rationale, any such decision would necessarily have to be political. However, the Council’s decision granting the mandate and authorising negotiations must be able to stand the test of judicial review, and the Opinion indicates that this might well be problematic.⁴⁷

4. Exploring the Commission Proposal to amend the Gas Directive

4.1. *The proposed amendments to the Gas Directive*

The Commission proposal would amend the definition of an ‘interconnector’ in Article 2 (17) of the Gas Directive 2009/73 to include transmission lines that cross or span a border between Member States and third countries ‘up to the border of the Union jurisdiction’. Its fifth recital states that the applicability of Directive 2009/73 for gas pipelines to and from third countries remains confined to the territorial limits of the EU’s jurisdiction, but as regards offshore pipelines, this should apply ‘in the territorial waters and exclusive economic zone of the Member States’.⁴⁸ As a result, EU energy law on unbundling, transparency, third-party access and regulated tariffs would not only apply 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.⁴⁹

In the opinion of the Council’s Legal Service on the Commission proposal of March 2018 (the so-called UNCLOS Opinion), the Commission’s assertion of regulatory power was defective. It would de facto imply that pipelines landing onshore in a Member State would automatically trigger EU jurisdiction. Extending EU law, and thereby the Gas Directive, to the EEZs of Member States would have significant consequences regarding the treatment of offshore pipelines passing through the EEZ of a Member State as pipelines crossing its territory.⁵⁰

⁴⁶ For an overview of the timeline and procedures surrounding the legal aspects of Nord Stream 1 and 2, see Katja Yafimava, ‘The Council Legal Service’s Assessment of the European Commission’s Negotiating Mandate and What It Means for Nord Stream 2’ (Oxford Institute for Energy Studies Energy Insight 19, October 2017); Council, Opinion of the Legal Service 12590/17 (n 1) paras 38–41.

⁴⁷ See also K Talus, ‘European Commission Crusade Against a Pipeline: Act Three’ *Oil, Gas & Energy Law* 4 (2018).

⁴⁸ International law differentiates between two categories for the application of legal systems at sea. Within the territorial waters (up to 22 kilometres from the coast), states have an exclusive right to apply their domestic laws. In the context of EU Member States, EU law also applies similarly. The EEZ (up to 370 kilometres) is not sovereign territory of a state, but an area where states can exercise activities of exploration and exploitation, according to UNCLOS, see nn 22 to 24. In addition, international environmental standards apply. In the case of Nord Stream 2, the pipeline only crosses the territorial waters of Russia, Germany and Denmark (around the island of Bornholm), but touches the EEZ of several coastal states.

⁴⁹ Council, Opinion of the Legal Service 6738/8 (UNCLOS Opinion) (n 25) para 3.

⁵⁰ Council, Opinion of the Legal Service 6738/8 (n 25) para 5. Regarding Art 11 of the Gas Directive (n 1) see para 6.

At present, the European Parliament, the Commission and Council have not decided on a common position on the Commission proposal to amend the Gas Directive. Nor are any of their positions published or final: no text has been adopted in Parliament and there is no agreed position in the Council. Proposed amendments by the European Parliament on the territorial scope seem to support the original Commission proposal. Exemptions under Article 36 of the Gas Directive would, however, be limited to five years and the European Parliament proposes to extend powers of national regulatory authorities to decide upon exemptions if third-country authorities do not respond to consultations. Derogations should be under Commission supervision albeit that the Commission would issue an opinion and not have the power to veto.

4.2. *The UNCLOS dimension*

While the EU is a party to the United Nations Convention on the Law of the Sea (UNCLOS), setting out the rights and responsibilities of states with respect to their use of the world's oceans, the EU can only act within the competences conferred to it by the Member States.⁵¹ According to the Legal Service of the Council's analysis, the sovereignty of a coastal state under Article 2 of UNCLOS extends to the territorial sea as well to the bed and its subsoil.⁵² By extension, the application of EU energy law to this part of Member States' territory would thus be permissible under UNCLOS.⁵³ However, since the purpose of the EEZs is to strike a balance between the freedom of the high seas for all states and a limited set of rights for coastal states, as set out in Part V of UNCLOS,⁵⁴ the Legal Service of the Council considered that the EU cannot rely on Article 58(3) of UNCLOS and may not invoke issues of security of supply to do so.⁵⁵ In its view, 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)'.⁵⁶

Only Member States have the jurisdiction to establish the conditions for pipelines entering its territory or territorial sea, while the sovereignty of the coastal state over the EEZ and the continental shelf is merely functional.⁵⁷ It follows that the EU does not have jurisdiction to apply energy law on unbundling, tariffs, third-party access and regulated tariffs in the EEZs of Member States, as it is unrelated to the economic

⁵¹ UNCLOS (n 23).

⁵² Council, Opinion of the Legal Service 6738/8 (UNCLOS Opinion) (n 25) para 11, although the opinion explains that this right is not absolute but subject to other rules of international law.

⁵³ *Ibid.*

⁵⁴ Council, Opinion of the Legal Service 6738/8 (UNCLOS Opinion) (n 25) para 16 and Part V UNCLOS (n 23). Article 58 of UNCLOS sets out that coastal states' freedoms in the EEZs 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 Art 56 (1). Also see Talus (n 36) 32–33.

⁵⁵ UNCLOS (n 23) Art 58 and Council, Opinion of the Legal Service 6738/8 (UNCLOS Opinion) (n 25) para 17.

⁵⁶ UNCLOS (n 23) Art 58 and Art 56(1) on rights, jurisdiction and duties of the coastal state in the exclusive economic zone. See also generally K Talus, 'European Commission Crusade Against a Pipeline: Act Three – Lex Nord Stream 2' (2017) *Oil, Gas & Energy Law* (n 47).

⁵⁷ Case C-111/05 *Aktiebolaget NN v Skatteverket* EU:C:2007:195 [159].

exploitation of the EEZ.⁵⁸ The EU can only act within the competences conferred on it by the Member State.

4.3. *The future allocation of competences in concluding intergovernmental agreements*

As explained, the shared competence on the area of energy flows from Article 4(2)(i) of the TFEU.⁵⁹ Currently, it follows from the analysis in section 2.2 above that Member States have jurisdiction to regulate the operation of third-country interconnectors to which Gas Directive 2009/73/EC is not applicable at present. They retain the competence to conclude international agreements to regulate the operation of such pipelines following Article 2(2) of the TFEU.⁶⁰

Since the Commission proposal can only apply to the part of a pipeline that lies within the EU's jurisdiction and not to the part of the pipeline under the jurisdiction of a third country, an IGA would become necessary to determine the legal framework for the operation of such a pipeline whenever the third-country legislation differs from EU energy law on unbundling, third-party access, regulated network tariffs and transparency requirements.

4.4. *An exclusive competence to act on future external matters?*

Even if the Commission proposal to amend the Gas Directive may seem like a technicality, it may have an impact on how competences are shared between the EU and the Member States.

If the Commission proposal is adopted, future IGAs would fall within an area that is largely covered by EU common rules and would be liable to affect those common rules or alter their scope within the meaning of Article 3(2) of the TFEU.⁶¹ It follows that the conclusion of a future IGA would fall under the exclusive external competence of the EU insofar as it is liable to affect the common rules of the Gas Directive or alter their scope within the meaning of Article 3(2) of the TFEU. Notably, the European Court of Justice has confirmed the existence of exclusive external EU competence in cases where an international agreement concerns an area that is internally covered by a directive that allows Member States to derogate from common requirements.⁶²

After the adoption of the proposed amendments to the Gas Directive, Member States would be under the obligation to take all appropriate steps to eliminate the

⁵⁸ Council, Opinion of the Legal Service 6738/8 (UNCLOS Opinion) (n 25) paras 19 and 21. NB the analysis of the Council is relevant not only for offshore gas pipeline projects, but also for offshore grids such as the planned North Sea Wind Power Hub, a remote wind farm under the proposed Clean Energy Package; see European Commission, 'First Meeting of the North Seas Energy Forum Held' <https://ec.europa.eu/energy/en/news/first-meeting-north-seas-energy-forum-held> accessed 15 December 2018, and whose work programme is stated to be undertaken in line with existing obligations under international law, see Annex 1 to the Political Declaration on Energy Cooperation between the North Sea Countries, 4.

⁵⁹ TFEU (n 16) Art 4(2).

⁶⁰ NB: there was no formal IGA between Germany/EU and Russia for Nord Stream 1, perhaps owing to the different political landscape; see Lang and Westphal (n 3) 13.

⁶¹ TFEU (n 16) Art 3(2) states that '[t]he Union shall also have exclusive competence for the conclusion of an international agreement [...] in so far as its conclusion may affect common rules or alter their scope.'

⁶² See Judgment of 26 November 2014, Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* EU:C:2014:2399, para 54. Opinion 3/15, *Marrakesh Treaty* ECLI:EU:C:2017:114.

incompatibilities of the existing intergovernmental agreements with the Gas Directive in accordance with Article 4(3) second subparagraph of the TEU and Article 351(2) of the TFEU. Member States would be under the obligation to terminate existing IGAs whenever possible, and the competence to renegotiate them would lie with the EU pursuant to Article 3(2) of the TFEU.

The existing balance of competences could be altered by the the Commission proposal to amend the Gas Directive in a variety of ways. First, Member States could no longer take unilateral decisions on exemptions. The Commission proposal claims that 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 (ACER). Article 36(4) states that

[w]here 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.

The Council Legal Service has opined⁶³ that a decision by all the national regulators of the Member States whose EEZ is in the EU’s jurisdiction would be required.

Second, Article 36(9) would extend the Commission’s veto power on exemptions to (new) interconnectors to and from third countries. Member States could no longer decide how to regulate their ‘import pipelines’ with third countries. Finally, the Commission proposal may also have an impact on the powers of Member States to negotiate new (and maintain existing) bilateral agreements (IGAs) with third countries.

In this context, legal questions arise as to whether a Member State could:

- (1) invoke Article 194(2) to contest (and veto) the Commission proposal as such;
- (2) claim that Article 194(2) allows it to opt out of adopting the Commission proposal in its jurisdiction; or
- (3) insist that in view of Article 194(2) the draft must be adopted on the basis of unanimity.⁶⁴

More importantly, a completely novel issue could arise: could a Member State rely on Article 194(2) of the TFEU to refuse to renegotiate an IGA, or even to negotiate a new one?

5. Conclusion: a common EU framework regulating import pipelines: does an amended Gas Directive provide the answer?

As it has proved difficult so far for the Commission to obtain a negotiating mandate with the Russian Federation on Nord Stream 2, it has opted to amend the Gas Directive

⁶³ Opinion of the Legal Service, 7502/18 (JUR 152, ENER 109, CODEC 442, Council of the EU, 26 March 2018) (Opinion 26 March 2018).

⁶⁴ NB: it should be mentioned that the Legal Service of the Council does not see TFEU, Art 194(2) as an obstacle in the Commission proposal as such.

to secure a common legal framework regulating import pipelines. Apart from viewing the lack of a common framework as detrimental to the security of supply, the Commission has attempted to create certainty on the application of the rules on unbundling, transparency and third-party access to various categories of pipeline. The question remains whether the Commission to amend the Gas Directive is the panacea for the uniform regulation of import pipelines that the Commission envisioned.

First of all, it is certain that an amended Directive, for reasons explained in this contribution, would not result in the application of a uniform set of rules over the entire route of the pipeline, and it would be misleading to assume that a single pipeline infrastructure originating in a third country and terminating in an EU Member State would be subject to a uniform regulatory framework.

Moreover, the Commission proposal would be applicable not only to planned and future pipelines, but also to existing pipelines between EU Member States and third countries to the extent that these pipelines fall within the new definition of an interconnector as provided by the amended Article 2(17) – albeit that derogations and exemptions would be possible in the interests of legal certainty. This is accompanied by difficulties regarding the division of competences and it may entail the withdrawal of existing intergovernmental agreements with third countries. Existing gas pipelines that could be affected by the Commission proposal enter the EU from Algeria, Libya, Morocco, Norway, Russia and Tunisia. It remains to be seen whether a Member State could invoke Article 194(2) to refuse to renegotiate an IGA or to cede competence to the EU to negotiate a new agreement. The Commission proposal may also have an impact – post-Brexit – on pipelines connecting the United Kingdom with EU Member States.

What is more, the current Commission proposal seems to be creating two different kinds of regimes, one that would regulate pipelines geographically, and the other one regulating different types of infrastructure under the regulations (eg, the regime would be applicable to pipelines, but why not to LNG facilities?). The Commission proposal may open a Pandora's box in terms and may raise serious issues of discrimination under the rules of the World Trade Organization – issues that inevitably have to be kept in mind by the Commission.⁶⁵

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⁶⁵ See WTO, *European Union and its Member States – Certain Measures Relating to the Energy Sector – Report of the Panel (Russian Federation – European Union)* WT/DS476/R.