



European Economic and Social Committee

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KEY INTERNATIONAL LAW IMPLICATIONS OF THE COMMISSION'S PROPOSAL TO AMEND THE GAS DIRECTIVE

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Scope of Presentation

- 1. Incompatibility of Proposal with provisions of 1982 Law of Sea Convention (UNCLOS)*
- 2. Incompatibility of Proposal with WTO Agreements*
- 3. Incompatibility of Proposal with Article 7 of the Energy Charter Treaty (ECT)*
- 4. Incompatibility of Proposal with Part III of ECT and numerous Bilateral Investment Treaties*
- 5. Conclusions*

Objectives of the Proposal

Ensuring the functioning of the energy market and of security of energy supply in the Union

- by resolving the unclear legal situation regarding interconnectors with third countries
- by creating a single regulatory framework for transmission of gas in the EU, irrespective of origin

1. *Incompatibility with UNCLOS*

- 168 parties to UNCLOS, including all EU MS and EU (since 1998)
- On signature of UNCLOS EU notified of its exclusive competence in the conservation and management of sea fishing resources and also other areas of shared competence with EU MS
- **Territorial Sea:** EU MS have sovereignty over territorial sea and seabed and subsoil up to 12 nm from baseline
NB. Sovereignty is exercised “subject to this Convention and to other rules of international law” [Art 2 and 3]
- **Exclusive economic zone (EEZ):** marine area extending no further than 200 nm from the baseline [Art. 55]
- **Continental shelf (CS):** comprises the seabed and subsoil of the submarine areas that extends beyond territorial sea to the outer edge of continental margin (up to 350 nm) or to distance of 200 nm [Art. 76]

1. **Scope of Functional Sovereignty: EEZ and CS**

- Pursuant to Article 56: “*In the exclusive economic zone, the coastal State has:*
 - (a) **sovereign rights** for the purpose of **exploring and exploiting, conserving and managing the natural resources**, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to **other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds**;*
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:*
 - (i) the establishment and use of artificial islands, installations and structures;*
 - (ii) **marine scientific research**;*
 - (iii) the **protection and preservation of the marine environment**;*
 - (c) other rights and duties provided for in this Convention.”*

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 - (c) other rights and duties** provided for in this Convention.”

1. *Rights of Other States in EEZ and CS of EU MS*

- Pursuant to Art. 58 and Art. 79(1) of UNCLOS “**ALL STATES ARE ENTITLED TO LAY SUBMARINE CABLES AND PIPELINES ON CONTINENTAL SHELF AND EXCLUSIVE ECONOMIC ZONE**” of EU MS
- “*Subject to its right to take reasonable measures for the exploration of the **continental shelf**, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State **may not impede** the laying or maintenance of such cables or pipelines.*” [Art.79(2)]
- “*The **delineation** of the course for the laying of such pipelines on the continental shelf is **subject to the consent** of the coastal State*”. [Art.79(3)]
- Nothing in this Part affects the right of the coastal State to **establish conditions for cables or pipelines entering its territory or territorial sea**, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and **structures under its jurisdiction**. [Art. 79 (4)]

1. *Conclusions re. Commission Proposal*

- EU MS DO NOT HAVE FULL SOVEREIGNTY OVER EEZ or CS BUT ONLY RIGHTS ACCORDED TO THEM UNDER UNCLOS
- Court of Justice of the EU confirmed this in Case C-111/05 Aktiebolaget NN

*“... sovereignty of the coastal State over EEZ and CS is merely **functional** limited to right to exercise activities laid down in Articles 56 and 77 of [UNCLOS]...”*

- EU MS have no right to dictate how a pipeline in their EEZ should be operated
- On the contrary, EU MS have an obligation not to impede the laying of pipelines
- At the very least, **Paragraph 6 of preamble to Proposal must be** amended since it provides that the Directive “should be applicable to the territorial waters and EEZ of the MS” as it is in **breach of International law**

2. *Incompatibility with WTO Agreements*

- Gas is regarded as a good and service under GATT and GATTS
- Freedom of transit obligation under Article V of GATT
- Most Favoured Nation (MFN) obligation under GATT
 - Any regulatory measure that affects gas pipelines but not LNG is unlikely to be consistent with MFN obligation
- Obligation not to impose quantitative restrictions as per Article XI of GATT
- Invoking security exception under Article XXI – do we want to follow Trump?
- Awaiting outcome of Russia's challenge of other provisions of the Gas Directive in the WTO

3. *Incompatibility with Art. 7 of ECT*

(1) Each Contracting Party shall take the **necessary measures to facilitate the Transit of Energy Materials and Products** consistent with the **principle of freedom of transit** and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.

....

(3) Each Contracting Party **undertakes** that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit **in no less favourable manner** than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

....

(5) A Contracting Party through whose Area Energy Materials and Products may transit **shall not be obliged** to (a) **permit the construction** or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which **it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.**

4. *Incompatibility with ECT + BITs*

- All EU MS and EU are parties to ECT and numerous BITs
- To the extent the Proposal seeks to change conditions of operation of existing gas pipelines this could amount to a breach of Fair and Equitable Treatment under ECT and BITs
- To the extent the Proposal does not impose equivalent obligations on LNG this could amount to a breach of MFN treatment
- Numerous arbitrations could be commenced against MS and EU for breach of investor rights under the ECT and BITs

5. *Conclusions: As the Proposal currently stands*

- It will result in EU MS and EU breaching the provisions of UNCLOS, a cornerstone treaty of international law
- It is likely to result in EU MS and EU breaching provisions of WTO Agreements
- It will result in EU MS and EU breaching provisions of ECT and BITs
- Contrary to its stated objectives the Proposal:
 - **Does not resolve an unclear legal situation** regarding interconnectors with third countries
 - On the contrary, it **would create an unclear legal situation where before there was none**
 - **Does not create a single** legislative framework for pipelines
 - On the contrary, **would result in a conflict of laws re. operation of pipelines**

Thank you for your attention

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