



**European Committee  
of the Regions**

**ENVE-VI/026**

**129th plenary session, 16-17 May 2018**

## **OPINION**

### **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**

#### THE EUROPEAN COMMITTEE OF THE REGIONS

- stresses that the availability of sufficient quantities of natural gas at reasonable prices from reliable suppliers through modern, safe and resilient import infrastructure constitutes a cornerstone of sustainable standards of living for local and regional communities;
- points out, however, that there have been fears about the strengthening of the dominant position of certain non-EU suppliers of natural gas, with resulting price distortions and the threat that such initiatives could pose to the necessary diversification of the EU's third-country energy sources;
- welcomes this legislative initiative from the Commission, while pointing out the importance of the necessary impact assessment in accordance with the Interinstitutional Agreement on Better Lawmaking;
- specifies that the overall EU interest and the establishment of the Energy Union should be taken into account, as well as the need to uphold not only the principle of solidarity, but also the principles of proportionality and subsidiarity;
- reiterates therefore that new rules should take into account the features of the market, linked to the development of the related infrastructure in an EU energy union and aimed at secure, competitive and sustainable energy, and should be carefully thought through with a view to the long term, rather than being addressed on an ad-hoc basis.

Rapporteur

Mauro D'Attis (IT/EPP), Member of Roccafiiorita Municipal Council (Messina)

Reference document

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

**Opinion of the European Committee of the Regions –  
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**

**I. RECOMMENDATIONS FOR AMENDMENTS**

**Amendment 1**

*Recital (3)*

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>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 regards the applicable legal regime to market participants, in particular investors in gas infrastructure and network users.</p>	<p>This Directive seeks to address the remaining <i>possible</i> 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, <i>including territorial waters and Exclusive Economic Zones of the Member States</i>. 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 regards the applicable legal regime to market participants, in particular investors in gas infrastructure and network users.</p>

***Reason***

The Committee of Regions deems that, pursuant to necessity, proportionality and subsidiarity principles and in view of the EU security of gas supply overall goal, extension of Third Directive provisions should not be limited to cases in which it is deemed strictly necessary.

**Amendment 2**

*Recital (4)*

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>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</p>	<p>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</p>

<p>this Directive. <i>The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas pipelines to and from third countries.</i></p>	<p>this Directive. <i>Any such derogation shall be approved by the Commission. The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas pipelines to and from third countries.</i></p>
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<b>Reason</b>
Self-explanatory.

### Amendment 3

#### Article 1

#### Point (1)

<b>Text proposed by the Commission</b>	<b>CoR amendment</b>
<p>(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 <i>third countries up to the border of Union jurisdiction</i>;"</p>	<p>(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 – <i>exclusively where the technical firm daily capacity of the overall set of existing infrastructures connecting the European Union to the third country from which the relevant infrastructure (completed subsequently to the date of adoption of this Directive) originates, as certified by the Agency, already (or jointly with that of the relevant new infrastructure) exceeds 40% of the total technical firm daily capacity of infrastructures (including LNG terminals in the European Union) connecting the European Union, or relevant risk group as defined in Annex I to Regulation 2017/1938, with third countries, as certified by the Agency</i> – between Member States and <i>a third country</i>"</p>

<b>Reason</b>
<p>As per recital (3). 40% is the threshold usually applied, under the practice of the Commission as confirmed by the European Courts, in order to assume a dominant position (such presumption being rebuttable). Furthermore, this approach is also more respectful of Articles 194(2), second paragraph, and 3(2) TFEU, as to the different competences of the European Commission and the Member States in the energy field, and of the principle of subsidiarity. Risk groups defined in Annex I of Regulation 2017/1938 remain the core of the EU security of gas supply system as they are designed to address major transnational risks. Particularly, two risk groups (Ukraine and Belarus) can be affected by the Nord Stream project.</p>

#### Amendment 4

##### Article 1

##### Point (4)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>(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.";</p>	<p>(4) Article 36 is amended as follows: (a) <i>in paragraph 1, letter (a) is replaced as follows: "(a) the investment must enhance competition in gas supply and enhance security of supply, taking into account in the case of infrastructures to and from third countries also the structure of the relevant offer and the access to export/import pipelines in such third countries;"</i>; (b) 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."; (c) 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.";</p>

#### *Reason*

This amendment aims to allow better and more detailed consideration – when evaluating the possible issuance of an exemption – also of the (commodity/capacity) factors abroad which are relevant for scrutiny under Article 36 of import/export infrastructures, *i.e.*, the existence of a dominant position at the supply/transport level.

#### Amendment 5

##### Article 1

##### Point (7)

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>(7) in Article 49, the following paragraph 9 is added: "In respect of gas pipelines to and from</p>	<p>(7) in Article 49, the following paragraph 9 is added: "In respect of gas pipelines to and from</p>

<p>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 <i>may</i> 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."</p>	<p>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, <i>shall cease to apply by ... [3 years after the date of entry into force of this amending Directive] at the latest</i>] and <i>shall</i> 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. <i>The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. Within a period of 2 months from notification, the Commission may take a decision requiring the Member State to amend or withdraw the decision to grant a derogation.</i> 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."</p>
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<b>Reason</b>
For legal security purposes, it is important to set a clear deadline for derogations.

**II. POLICY RECOMMENDATIONS**

THE EUROPEAN COMMITTEE OF THE REGIONS

**General comments**

1. recalls that local and regional authorities have in many cases key responsibilities in providing and/or distributing energy, in planning and environmental protection, in strengthening the security of energy supply and as interlocutors for citizens, companies and national authorities on energy provision;

2. would state first and foremost that the availability of sufficient quantities of natural gas at reasonable prices from reliable suppliers through modern, safe and resilient import infrastructure constitutes a cornerstone of sustainable standards of living for local and regional communities, as well as a key resource underpinning the business activities that provide work and dignity to the people belonging to those communities, and that the European Union is committed to reducing greenhouse gas emissions to 80-95% below 1990 levels by 2050 as per the EU policy objectives<sup>1</sup>;
3. points out that the EU's natural gas import needs are expected to increase again in the coming years, given the prospect of increased domestic demand, and a decrease in EU gas production; highlights that infrastructure projects providing a single supplier access to over 40% of import capacity of the EU or relevant risk group as defined in Annex I to Regulation 2017/1938 such as Nord Stream 2 is threatening energy security and development of the internal market. In order to mitigate the risks, full compliance with Gas Directive requirements, particularly with third-party access, unbundling and transparent, non-discriminatory and cost reflecting tariffs, is necessary;
4. stresses that the process of developing the internal market in natural gas in the EU is ongoing and hinges on choices that should improve commodity-market liquidity and supply diversification, as well as the development of import capacity, in order, inter alia, to reduce gas prices for people living in local and regional communities across the EU;
5. notes that the natural gas market is characterised by a high level of interdependence between the commodities market and that of the related capacity. In both of these markets the same demand operates, that of the shippers, which link up the sources of the commodity (gas fields inside or outside the EU and terminals for the liquefaction of liquefied natural gas, LNG) and the related EU local demand;
6. reiterates therefore that new rules (taking into account the features of the market, linked to the development of the related infrastructure in an EU energy union, aimed at secure, competitive and sustainable (2050 low-carbon Europe) energy and based on the free market and the solidarity principle) should be carefully thought through with a view to the long term, rather than being addressed on an ad-hoc basis;
7. points out that this is all the more necessary in the light of the impact, in terms of investment and enterprise, on local and regional communities where pipelines from third countries land on the EU's territory;
8. points out that while undersea pipelines are subject to stringent EU and international environmental rules, including the Espoo Convention, and the accident rate for natural gas infrastructure – compared to other energy infrastructure – is particularly low, there can be an environmental impact on local and regional communities;

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<sup>1</sup> Energy Roadmap 2050, COM(2011) 885 final

## Specific recommendations

9. points out that, under these conditions, to achieve the aforementioned objectives the EU needs: (i) non-EU gas (from existing suppliers and, in the future, from new potential suppliers, with which connections should be encouraged) and (ii) not to be dependent on particular suppliers/countries, and that, as with any legislative initiative, both of these objective constraints must be taken into account;
10. Reiterates<sup>2</sup> its view that new energy projects in Europe should focus on energy diversification and should not undermine the status of transit countries, including the European Neighbourhood Policy countries;
11. recognises that certain recent infrastructure initiatives for importing natural gas, particularly Nord Stream 2 while helping to increase supply routes – could constitute a problem for the security of supply in certain other Member States and in particular in certain local and regional communities, and points out that such problems need to be addressed on the basis of the principles of solidarity, the internal market at EU and regional levels as well as risk evaluation, both in terms of security of supply, and in terms of the safety of the installations themselves subject to the appropriate EU rules ;
12. points out how, in particular, there have been fears in this respect about the strengthening of the dominant position of certain non-EU suppliers of natural gas, with resulting price distortions and the threat that initiatives such as Nord Stream 2 could pose to the necessary diversification of the EU's third-country energy sources;
13. therefore welcomes this legislative initiative from the Commission, while pointing out the importance of the necessary impact assessment in accordance with the Interinstitutional Agreement on Better Lawmaking<sup>3</sup>;
14. specifies that responses to this issue should, however, always take into account the overall EU interest and the establishment of the Energy Union, which continues to take precedence over that of each individual Member State, as well as the need to uphold not only the principle of solidarity, but also the principles of proportionality and subsidiarity, the latter of which the Senate of one EU Member State deems to be under threat in this case;
15. notes that, with this in mind and taking into account the above-mentioned link between the capacity (import infrastructure) and the commodity (natural gas), priority should be given to solutions that avoid discouraging investment in new import structures (e.g. the offshore infrastructure from the Middle East to Greece, which could help diversify the supply sources for the Member States in south-east Europe) and that avoid complicating the management of existing ones, since this could have the paradoxical effect – by decreasing import opportunities – of making the EU more dependent on current suppliers;

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<sup>2</sup> *CIVEX-VI/011*

<sup>3</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law- Making, OJ L 123, 12.5.2016



16. points out that adopting an approach as described above which does not discourage new investments and does not put excessive additional burden on the management of existing import infrastructure would help to relieve concerns about the possible negative and unintended impact of the proposed Directive on the market and on operators as raised during the consultation launched by the Commission;
17. points out, in particular, the fact that a stakeholder organisation like the association Eurogas has complained about: (i) the impact of the retroactive effects of the proposal on the security of investments already made (given the legal framework and time frame that would be amended ex post) in existing infrastructure and on investors' legitimate expectations; (ii) the political and legal difficulty (under international law) of renegotiating the relevant existing intergovernmental agreements with third countries without their consent; and (iii) the dangers that the above issues and the difficulties also arising for new gas pipelines could pose to the future security of supply in the EU;
18. in the light of the above, and in accordance with the inextricably linked principles of subsidiarity, proportionality and solidarity, would suggest amendments that: (i) enable the EU institutions to avoid or resolve problems that certain Member States might face as a result of infrastructural initiatives by other Member States that may have the effect of strengthening dominant positions or reducing the diversification of the EU's third-country energy sources as mentioned in point 10 above; (ii) protect the EU as a whole against risks to the EU's security of supply; and (iii) ensure compliance with the EU's existing legal framework and international obligations;
19. calls on the Commission here, in relation to the proposed directive's extended scope into the territorial waters, to ensure the necessary conformity with the provisions of the UN Convention on the Law of the Sea concluded in Montego Bay (UNCLOS), and thus adjust this extended scope accordingly;
20. points out that the above approach would enable the necessary policy responses to be consistently reconciled with the need to comply with the legal constraints of EU law on the movement of capital and of international law (UNCLOS, WTO, investment protection rules);

21. emphasises the efforts that the CoR – in performing its role in this area – intends to make to find EU solutions to the problems outlined here and hopes that the same efforts will be made by the other EU institutions and calls on them to adopt the amendment.

Brussels, 16 May 2018

The President  
of the European Committee of the Regions

Karl-Heinz Lambertz

The Secretary-General  
of the European Committee of the Regions

Jiří Buriánek

### III. PROCEDURE

<b>Title</b>	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
<b>Reference(s)</b>	COM(2017) 660 final
<b>Legal basis</b>	Article 307(1)
<b>Procedural basis</b>	
<b>Date of Council/EP referral</b>	22 November 2017
<b>Date of Commission letter</b>	8 November 2017
<b>Date of Bureau/President's decision</b>	27 November 2017
<b>Commission responsible</b>	Commission for the Environment, Climate Change and Energy
<b>Rapporteur</b>	<b>Mauro D'Attis (IT/EPP)</b> , Member of the Executive Council of Roccafiorita Municipality (Messina)
<b>Discussed in commission</b>	12 April 2018
<b>Date adopted by commission</b>	12 April 2018
<b>Result of vote in commission (majority, unanimity)</b>	Majority
<b>Date adopted in plenary</b>	16 May 2018
<b>Previous Committee opinions</b>	n/a
<b>Date of subsidiarity monitoring consultation</b>	n/a