



Council of the
European Union

Brussels, 1 March 2018
(OR. en)

6738/18

LIMITE

JUR 96
ENER 88
CODEC 301

**Interinstitutional File:
2017/0294 (COD)**

OPINION OF THE LEGAL SERVICE¹

From: Legal Service

To: Energy Working Party

Subject: **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**
- compatibility with UNCLOS

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (04.04.2018)

On 13 November 2017, the Commission presented a 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.²

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

² COM(2017) 660 final, doc.14204/17.

At the meeting of the Working Party on Energy on 11 January 2018, the Council Legal Service was asked by the Presidency to put in writing its opinion on whether the application of the proposal to the exclusive economic zone of the Member States is compatible with the UN Convention on the Law of the Sea ("UNCLOS")³ and the impact of its adoption on the allocation of competences between the Union and its Member States. This opinion answers the first question of that request. A separate opinion will address the other issues raised by delegations during the meeting.

I. Introduction

1. The objective of the draft Directive is to apply the substantive "*rules applicable to gas transmission pipelines connecting two or more Member States*" to gas "*pipelines to and from third countries*".⁴
2. For this purpose, it is proposed to amend the definition of an interconnector in Article 2(17) of Directive 2009/73/EC⁵ ("Gas Directive") and to include in its scope transmission lines which cross or span a border between Member States and third countries "*up to the border of the Union jurisdiction*". Recital (5) indicates that "*(t)he applicability of Directive 2009/73/EC for gas pipelines to and from third countries remains confined to the territorial limit of Union's jurisdiction*" but, as regards offshore pipelines, this should apply "*in the territorial waters and exclusive economic zone of the Member States*."

³ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁴ Recital 3; see also the Explanatory memorandum, page 2, 3rd paragraph.

⁵ Directive 2009/73/EC 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.

3. In other words, the proposal intends to make Union energy law on unbundling, transparency, third-party access and regulated tariffs applicable not only 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. Although the latter condition is not expressly mentioned, it may be deduced from the text of some amendments⁶ and from the fact that it is very unlikely that the application of common rules to offshore pipelines merely transiting through the EEZ of the Member States without any interconnection with the Union network might contribute to the completion of the internal market in natural gas.⁷

4. The Explanatory Memorandum of the proposal lacks any reasoning on the regulatory power of the Union over offshore pipelines in the EEZ of Member States and only states that "*EU law in general applies in the territorial waters and the exclusive economic zone of EU Member States*". According to the explanation given by the Commission during the Working Party on Energy of 12 December 2017, the pipeline's onshore landing in a Member State would trigger the Union jurisdiction to adopt legislation on offshore pipelines in the EEZ. Reference was made to Article 79(4) of UNCLOS allowing coastal States to establish conditions for pipelines entering the territory or territorial sea of a Member State.

⁶ Member States would be entitled to take a number of decisions "*as regards infrastructure to and from third countries between the border of the Union jurisdiction and the first interconnection point with the Union network*" under Article 9(8)(b) and (9)(b), 14(1)(b) and 49(9).

⁷ This has also been confirmed by the Commission in its presentation to the Working Party on Energy on 20 February 2018.

II. Legal analysis

DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (page 11)
