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Eurogas views on the modification of the Gas Directive

Eurogas is the association representing the European gas wholesale, retail and distribution sectors. Founded in 1990, its members are 43 companies and associations from 21 countries.

Eurogas represents the sectors towards the EU institutions and, as such, participates in the Madrid Gas Regulatory Forum, the Gas Coordination Group, the Citizens Energy Forum and other stakeholder groups.

Its members work together, analysing the impact of EU political and legislative initiatives on their business and communicating their findings and suggestions to the EU stakeholders.

The association also provides statistics and forecasts on gas consumption. For this, the association can draw on national data supplied by its member companies and associations.

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Executive summary and proposal on the way forward

1. Eurogas has been at the forefront of efforts aiming at full and rapid implementation of the Third Energy Package in all Member States and would therefore support a reasonable extension of the Gas Directive, as far as such extension would contribute to security of supply and the well-functioning of the market in the EU itself. The implementation of the Third Energy Package should remain a priority.

2. Eurogas' initial analysis suggests, however, that the Commission's proposal will more likely have adverse and detrimental effects in a number of areas.

3. The proposal establishes obstacles to *existing* pipelines entering the EU, such as Medgaz (Algeria-Spain), TransMed (Tunisia-Italy), Green Stream (Libya-Italy), Maghreb-Europe Pipeline (Morocco-Spain) etc., thereby creating risks to security of supply in the EU, to investment security for project developers and operators, as well as to wider trade and geopolitical relations between the EU and third countries.

4. The risks to *new* pipelines such as EastMed (Israel-Greece) or pipeline projects bringing gas from the Caspian Region to the EU are similar.

5. In legal terms, application of the Gas Directive in the EEZ is to be carefully assessed against potential incompatibilities with UNCLOS.

6. The sovereignty of Member States under Article 194(2) TFEU to determine its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c), would be curtailed, just as the Member States would be deprived of their currently existing possibility to negotiate bilateral Intergovernmental Agreements with exporting third countries on their own.

7. Inconsistency in the Commission's arguments underpinning the proposal further weakens the points supporting it.

8. In light of these considerations, Eurogas recommends not progressing the proposal until its impact has been fully assessed within a timeframe that allows stakeholder opinion to be taken into account.

Introduction

1. The views that Eurogas expresses in this paper on the Commission's proposal COM(660) of 8 November 2017 to amend Directive 2009/73/EC (Gas Directive) concerning common rules for the internal market in natural gas should be considered in light of the following:

   a) Eurogas has been at the forefront of efforts aiming at full and rapid implementation of the Third Energy Package in all Member States.

   b) To this end, Eurogas actively participates and is a recognised interlocutor in the Madrid Gas Regulatory Forum, the London Citizens' Energy Forum, the Copenhagen Energy Infrastructure Forum, the Gas Coordination Group, the activities of the Council of European Energy Regulators (CEER), the Agency for the Cooperation of Energy Regulators (ACER), the European Network of Transmission System Operators for Gas (ENTSOG), particularly the swift development of network codes, and has argued in all its written and oral contributions in favour of a well-functioning internal energy market, making proposals for its effective development.

   c) Eurogas has also supported the voluntary extension of the acquis communautaire in energy within the Energy Community.

   d) Eurogas is of the opinion that a fully interconnected and well-functioning internal gas market is the best way to ensure security of supply across the EU.

   e) There should therefore be no doubt that Eurogas would support any reasonable extension of the Gas Directive as far as such extension would contribute to overall improved security of supply and the well-functioning of the market in the EU itself.

   f) Eurogas is further of the opinion that the EU gas market has progressed in terms of interconnection, increased competition, development of hubs, liquidity, and diversification of supply routes and sources since the Third Energy Package was adopted in 2009, and has demonstrated its robustness and resilience since then, ensuring security of supply and, in many Member States, competitive prices.

   g) However, this should not hide the fact that a number of Member States still needs to make considerable progress in market opening, and a few missing links, including reverse flow possibility, should be put in place.

Initial analysis reveals a number of obstacles and barriers

Eurogas has examined the proposal and has identified numerous issues of significant detrimental or undesired effects.

Concerns about detrimental effects of the proposal on the internal market

Regulatory uncertainty for existing pipelines and unreliable neighbourhood policy

2. Whilst the proposal provides for Member States to allow existing pipelines to derogate from the Gas Directive, the conditions for such derogations are not set out. This creates a situation of uncertainty for developers and users alike and potentially undermines contractual rights and obligations.

3. More importantly, pipeline projects involving significant capital costs, their developers need to be able to rely on stable conditions once such investments have been made. The proposal contains two retroactive changes requiring a derogation, which may be lengthy processes with an uncertain outcome.

   A first derogation, which can be issued by Member States under certain conditions, is needed to derogate from the application of the Directive. As this derogation will be limited in time, a second derogation, possibly in the shape of an intergovernmental agreement, will be needed when the derogation expires.

4. Limiting the application of a derogation in time significantly impacts investment security for project developers and operators of existing pipelines, as well as their legitimate expectations at the time investment decisions have been made.

5. Retroactive changes also affect existing and future shippers and customers of the gas transported that have already taken business decisions based on the existing conditions.

6. What is more, once a derogation has expired, an existing Intergovernmental Agreement with a third country may need to be (re)negotiated with all risks of this not being successful or beneficial.

7. Companies that are not or cannot be compliant with the Gas Directive after the derogation has expired and before an Intergovernmental Agreement has been (re)negotiated, risk hefty fines of up to 10% of global group turnover.

8. Pipeline links exist between Member States and various third countries: This includes, for example, Algeria-Spain (Medgaz Pipeline), Libya-Italy (Green Stream Pipeline), Morocco-Spain (Maghreb-Europe Pipeline), Norway-Germany (Europipe I+II, Norpipe), Russia-Germany (Nord Stream Pipeline), Tunisia-Italy (Transmed Pipeline) and the United Kingdom (after Brexit). Except for the UK, the regulatory regimes for pipelines in place in these countries differ widely from one another and from that of the EU.

   Agreeing or adapting Intergovernmental Agreements to achieve greater compatibility with the Gas Directive will prove cumbersome or even impossible.

   Moreover, the EU changing the conditions for pipelines retroactively can be viewed very negatively by the third countries concerned, which counted on the EU as a reliable partner, and could affect the credibility of the European market with repercussions reaching far beyond the pipeline and gas trade.

Increasing obstacles to existing pipelines entering the EU creates risks that jeopardise security of supply and wider trade and geopolitical relations between the EU and third countries.

Risk of delays or non-realisation of new pipeline projects

9. The impact of the modification of the Gas Directive on new pipeline projects is very similar. From an investment security perspective, it appears questionable to treat completed pipelines and pipelines under construction differently since project developers in both cases made significant investments and can legitimately expect a stable legal framework.

10. Already without the modification, it takes several years until the financial, political, regulatory and legal frameworks of a new pipeline project have been agreed amongst and between the developers and the countries in which the pipeline will be laid. Pipelines in the Middle East and the Caspian region could be affected, as well as future pipeline projects in general which would increase security of supply and the diversification of supply sources and routes.

Risk to investment security and procedures that are even longer than usual could delay, stop or prevent new pipeline projects.

Unequitable treatment of imported LNG and pipeline gas affecting diversity and competition

11. The extension of the application of the Gas Directive to pipelines to and from third countries may lead to an advantage of imported LNG over imported pipeline gas since LNG

regasification terminals in the EU, whilst partially also linked to exemptions, do not require an agreement with third countries.

Unequitable treatment of LNG and pipeline gas risks having an impact both on the diversity as well as competition in supplies.

Legal concerns

Application of the proposal to the Exclusive Economic Zone (EEZ) and compatibility with the United Nations Convention on the Law of the Sea (UNCLOS)

12. The Commission puts forward that "EU law in general applies in the territorial waters and the exclusive economic zone of EU Member States"[1].

Application of EU law in the EEZ should be carefully assessed against UNCLOS.

Loss of Member States' sovereignty

13. The proposed extension of the application of the Gas Directive to pipelines from third countries limits a Member State's right, laid down in Article 194(2) TFEU, to determine its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c) because the extended application could limit that choice and structure.

14. Moreover, Intergovernmental Agreements fully or partially removing the extended application of the Gas Directive would need to be negotiated by the EU. This follows from the fact that the Gas Directive would now apply in an area that was previously not regulated by the EU. In other words, if there is no derogation or it has run out (existing pipelines) or there is no exemption (new pipelines), Member States will not be able to deviate from EU law through a bilaterally negotiated Intergovernmental Agreement. Currently a Member State can negotiate an Intergovernmental Agreement on its own and it would at most impose certain provisions from the Gas Directive, which would otherwise not apply.

15. These two points affect investment security in Member States and could in the worst case lead to investors giving up a project or a third country not agreeing to the new regulatory regime or entering into an Intergovernmental Agreement with the EU.

[1] COM(2017) 660 final of 8 November 2017, p. 2

Member States' sovereignty provided through Article 194(2) TFEU is affected twice:

1. **with regard to their right to determine their choice between different energy sources and the general structure of its energy supply, which could be limited through the extended application of the Gas Directive;**
2. **with regard to the possibility to negotiate bilateral Intergovernmental Agreements on their own.**

Concerns about lack of informed decision-making

No prior impact assessment despite preceding political differences

16. Eurogas members are surprised that the Commission argues that no impact assessment was necessary, given:

    a) the strong political discussion that the Nord Stream 2 pipeline project generated amongst Member States and between the EU and the Russian Federation;
    b) the "conflict of laws" that the Commission itself anticipates;
    c) the recognised need for Intergovernmental Agreements with third countries and likely wider trade and geopolitical consequences;
    d) the strong impact that the amendment would have on existing and new pipelines, as highlighted above.

Deadline for post-publication consultation lies after the deadline for amendments in the European Parliament

17. Eurogas members are worried that the Commission conducted no consultation with the stakeholders immediately concerned by the proposals prior to the publication of the proposal, and launched a public consultation about one month *after* its publication.

    The deadline for response to this consultation is 31 January 2018, which is challenging given that the consultation was launched on 6 December 2017 and seasonal holidays will make it difficult to respond in time.

    More importantly, the usefulness of the consultation is put into question by the following circumstances which – contrary to the principles of better regulation – effectively prevent stakeholder feedback to be fully taken into account by the EU institutions:

a) In its press release of 8 November 2017, the Commission called on the co-legislators “to work closely together to ensure the swift adoption and implementation of these proposals"[2].

b) Consequently, the European Parliament committee in charge (ITRE) held a first exchange of views on 28 November 2017 and has set the timetable of its work in such a way that amendments to the Commission’s proposal need to be submitted by 16 January 2018 to be voted in committee on 21 February and in plenary on 28 February in a single reading. This means that Members of the European Parliament could not benefit from the outcome of the consultation.

c) Discussions in Council have also commenced and can be expected to be considerably advanced by the time the consultation has closed and its outcome has been published.

The preliminary analysis that Eurogas performed shows that the implications of the proposal are much more complex than the Commission assumed. An impact assessment and prior consultation of stakeholders would therefore have been advisable.

Lack of analysis of the benefit to the implementation of the Third Package in the EU

18. The Commission puts forward that the proposed amendment to the Gas Directive is “necessary to achieve the purpose of an integrated EU gas market” and “is strictly oriented on what is indispensable to achieve the necessary progress for the internal market”.[3]

    However, the Commission neither sets out in what way the proposal would support the missing implementation of the Third Energy Package in Member States, nor the impact on that implementation arising from the current non-application of the Gas Directive to pipelines to and from third countries.

    For instance, the Commission’s proposal raises the question what would be the benefit of an external pipeline that is fully compliant with the Gas Directive, if it passes through Member States that are not and, for example, do not fully offer the opportunity to the shippers using the pipeline to sell the gas in these Member States.

In light of these considerations, it is appropriate to assess whether the proposal, indeed, benefits the internal market.

[2] http://europa.eu/rapid/press-release_IP-17-4401_en.htm
[3] COM(2017) 660 final of 8 November 2017, p. 4

Lack of consistency in the arguments of the Commission

Need for a legislative approach

19. The Commission concludes 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".[4]

    However, the proposal recognises the continued need for international agreements negotiated on a case-by-case basis. By nature, negotiations with diverse third countries on a case-by-case basis render it unlikely that the rules under which (competing) import pipelines operate will be coherent and identical.

Question of what affects security of supply more: Non-application of the Gas Directive to external pipelines or lack of its implementation in Member States

20. The Commission further puts forward that "pipelines to and from third countries are in most cases of a capacity which is capable of impacting the internal market and security of supply in several Member States"[5]. However, this is foremost the case because the EU internal market is not yet fully interconnected and the Third Energy Package not yet fully implemented.

Commission's expectation of rising requests for derogation raises doubts about the usefulness of the proposal

21. The proposal provides for derogations for existing pipelines and exemptions for new pipelines. With regard to existing pipelines, the Commission justifies this approach with complex legal structures already in place which may require a case-specific approach.[6]

    This argument applies to existing and new pipelines alike and justifies the non-application of the Gas Directive to pipelines to and from third countries more than it enhances the need for its application.

    Indeed, the Commission anticipates that "the number of requests for derogations 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"[7].

[4] COM(2017) 660 final of 8 November 2017, p. 2
[5] COM(2017) 660 final of 8 November 2017, p. 3
[6] COM(2017) 660 final of 8 November 2017, p. 4
[7] COM(2017) 660 final of 8 November 2017, p. 4

Conclusion

In light of the preliminary analysis set out above, Eurogas is of the opinion that it is of paramount importance to security of supply and a well-functioning internal gas market in the EU that the effects of extending the application of the Gas Directive to pipelines to and from third countries is more thoroughly analysed in a full impact assessment before the proposal is further pursued. The timeframe of that assessment should be such that stakeholder opinion can be taken into account.