

New EU energy regulations: a competence shift?

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New EU Gas Directive

- Agreement reached with the EP was endorsed by EU the Coreper on 20.02.19. “The final adoption of the text is expected to take place later in spring” (Council of the EU).
- Official aim: implementation of the core principles of EU energy legislation to gas pipelines to and from third countries.
- Real outcome: competence shift from MS to the EC: Art. 2(2) TFEU (shared competence); art. 194 (2) TFEU (choice of energy sources).

New Gas Directive Draft: market justifications?

- ADL reports (“Analysis of the proposed gas directive amendment”, 03/18; “Gas Directive amendment and relations with third countries”, 09/18). **Key messages: unnecessary changes, creates additional risks.**
- “Transparency at EU import entry-points has already been achieved via the Network Codes; and has no practical value upstream from those points”.
- “Unbundling is superfluous affected underwater stretches of pipeline are owned and operated by separate legal entities”.
- “Tariff Regulation may be effective in disclosing the transport element of the delivered price of gas, but since the gas has to compete against market prices anyway ... this is unlikely to bring any actual consumer benefits”

New Gas Directive: Key points

- EU law applies only in the territorial waters of the member state where pipeline connects to the European gas market. This avoids a clash with UN Convention of the Law of the Seas and one unnecessary conflict of laws but leaves open a number of questions unanswered.
- Possibility of derogations from TPA, unbundling, etc. by the relevant MS under Art. 49 subject to the EC approval.
- The EC will have the power to authorize and block the IGAs between the MS and the third countries.

Next steps & implications

- The EC is in a hurry to pass the directive before the EP elections and arrival of the new Commission which might have a different opinion (ADLittle, Feb. 2019).
- Transposition period is short – 9 months (usually – 18 months), the EC requested 3 months period.
- The Directive have to be approved by the Council of the EU, published in the *Official Journal* and to be transposed into the legislation of the EU MS. What happens during the transposition period as no infringement procedures could be initiated by the EC before the end of this process?

Conclusions

- The amendment creates a competence shift and increases the EU role in concluding and amending existing and future IGAs, and determining MS' energy policies.
- It also creates an additional uncertainty for the investors as the rules keep changing mid-game. Many investors will look to Brussels now for reassurance that this type of politicization does ultimately not undermine their legitimate expectations.
- If this trend continues, the EU will end up with an infrastructure sector in which only tax-payer funded subsidy programmes like the CEF can provide funding, with political strings attached. It would roll back the liberalization of the market into some central planning model.