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Legal Issues Related to the Application of the Gas Directive to Gas Pipelines between the EU and Third Countries

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The EU gas directive in force regulates issues pertaining to the transmission of gas from third countries to the Union but is ambiguous. It can be interpreted in such a way that gas pipelines from these countries are not covered by EU energy regulations, leaving room for abuse. From the point of view of both Poland and the whole Union, it would be desirable to change the directive so that it clearly applies to EU legislation regarding gas pipelines used for the import of gas into the Union.

On 24 October, the European Commission (EC) announced its work programme for 2018. Among the proposed initiatives is the adoption of common rules for gas pipelines transporting gas from third countries to the EU. Recent speeches by EC representatives, including Energy Commissioner Miguel Arias Cañete, indicate that the changes would consist of making unequivocal coverage of gas pipelines connecting the EU with third countries, those currently under construction, as well as future ones under existing Directive 2009/73/EC. Opponents of this proposal say it is being dictated by the ongoing debate in the EU on the legal status of Gazprom's Nord Stream 2 (NS2) gas pipeline. However, the premises for amending the directive in this respect have existed for a long time now.

Unclear Status of Some Gas Pipelines. A key problem with the application of the directive is its classification of gas pipelines is incomplete. In addition to the "transmission" and "distribution networks" used for gas, it regulates the status of "upstream pipelines" used to transport natural gas directly from the place of extraction to the place of processing or loading, "direct lines" used by gas providers to supply some customers without using public networks, and "interconnectors," defined as transmission lines crossing borders between EU Member States solely for the purpose of connecting the national transmission systems.

The directive apparently lacks specificity about gas pipelines linking the transmission systems of Member States and third countries, leaving room for doubt whether it would apply to new gas pipelines bringing Russian gas to the EU. This makes the status of such projects subject to political controversy. The parties involved tend to avoid subjecting these pipelines to strict EU law. For instance, in 2014, the Bulgarian government adopted a law referring to a 60km portion of the South Stream gas pipeline running from Russia to the point of connection with the Bulgarian network on the latter's coast as a "sea gas pipeline," allegedly excluded from EU law. Gazprom also questioned whether Nord Stream 1 (NS1) and NS2 are even subject to EU legislation, calling them "submarine" or "export" pipelines.

Risk of Unequal Treatment. Although gas pipeline classification by investors and Member States is subject to EC controls, the current situation raises the risk of leaving it to individual discretion, as has already been observed. For instance, the Commission firmly opposed attempts to exclude the portions of South Stream running through Bulgarian territory from coverage under EU law, but it proved to be much more lenient in relation to NS1 and NS2. It did not protest the unclear legal situation of NS1, though MEPs did.

For example, in 2010, a request was made to pursue an agreement with Russia guaranteeing the application of EU legislation to NS1. Regarding NS2, the Commission has described it as being created in a "legal void." As can be deduced from statements made by EC representatives, the main reason for the differences could be that South Stream was to run through the territories of several Member States, which, according to the directive, allowed it to be classified as an "interconnector" while NS2 is to formally end on the German coast, with gas transported from there to the Czech Republic through the separate EUGAL pipeline.

The approach taken by the EC makes the application of legal rules dependent on how the investor designs the transmission route, whether as a single pipeline from a third country running through several EU countries (like South Stream) or as two separate pipelines, one *to* the EU and another *on* Union territory (like NS2 and EUGAL). The decisive assessment criterion should be does the pipeline supply gas from a third country's transmission grid to the EU, regardless of whether it formally terminates directly on the coast or continues inland. The construction of either pipeline would not make sense if the gas flowing through them could not be received or transported further.

Possibilities of Circumventing EU Law. The existing interpretation of the application of EU law to third-country pipelines also gives investors an opportunity to circumvent EU energy law through infrastructure in separate countries. For example, companies involved in the construction of the Balticconnector gas pipeline from Ingå, Finland, to Paldiski, Estonia, could create two separate gas pipelines within each country that run to the Russian coast but which would be linked together in Russia, thus avoiding the application of EU energy law to the newly established transmission network. According to the interpretation used by the EC, these pipelines could not be classified as "interconnectors" and would also remain in a legal vacuum. Similar solutions could be adopted by companies from other Member States in cooperation with third countries, such as firms from Cyprus and Greece with Turkey, and from Malta and Italy with the help of Tunisia. Such practices could lead to an erosion of the EU's regulatory regime over gas regulation.

A Different Interpretation of the Existing Provisions. The interpretation accepted by the EC is not the only acceptable one. In light of international law, the territorial sea belt is an integral part of the territory of a state and where the law of the state is fully applicable. This applies to EU law as well, unless a legal act explicitly excludes such effect. The EC has never contested the obligation to apply EU legislation, such as that pertaining to customs, environmental protection, or marine resources, to such areas. Accordingly, there are no premises that would deny the application of the gas directive to gas pipelines running through such territory. At the same time, for technical reasons, the application of EU law to only parts of a gas pipeline without separate points of entry and exit of the gas is impossible. For that reason, it would seem more correct from the perspective of the existing legislation if pipelines from third countries to the EU would be subject to Union regulations in full. Under the current legislative framework, EU law should apply also to gas pipelines that only partially pass through the territory of an EU Member State, just as it applies to transmission networks located entirely within it.

Conclusions. Revision of the gas directive is not absolutely necessary since the same effects can be obtained by adopting a broader interpretation of the existing law. However, given the perceived unwillingness of the EC to choose the latter solution, the former becomes the only option to secure long-term EU interests in the field of security of supply and the development of competition in the gas market. From the point of view of Poland's interests, the EC's desire to ensure the application of EU regulations to gas pipelines from third countries should be considered beneficial. However, the details of the solutions will be crucial.

There are two contending approaches within the Commission: a thorough revision of the directive or the extension of the concept of interconnectors to the pipelines in question. The EC's preferred solution so far seems to be the second, faster one since it does not require an impact assessment of the effects of the new legislative proposal, which usually takes about a year. It should be borne in mind, however, that it would allow investors to obtain the Commission's consent to completely exclude from EU legislation a significant portion of the capacity of newly constructed pipelines for a number of years, through so-called new infrastructure exemptions. Therefore, such a change would mean granting a lot of responsibility to the decision-makers on the EC.

However, the Commission's 2018 work programme includes an impact assessment of the new regulations, which may suggest an intention to pursue more ambitious reform, though which direction it takes is not yet predictable. The direction could likely still be influenced by Polish diplomatic activity in the EU forum.