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**OPINION OF THE LEGAL SERVICE<sup>1</sup>**

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From:	Legal Service
To:	Permanent Representatives Committee Part 1 Pemanent Representatives Committee Part 2
Subject:	Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues

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**I. INTRODUCTION**

1. On 12 June 2017 the Commission submitted to the Council a recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline<sup>2</sup> ("the recommendation"). The recommendation was the subject of first exchanges in the Energy Working Party on 20 June and 25 July 2017. In Coreper (part 2) on 6 July 2017, the Legal Service was requested to assess the compatibility of the recommended agreement with EU law, including as regards the distribution of competences between the Union and the Member States. The latter aspect will mainly be examined in the present opinion.

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<sup>1</sup> 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.

<sup>2</sup> Council Document 10249/17 + ADD 1.

2. Other legal aspects which may be relevant for the assessment of the recommendation will, in the framework of this opinion, be analysed to the extent necessary to advise on the distribution of competences. The Legal Service stands ready to provide further legal advice if it remains necessary for Council deliberations.

## II. LEGAL ANALYSIS

3. This section analyses the recommendation with respect to the distribution of competences between the Union and the Member States (B.). However, such an assessment requires prior clarification of a number of preliminary points (A.). One such point concerns the substantive legal basis envisaged for the Council decision, another the purpose of and need for the envisaged agreement. A third point concerns the applicability of the Union's internal energy acquis to the pipeline in question. There are also some remarks on procedure (C.).

### A. Preliminary observations

#### 1) First preliminary observation: the envisaged substantive legal basis

4. The draft Council Decision for authorising the opening of negotiations states only a procedural legal basis, namely Article 218(3) and (4) TFEU. It provides no indication that could serve for an assessment of Union competence. In contrast to this, the Legal Service has already advised based on the CITES judgment that a Council decision authorising the opening of negotiations should generally indicate not only its procedural legal basis, but also the relevant substantive legal basis or bases<sup>3</sup>.
5. This being said, the recommendation concerns rather clearly the field of Union energy policy which is governed by the substantive legal basis of Article 194 TFEU. This seems to be confirmed by part 3 of the recommendation's explanatory memorandum entitled "Legal Assessment", which makes reference to that legal basis<sup>4</sup>.

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<sup>3</sup> See CLS opinion 7726/13 (+COR1), paragraphs 7 to 11 based on the judgment of the Court of 1 October 2009, *Commission v Council*, Case C-370/07, EU:C:2009:590 ("CITES"). The recommendation is also not a case where, at the stage of a decision to open negotiations, it may be difficult to identify the substantive legal basis or bases which will be relevant, see in this respect CLS opinion 7726/13, paragraphs 10 and 11.

<sup>4</sup> Doc. 10249/17, p. 3.

6. The present analysis will therefore take Article 194 TFEU as the envisaged substantive legal basis for the draft Council decision.

**2) Second preliminary observation: on the purpose of and need for the envisaged agreement**

7. In its sole recital, the draft Council Decision on the opening of negotiations summarises the purpose of these negotiations as follows: "(...) *negotiations should be opened with a view to negotiate an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline in order to ensure a coherent regulatory framework contributing to market functioning and security of supply in the Union.*"<sup>5</sup> This purpose is further elaborated in the draft negotiating directives.
8. The purpose of regulating the operation of the Nord Stream 2 pipeline by a coherent regulatory framework will be assessed in more detail in the section on shared competence, as well as the measures of mitigation mentioned in part 4 of the draft negotiating directives.<sup>6</sup>
9. As a point of departure, it suffices to note that the recommendation aims at regulating specifically the operation of the pipeline. It follows implicitly that the draft recommendation does not aim at precluding its construction or opening, which are as such, by construction, accepted as compatible with EU law. The Council Legal Service has not, anymore than the Commission, found reasons in EU law why the equipment concerned would come in contradiction with EU law requirements.
10. The Treaty concept of security of energy supply into the European Union implies an element of discretion in the definition of the policies through which such security is ensured. However, in the presence of a risk that disputes occurring outside the Union between the countries of origin of the flows and the countries on which territories they transit might affect the uninterrupted transfer of energy sources in pipelines from the territory of the country of origin to the Union territory, it is *prima facie* evident that the opening of alternative routes with augmented capacity would increase the ability of the Union to be unaffected by such disputes and therefore the resilience of the Union's external supply networks to international incidents over which it has no direct control.

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<sup>5</sup> Doc. 10249/17, p.6; underlining added.

<sup>6</sup> See below, part B.2)a).

11. In this respect, the assumption that the opening of supplementary routes or capacities might increase the Union's dependence on its external energy providers is, at the very least, counter intuitive. It cannot be excluded, as the Commission claims, that the operation of new pipelines might reduce the strategic importance of other routes that the Union might wish to preserve, but it would certainly not be in line with any concept of security of supply to prevent - or even restrict - recourse to direct supply routes in the event of the occurrence of a crisis affecting the flows of energy on the territory of transit countries.
12. This is not only a matter of political choice, but one that must be addressed in accordance with the primary objective of the Union's energy policy as defined by the EU Treaties to guarantee the unhindered access into the territory of the Union of the energy sources required for the operation of the Union's economy.
13. In its explanatory memorandum, the Commission explains the need to establish a specific regime by the need to avoid a "legal void" or, alternatively, a "conflict of laws" on the pipeline or parts thereof. Since delegations have raised a number of questions in this respect, it is necessary to clarify the legal dimension of these arguments.
14. More specifically, the Commission asserts that "*[n]either the EU nor its Member States could claim to have jurisdiction on the part of an offshore pipeline outside their territory. Likewise, no third country could impose the application of its national jurisdiction to offshore pipelines outside of its territory. Admitting a legal void for an offshore pipeline or applying two different legal regimes, in the present case the ones of Russia and the EU, to one and the same pipeline would however result in negative market impact, either by allowing to circumvent fundamental principles of energy law by specific technical pipeline configurations, or by applying several contradictory regimes to one and the same stretch of pipeline. Those approaches are thus no viable alternatives either. As a result, there is a need to establish a specific regulatory regime for the operation of the pipeline via negotiations with the respective third countries, in this case the Russian Federation.*"<sup>7</sup>

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<sup>7</sup> Part 3 of the explanatory memorandum, doc. 10249/17, p. 4.

**a) On the need to avoid a "legal void" for offshore parts of the pipeline**

15. The Commission states that the limited jurisdiction of the EU and its Member States, on the one hand, and a third country, on the other hand, leads to a "legal void" on certain offshore parts of the pipeline that must be filled by mutually agreed principles for its operation.
16. In this respect, the Legal Service observes that the offshore parts of the pipeline would in any event be subject to the relevant rules of international law, including the law of the sea. The Commission's explanatory memorandum does not specifically examine these aspects, nor does it seem necessary to do so for the purposes of the present opinion.
17. Crucially, the third state, on the one hand, and the Member State concerned and the Union, on the other hand, would in any event have jurisdiction to regulate the operation of the pipeline at the respective points of departure and arrival of the pipeline on their territory, and there is no third point of entry or exit along the pipeline.
18. Therefore it is not the case that the limited jurisdiction of the EU and its Member States, on the one hand, and a third country, on the other hand, would lead to a "legal void" as regards the operation of the offshore pipeline that would have to be filled by agreed principles.
19. If the Commission's real point is that additional internationally agreed rules would be desirable in order to ensure that the equipment is operated according to a framework established in the interest of all parties concerned, this at any rate has nothing to do with a "legal void".

**b) On the need to avoid a "conflict of laws"**

20. Alternatively, the Commission identifies the risk of "*applying two different legal regimes*" and even "*applying several contradictory regimes to one and the same stretch of pipeline*". Moreover, the Commission argues that "*[o]nly via negotiation of a specific agreement can the underlying conflict of laws be resolved, which comes from contradicting legal principles in the Russian legislation and the Union acquis.*"<sup>8</sup>

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<sup>8</sup> Part 3 of the explanatory memorandum, doc. 10249/17, p. 4.

21. Such a situation of "conflict of laws" between Russian law and the internal EU energy acquis, in particular Gas Directive 2009/73<sup>9</sup> ("the Directive"), cannot currently exist.
22. There could currently be a "conflict of laws" if both the Union and the third country had applied their respective jurisdiction to the pipeline. As regards the Union, this would necessarily presuppose that Gas Directive 2009/73 is indeed applicable to the part of the Nord Stream 2 pipeline which is under the jurisdiction of the Union and Germany. As will be set out further below<sup>10</sup>, the Legal Service does not consider that this is the case. This excludes actual conflict of laws, at least with respect to the Union<sup>11</sup>.
23. The current absence of an actual conflict of laws does not exclude in principle a potential future conflict of laws. Should the EU and the Russian Federation apply conflicting legal regimes within their respective jurisdictions over the pipeline, this could indeed create a need to sort out any ensuing contradictions. But these are inherent to the operation of any international trans-border facility.
24. Moreover, it is naturally a matter of political choice whether to address the hypothesis that only the third country applies its jurisdiction to the pipeline, thereby regulating its operation alone. Such a choice would in any case have to take into account the limits of the Union's conferred competences as regards energy policy.
25. The analysis of the notions of "legal void" and "conflict of laws" leads to the conclusion that the decision whether or not to negotiate the envisaged agreement is not related to a legal need deriving from these notions but instead a matter of political choice, provided of course that the Union has competence to negotiate the envisaged agreement.

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<sup>9</sup> 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, OJ L 211, 14.8.2009, p. 94.

<sup>10</sup> See below part A.3.

<sup>11</sup> Nor has the Commission provided any information on an actual conflict of laws between German and Russian law.

**3) Third preliminary observation: the applicability of the internal EU energy acquis**

26. To assess whether there is exclusive Union competence pursuant to Article 3(2) TFEU for the envisaged agreement, it is necessary to determine whether the relevant secondary Union energy law applies to the Nord Stream 2 pipeline<sup>12</sup>.
27. This is without prejudice to the question whether primary Union law, contained in Article 194 TFEU, gives the Union competence to limit the right of Member States to import energy sources from third countries into their territory, either through international agreements or through secondary legislation. The Council Legal Service stands ready to address this question eventually, should the need for this arise at some point of time.
28. The Commission describes the Nord Stream 2 pipeline as an offshore pipeline that *"is planned to be connected to the gas transportation grids in Russia and in Germany. In principle, [it] could supply a large part of the EU internal gas market"*<sup>13</sup>.
29. In other words, the offshore pipeline seems to connect the national transmission systems of Russia and Germany exclusively in order to import gas from that third country. There is no connection to other national transmission systems along the way.
30. The common rules for the internal market in natural gas are essentially set out in the so-called "third energy package" and its implementing acts. This analysis will focus on Gas Directive 2009/73, which is the basic legislative act in this area and which contains the rules of EU energy law to which the Commission refers in its draft mandate<sup>14</sup>.

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<sup>12</sup> See below part B.1).

<sup>13</sup> Part 1 of the explanatory memorandum, doc. 10249/17, p. 3.

<sup>14</sup> See point 3 of the draft negotiating directives, document 10249/17 ADD 1, p. 2 and 3, and, for instance, Articles 9, 32 and 13 of Gas Directive 2009/73. The Directive is further complemented, inter alia, by Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks, OJ L 211, 14.8.2009, p. 36.



31. Inter alia, the Directive "*establishes common rules for the transmission (...) of natural gas. It lays down the rules relating to the organization and functioning of the natural gas sector (...) and the operation of systems.*"<sup>15</sup> This includes specific provisions which explicitly address the particular situation of certain gas infrastructure.
32. One such type of gas infrastructure which is explicitly addressed and specifically regulated is an "upstream pipeline network". It includes inter alia any pipeline used to convey natural gas from gas production projects to a final coastal landing terminal<sup>16</sup>. However, on the basis of the available information, it does not seem that the Nord Stream 2 pipeline is used for such purposes.
33. Instead, the said pipeline's design of connecting the national transmission systems of two states recalls the definition of another specific infrastructure, an "interconnector". The latter is defined in Article 2(17) of the Directive as "*a transmission line which crosses (...) a border between Member States for the sole purpose of connecting the national transmission systems of those Member States.*"
34. However, Nord Stream 2 cannot qualify as such an interconnector since it does not connect the national transmission systems of two Member States but those of a Member State and a third country.
35. This leads to the question whether it is possible to apply the Directive's general rules related to the transmission<sup>17</sup> of gas and the operation of transmission systems<sup>18</sup>, to an offshore import pipeline with a third country such as Nord Stream 2, at least within the limits of the Union's jurisdiction.

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<sup>15</sup> Article 1(1) of Gas Directive 2009/73.

<sup>16</sup> See Article 2(2) and Article 34 of the Gas Directive 2009/73, which contains a specific regulatory regime.

<sup>17</sup> Article 2(3) of the Directive defines "transmission" as "*the transport of natural gas through a network, which mainly contains high-pressure pipelines, (...) with a view to its delivery to customers, but not including supply*".

<sup>18</sup> Article 2(13) of the Directive defines "system" as "*any transmission networks (...) owned and/or operated by a natural gas undertaking (...)*".



36. An affirmative interpretation could seek to rely on the part of the wording of the Directive's subject-matter which refers to "*common rules for the transmission (...) of natural gas*"<sup>19</sup> and argue that the Directive should be applicable to all "transmission" of natural gas within the Union's jurisdiction.
37. The Legal Service considers that such a result cannot be reconciled with the required coherent interpretation of the Directive.
38. Gas Directive 2009/73 is a market liberalisation Directive, its objective "*namely the creation of a fully operational internal market in natural gas*" where cross-border trade takes place<sup>20</sup>. For this purpose, the Directive sets up a comprehensive set of regulatory instruments for the gas transmission sector. This includes inter alia non-discriminatory third party access to the transmission system, regulated transmission tariffs and the effective unbundling of transmission systems and their operators from supply and production activities to address the risk of discrimination<sup>21</sup>. Major new gas infrastructure may, pursuant to Article 36 of the Directive, be temporarily exempted from a number of these requirements in order to promote investment in the infrastructure<sup>22</sup>. Member States' national regulatory authorities play an essential role in this system<sup>23</sup>.
39. It does not seem possible to apply this framework to an offshore import pipeline with a third country with a sufficient degree of coherence.

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<sup>19</sup> Article 1(1) of Gas Directive 2009/73.

<sup>20</sup> Recitals 60 and 1 of the Directive.

<sup>21</sup> See e. g. Articles 32, 41 and 9 and recital (6) of the Directive.

<sup>22</sup> See also recital 35 of Gas Directive 2009/73.

<sup>23</sup> See e.g. Article 41 of the Directive.

40. The scope of Article 36(1) of the Directive is a key obstacle in this respect. The Union legislator stated in this regard that "[i]nvestments in major new infrastructure should be strongly promoted (...)." <sup>24</sup> However, the scope of Article 36(1) of the Directive is restricted to three types of major infrastructure <sup>25</sup>. This includes an interconnector within the meaning of Article 2(17) of the Directive, i. e. a transmission line which connects Member States' national transmission systems. By contrast, a major new offshore import pipeline connecting exclusively the national transmission systems of a Member State and a third country is not enumerated in Article 36(1) of the Directive nor does it fulfil the definition of an interconnector <sup>26</sup>. Therefore such a type of pipeline does not fall under the scope of Article 36(1) of the Directive. It hence cannot benefit from exemptions and thereby be promoted, even if a concrete project were to fulfil the substantive conditions for an exemption <sup>27</sup>.
41. It seems difficult to explain and justify this strong difference in treatment of two similar types of major infrastructure, except by the fact that the Union legislator did not intend to apply the Directive to offshore import pipelines with third countries. The inapplicability of the Directive explains the lack of a possibility of exemption.
42. This conclusion on the inapplicability of the Directive is corroborated by the fact that none of the Directive's main regulatory instruments described above explicitly addresses the particularly complex situation of an offshore import pipeline with a third country. It is characterised inter alia by the circumstance that the Union cannot unilaterally require a third country to equally apply the Directive's regulatory regime to the part of the pipeline under its jurisdiction, a situation which may lead to conflict of laws. However, the Directive does not provide for any specific rules which address this situation, not even obligations for Member States' authorities to cooperate with third-country authorities.

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<sup>24</sup> See recital 35 of the Directive.

<sup>25</sup> Article 36(1) of the Directive reads: "*Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may (...)*"; underlining added.

<sup>26</sup> See above points 33 and 34.

<sup>27</sup> This analysis does not touch on the question whether the Nord Stream 2 project would fulfil the substantive conditions of Article 36 of Gas Directive 2009/73 if it did fall within the scope of the provision.

43. By contrast, the Directive contains general and specific rules on cooperation between Member States' national regulatory authorities on cross-border issues. For instance, Member States' national regulatory authorities cooperate as regards the exemption of major new gas infrastructure that is located in more than one Member State.<sup>28</sup> As a provision addressing a third-country related aspect, the Directive establishes, in the context of the unbundling of transmission systems and transmission system operators in Member States, specific certification requirements in relation to persons from a third country exercising control over the transmission system owner or operator<sup>29</sup>.
44. These considerations lead to the conclusion that the Directive does not apply to the Nord Stream 2 pipeline. The Legal Service will conduct its further analysis on this basis.

#### **B. Analysis of the allocation of competences**

45. As regards the allocation of competences between the Union and Member States, Article 5(1) TEU provides that "*[t]he limits of Union competence are governed by the principle of conferral*". The Treaties set out the Union's competences and divide them into the categories described and listed in Articles 2 to 6 TFEU. These provisions distinguish inter alia between exclusive competence and shared competence. Article 4(1) TEU provides that "*competences not conferred upon the Union in the Treaties remain with the Member States*".
46. It must therefore be determined which type of Union competence could be concerned in the present case, if any.

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<sup>28</sup> See the (general) regulatory regime for cross-border issues in Article 42, and, for the example, Article 36(4) of Gas Directive 2009/73.

<sup>29</sup> Article 11 of the Directive.

1) On exclusive Union competence

47. Where the Treaty confers on the Union exclusive competence in a specific area, only the Union may negotiate and conclude an agreement: see Article 2(1) TFEU. The TFEU does not provide for an explicit exclusive competence in the area of energy, which is defined as an area of shared competence: Article 4(2)(i) TFEU. An exclusive competence could nevertheless derive from Article 3(2) TFEU, which enumerates several grounds in this respect<sup>30</sup>.
48. As regards the first ground set out in Article 3(2) TFEU, it suffices to say that the recommendation from the Commission does not identify any legislative act of the Union which would provide for the conclusion of the envisaged agreement.
49. Pursuant to the second ground enumerated in Article 3(2) TFEU, competence is exclusive in nature "*where the conclusion of an agreement is necessary for the Union to exercise its internal competence*".<sup>31</sup> However, and irrespective of considerations of political necessity, the envisaged agreement is not a legal necessity to enable the Union to exercise its internal competence on the functioning of the energy market or on security of energy supply in the Union. Instead, the envisaged agreement rather seems to be presented as a means to "externalise" the principles of the Union's internal energy acquis at the international level<sup>32</sup>.

<sup>30</sup> See also with respect to the application of the ERTA case-law in the field of environment policy the judgment of the Court of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraphs 35 and 36.

<sup>31</sup> By contrast, Article 216 TFEU provides for an external competence of the Union where an "*agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*". Underlining added.

<sup>32</sup> See part 2 of the negotiating directives, doc. 10249/17 ADD 1, p. 2: "*The purpose (...) should be to ensure that the Nord Stream 2 pipeline is operated in accordance with a mutually agreed regulatory framework which incorporates the core principles of (...) European union law on energy.*"

50. The third ground of Article 3(2) TFEU would provide exclusive Union competence in so far as the conclusion of the agreement "*may affect common rules or alter their scope*", in line with the ERTA case-law of the Court<sup>33</sup>.
51. Since the EU is vested only with conferred powers, the Court's case-law requires that any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the international agreement envisaged and the EU law in force<sup>34</sup>. That analysis must take into account the areas covered, respectively, by the rules of EU law and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions<sup>35</sup>.
52. Although the final shape of any future agreement cannot be known at this stage, it follows from the draft negotiating directives that the agreement would be limited in scope specifically to the operation of the Nord Stream 2 pipeline. Its purpose is to establish an international regulatory framework for the operation of that pipeline which incorporates core principles of EU energy law, taking into account at the same time the impact on the current gas supply from the Russian Federation to the EU<sup>36</sup>.
53. The area covered by the envisaged agreement is therefore defined narrowly by the draft mandate. It concerns the regulation of the operation of an offshore import pipeline with a third country, with only two points for entry and exit, one in a third country and one in a Member State.

<sup>33</sup> See on this the judgments of the Court of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraphs 26 to 29, and of 4 September 2014, *Commission vs Council [CoE Convention on the protection of the rights of broadcasting organisations]*, C-114/12, EU:C:2014:2151, 66 and 67. In the same line, Article 216(1) TFEU gives the Union competence to conclude an international agreement which "*is likely to affect common rules or alter their scope*".

<sup>34</sup> Judgment of 4 September 2014, *Commission vs Council [CoE Convention on the protection of the rights of broadcasting organisations]*, C-114/12, EU:C:2014:2151, paragraph 74; to this effect also opinion 1/03 of the Court of 7 February 2006 [New Lugano Convention], EU:C:2006:81, paragraph 124.

<sup>35</sup> Opinion 1/13 of the Court of 14 October 2014 [*Convention on the civil aspects of international child abduction*], EU:C:2014:2303, paragraph 74; judgment of the Court of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraph 33.

<sup>36</sup> Point 2 of the draft negotiating directives, doc. 10249/17 ADD 1, p. 2.

54. As regards the area covered by the rules of Union law, the Legal Service considers that it is determined by the Union's common rules for the internal market in natural gas, in particular Gas Directive 2009/73 which contains the "principles" of Union law on energy which the Commission wants to include in the draft agreement<sup>37</sup>.
55. As regards a possible overlap between these two areas, the Legal Service refers to its analysis above under section A.3), where it considers that Gas Directive 2009/73 does not apply to an offshore import pipeline with a third country such as Nord Stream 2. Instead, the Directive regulates, for the purpose of creating a fully operational internal market, the operation of Member States' transmission systems.
56. It follows that the areas covered, respectively, by the rules of EU law and by the envisaged agreement do not overlap. They are indeed adjacent to one another. In the view of the Legal Service, this is therefore a case where the analysis and comparison of the respective areas covered rule out any affectation of common rules or an alteration of their scope<sup>38</sup>.
57. The Commission submits that the envisaged agreement *"would also directly affect the operation of onshore transmission pipelines in the EU, as well as have significant impact on the functioning of the internal market for natural gas, on which common rules have been set out notably in Directive 2009/73/EC, Regulation (EC) 715/2009."*<sup>39</sup> The Legal Service understands this as a reliance on the positive effects of "externalising" the principles of the relevant rules of EU law.

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<sup>37</sup> See point 3 of the draft negotiating directives, document 10249/17 ADD 1, p. 2, and, for instance, Articles 9, 32 and 13 of Gas Directive 2009/73. The Directive is further complemented, inter alia, by Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks.

<sup>38</sup> See to that effect opinion 1/03 of the Court of 7 February 2006 [New Lugano Convention], EU:C:2006:81, paragraph 125 with further references.

<sup>39</sup> Point 3 of the explanatory memorandum, doc. 10249/17, p. 3.

58. The Legal Service considers that, in the absence of any overlap of the areas covered by the agreement and Union rules, this purely effects-based argumentation lacks specificity and is insufficient in order to affirm an exclusive competence of the Union<sup>40</sup>.
59. In addition, it should be borne in mind that the Court requires, based on the principle of conferral set out in Article 5(1) and (2) TEU, a party to provide evidence establishing the exclusive nature of the external competence of the EU on which it seeks to rely<sup>41</sup>.
60. The Legal Service therefore considers that the envisaged agreement would not affect common rules or alter their scope as required by Article 3(2) TFEU.
61. None of the grounds enumerated in Article 3(2) TFEU are therefore fulfilled. Hence the envisaged agreement does not fall into an area of exclusive Union competence. This is thus not a case provided for in Article 2(1) TFEU where the Union alone may conclude the envisaged agreement.

**2) On shared competence**

**a) On the existence of shared competence**

62. Where the Union shares competence with Member States and a matter falls into such shared competence, the Member States may exercise their competence to the extent that the Union has not exercised its own: see Article 2(2) TFEU. It is for Member States to choose whether or not to conclude an international agreement unless they, as Council members, allow the Union to conclude the agreement alone by deciding that it will exercise its competence for this purpose. A third possibility is that the agreement is concluded jointly by the Member States and the Union as a mixed agreement if the Union already has or exercises competence for part of the agreement.

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<sup>40</sup> See also the judgment of the Court of 26 November 2014, *Green Network*, C-66/13, EU:C:2014:2399, paragraphs 41 to 60, where the Court first found that the agreement was liable to alter the scope of the common rules before stating that the agreement was also liable to affect the proper functioning of a system established by Directive 2001/77. Moreover, the system before the Court was, contrary to the system set up by Gas Directive 2009/73, characterised by national indicative targets and a global indicative target at Union level.

<sup>41</sup> Judgment of 4 September 2014, *Commission vs Council [CoE Convention on the protection of the rights of broadcasting organisations]*, C-114/12, EU:C:2014:2151, paragraph 75.



63. Energy is a shared competence between the Union and the Member States: Article 4(2)(i) TFEU. Therefore, when Article 216(1) TFEU confers on the European Union competence to "(...) *conclude an agreement with one or more third countries (...) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*", this competence is also shared in the field of energy.<sup>42</sup>
64. It must therefore be examined whether the envisaged agreement "*is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*".
65. As regards the objectives referred to in the Treaties, Article 194 TFEU, the substantive legal basis for the Union's energy policy, provides that Union policy on energy shall aim, in a spirit of solidarity between Member States, inter alia, to ensure the functioning of the energy market and to ensure security of energy supply in the Union<sup>43</sup>.
66. It must be analysed how the measures of the draft mandate are linked to these Treaty objectives.
67. The draft Council Decision on the opening of negotiations provides in its sole recital that "(...) *negotiations should be opened with a view to negotiate an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline in order to ensure a coherent regulatory framework contributing to market functioning and security of supply in the Union.*"

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<sup>42</sup> See the reasoning of the Court in opinion 2/15 of 16 May 2017 [Free Trade Agreement with Singapore], EU:C:2017:376, paragraph 242, as regards shared competence conferred by Article 216 TFEU relating to the internal market (Article 4(2)(a) TFEU); the Court refers to Article 4(1) TFEU which "*provides that the European Union 'shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6', which is the case here.*"

<sup>43</sup> Points (a) and (b) of Article 194(1) TFEU.

68. Furthermore, point 2 of the draft negotiating directives states that *"the purpose of the agreement between the Russian Federation and the European Union should be to ensure that the Nord Stream 2 pipeline is operated in accordance with a mutually agreed regulatory framework which incorporates the core principles of international law and European union law on energy, taking into account at the same time the impact of the pipeline's operation on the current gas supply from the Russian Federation to the European Union, including through Ukraine."*<sup>44</sup>
69. In the first place, the recommendation therefore seeks to achieve the Treaty objectives of market functioning and security of supply in the Union by regulating the operation<sup>45</sup> of the Nord Stream 2 pipeline in accordance with a framework that is mutually agreed with the third country exporting the gas.
70. Moreover, the draft negotiating directives make a more specific link to the said two Treaty objectives by aiming at an agreed framework on principles for the operation of the pipeline reflecting certain basic rules by which the Union regulates the functioning of its internal gas market, namely unbundling, third-party access, tariff regulation and transparency obligations. It thus aims at "externalising" at least "principles" of internal EU energy law for the operation of an offshore gas import pipeline with a third country.
71. Beyond this, point 4 of the draft negotiating mandate seeks to achieve the said Treaty objectives by including in the agreement "appropriate measures to ensure the possibility of mitigating the potential negative market impact of the Nord Stream 2 pipeline, in particular: the need for sustainable long-term gas transit after 2019 along a number of existing supply routes, notably via Ukraine, Member States' endeavours to open up their gas markets in accordance with relevant obligations under EU energy law and Member States' goals to diversify their gas supplies, notably in Central and Eastern Europe".<sup>46</sup>

<sup>44</sup> Doc. 10249/17 ADD 1, p. 2.

<sup>45</sup> "Operation" excludes construction or opening.

<sup>46</sup> Point 4 of the draft negotiating directives, doc. 10249/17 ADD 1, p. 3. Underlining added.

72. In its explanatory memorandum, the Commission asserts that *"Nord Stream 1 and 2 together would be able to transport yearly approximately 110 bcm of natural gas, equivalent to more than 80% of Russia's gas exports to the EU."* As regards market impact, the Commission submits inter alia that *"[d]ue to its size and route, Nord Stream 2 is likely to change the delivery pattern of Russian gas to European markets. Current transit routes for Russian gas could to a large extent be replaced by a single dominant gas transportation corridor (...). Nord Stream 2 could also impact the overall gas supply architecture in the EU: it could lead to a replacement of eastern entry points for Russian gas within Central and Eastern Member States by entry points in the western parts of those Member States. Those western points have however been developed largely with the aim of diversifying supply sources and routes, an effort which risks being undermined by the Nord Stream 2 project. Nord Stream 2, due to its size and route, could facilitate the expansion of Gazprom's position on EU's main gas markets. This could hamper the process of creating an open gas market with competitive prices and diversified supplies in the EU."* As regards security of supply, the Commission maintains that *"the negotiation of such agreement should take into account the expected impact which the operation of Nord Stream 2 will have on the current gas supply from Russia to the European Union, in particular to the Central and Eastern Member States which are currently being largely supplied via Ukraine and Belarus. To ensure security of supply via a diversification of routes, those alternative transportation corridors should remain operational. (...)"*<sup>47</sup>
73. Whether such measures would actually, as required by Article 216(1) TFEU, be "necessary" in order to achieve the Union's energy objectives and thereby provide competence to the Union to negotiate and conclude the envisaged agreement is impossible to establish on the basis of the Commission's analysis provided above.
74. In legal terms, the Council should be satisfied that, without the recommended measures, the objectives of Union energy policy could not be achieved in order for its decision authorising negotiations to stand the test of judicial review.

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<sup>47</sup> Points 1, 2 and 3 of the explanatory memorandum, doc. 10249/17, p. 3 and 4.

75. In this respect, the Legal Service recalls in the first place that the notions of "legal void" and "conflict of laws" advanced by the Commission in support of the need for the envisaged agreement do not imply any legal need to negotiate it but contain mere political arguments.<sup>48</sup>
76. Second, as regards the measures in point 3 of the draft mandate, their purpose to "externalise" certain principles of EU energy law vis-à-vis a third state as a common legal regime for the pipeline is set out clearly but in no way allows the Council to regard as established their necessity for the achievement of the objectives of the Union's energy policy, which has until now produced no relevant development of secondary law.
77. Third, as regards measures of possible mitigation as referred to in point 4 of the draft negotiating directives, such measures are not identified with any specificity and are therefore unable to demonstrate a link between the operation of the Nord Stream 2 pipeline and any substantiated market or security concern for energy supply into the Union.
78. If measures of mitigation amount to legal requirements intended to mitigate a potential negative impact of the use of the Nord Stream 2 route while keeping that route operational, the soundness of the underlying reasoning of the Commission remains to be established. The Commission seems to suggest that the use of the Nord Stream 2 pipeline, even if regulated by principles of EU energy law, could still be detrimental to the diversification of supply routes. Therefore, were the risk convincingly demonstrated (*quod non*), the relevance of the measures foreseen (i.e. their ability to effectively remedy the problem) would not be apparent.
79. Additionally, any measures which would amount to regulating structurally the gas supply of one or several Member States from a third country, including via choices of supply routes, would risk affecting a Member State's choice between different energy sources pursuant to the second subparagraph of Article 194(2) TFEU. Were this the case, such measures could not be decided without the participation of or against the will of the Member State concerned.

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<sup>48</sup> See above part A.2).

80. Should the Council, within its margin of appreciation, come to the assessment that, despite the above, Article 216(1) TFEU provides competence to the Union to negotiate a mixed agreement with the Russian Federation on the operation of the Nord Stream 2 pipeline, a negotiating mandate to this effect would need to justify how the conditions set forth by Article 216(1) TFEU will be met, which it cannot do on the sole bases provided by the Commission's recommendation.

**b) On the use of shared competence**

81. Pursuant to Article 5(1) TEU, "[t]he use of Union competences is governed by the principles of subsidiarity and proportionality". Article 5(4) TEU specifies that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". The disadvantages caused must not be disproportionate to the aims pursued<sup>49</sup>.
82. Should the Council be eventually satisfied that the purposes of the agreement contribute to the Treaty's energy objectives, the principle of proportionality still requires that the envisaged instruments do not exceed what is appropriate and necessary to achieve the intended purposes and that the disadvantages caused are not disproportionate to the aims pursued.
83. First, any measures related to the operation of the Nord Stream 2 pipeline should be linked to an actual threat to the Union's existing energy policies that this operation could create and should be able to effectively remedy such a threat. Second, it must be ensured that any measures contemplated do not amount to having the effect of preventing the construction or operation of the pipeline or to affecting such operation in a disproportionate manner, by comparison between the benefits and the disadvantages entailed by them.

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<sup>49</sup> See e. g. General Court, judgment of 29 April 2015, *Bank of Industry and Mine*, EU:T:2015:235, T-10/13, paragraph 90, with further references.

- 3) **On the affectation of a Member State's right to determine its choice between different energy sources and the general structure of its energy supply (second subparagraph of Article 194(2) TFEU)**
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84. It remains to be assessed whether certain parts of the envisaged agreement might fall under the exclusive competence of Member States, in view of the limitation inherent in the second subparagraph of Article 194(2) TFEU.
  85. The Legal Service already had the occasion to advise on a draft negotiating mandate for an agreement concerning a legal framework for a gas pipeline system between Azerbaijan and Turkmenistan<sup>50</sup>. In this context, the Legal Service advised that the envisaged agreement, while covering matters falling into shared competence, *"would nonetheless touch upon Member States sovereignty if and insofar as it concerned or prejudged the installation of a pipeline within the territory of a Member State."*<sup>51</sup>
  86. However, such a case of exclusive Member State competence does not apply here. The subject-matter of the draft negotiating mandate is not about the Union and a third country agreeing to install a pipeline on the territory of a Member State. Instead, the negotiating mandate treats the Nord Stream 2 project as a given and seeks to regulate its operation.
  87. Another question is whether some measures that could be covered by the mandate could fall under the second subparagraph of Article 194(2) TFEU which provides, inter alia, that *"measures shall not affect a Member State's right to determine (...) its choice between different energy sources and the general structure of its energy supply."*
  88. Not only the elimination of a pipeline from a Member State's choice of supply routes, but even restrictions on its operation, could in principle, depending on their scope and effects, affect the rights of the Member State as regards the general structure of its energy supply.

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<sup>50</sup> Doc. 11315/3/11 REV 3 + ADD 1.  
<sup>51</sup> CLS opinion 11668/11, para. 21.

89. Measures of possible mitigation might potentially have the effect of restricting the available capacity of the Nord Stream 2 pipeline. It is not inconceivable that the EU could agree with a third country on measures aimed at ensuring a proportionate diversification of supply routes should the Council be satisfied that this is necessary in order to achieve the Union's energy policy goals<sup>52</sup>.
90. However, such measures must, in particular, not amount to structurally regulating the gas supply of one or several Member States from a third country, including via choices of supply routes or restrictions thereto. This would risk affecting a Member State's choice between different energy sources pursuant to the second subparagraph of Article 194(2) TFEU. Such affectation of a Member State's energy mix could not be obtained without the consent of the Member State concerned, which could be granted either through a mixed agreement or through a unanimous vote in Council, pursuant to Article 218(8), second subparagraph TFEU in relation to Article 194(2) and possibly Article 192(2)(c) TFEU. The Legal Service stands ready to advise further on these two alternatives should the need arise.
91. Therefore, depending on a more precise definition of the measures envisaged - which is in any case indispensable to determine the possible legal effects of the recommended instrument -, it cannot be excluded that parts of the mandate would fall under the exclusive competence of Member States, notably if a mandatory reduction of a Member State's imports through a given pipeline is envisaged.

### **C. Procedure**

92. Should the authorisation to negotiate be granted for a mixed agreement, the procedure to be followed consists of (a) checking that common accord exists among Member States as regards the national competences to be exercised, before (b) putting the elements falling under EU competence to the vote under the procedure foreseen by the applicable material legal basis. In practice, common accord having been reached among Council members, any other voting requirement will not need to be separately checked.

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<sup>52</sup> See above paragraph 78.



93. The subject matter under which the recommendation falls is not one to which EU exclusive competence applies. However, a question remains to be answered. Could a mixed agreement requiring common accord be replaced by a Union-only agreement, requiring either qualified majority or unanimity, via a decision to authorise the negotiation of an agreement reserving to the Union exclusive competence on the subject?
94. It is accepted in jurisprudence that a yet unexercised shared Union competence may be exercised not only by the adoption of secondary legislation on the subject but also by the conclusion of international agreements regulating the subject in whole or in part. This approach reflects the principle that rules of the international law of the Union may constitute a legal framework in the same way and with the same authority as secondary legislation. But this approach is not intended to cover agreements of which the purpose is not to establish a framework of general application but to respond to a single isolated situation, which makes it analogous to a decision of individual scope and not to a development of secondary legislation.
95. In other words, if one were to admit that Article 194 TFEU allows the Union to regulate international networks of energy connecting the Union, it ought to be expected that the Union would start by setting principles to activate such a potential development, not by adopting straight away measures of implementation concerning an individual case; the same goes in this regard for an exercise of competence through international agreements as for an exercise through internal legislation.<sup>53</sup>
96. Therefore, the Legal Service is of the view that a first exercise of a Union competence, conferring on it exclusivity, through the mandating and conclusion of an agreement of individual scope, like the one recommended, would not reflect a legally sustainable approach.

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<sup>53</sup> Opinion of the Court of 26 April 1977 (1/76), EU:C:1977:63, deals, by contrast, with the case of the already existing legal framework for the navigation of the Rhine.

### III. CONCLUSION

97. In the absence of an indication of any substantive legal basis in the draft Council Decision, this analysis takes Article 194 TFEU as the envisaged substantive legal basis for the draft Council decision.
98. The stated purpose of the envisaged international agreement is in the first place to establish a regulatory framework for the operation of the Nord Stream 2 pipeline. It follows implicitly that the draft recommendation does not and cannot aim at precluding the construction or opening of the pipeline.
99. The analysis of the notions of "legal void" and "conflict of laws" advanced by the Commission in favour of an agreement leads to the conclusion that the decision whether or not to negotiate the envisaged agreement cannot be related to a legal need deriving from these notions.
100. The Legal Service considers that the provisions of Gas Directive 2009/73 do not apply to the Nord Stream 2 pipeline, without prejudice to the issue of whether Article 194 TFEU may provide a legal basis applying to it.
101. In the view of the Legal Service, the envisaged agreement does not fall into an area of exclusive Union competence. The Union may therefore not conclude the envisaged agreement alone unless, to the extent Article 194 TFEU offers a legal basis, the Council decides to exercise a potential competence by concluding it.
102. If the Council were to decide to exercise the potential competence through an international agreement, it could be expected that the Union would start by setting principles to activate such a potential development, not by adopting straight away measures of implementation concerning an individual case.
103. The assessment of shared competence requires clarification of the nature of measures of possible mitigation as set out in point 4 of the draft negotiating directives. The analysis is based on the assumption that any such measures would not amount to regulating structurally the gas supply of one or several Member States from a third country, including via choices of supply routes.

104. The necessity of the envisaged agreement in order to achieve the Union's energy policy objectives is not apparent from the recommendation. However, should the Council, within its margin of appreciation, come to a positive assessment as regards the necessity of the envisaged measures for the achievement of the Treaty's energy objectives, Article 216(1) TFEU provides competence for the Union to negotiate an agreement in a context of mixity. Any negotiating mandate should justify the necessity of the instrument with regard to the achievement of energy policy objectives.
105. The principle of proportionality requires, inter alia, that a negotiating mandate of the Council explicitly excludes measures which exceed what is appropriate and necessary as regards its energy policy purpose. It must therefore not envisage any instruments which would have the effect of preventing or hindering the construction or operation of the pipeline. Moreover, the envisaged measures should not be disproportionate to the aims pursued.
106. Measures restricting the choice of supply routes may not amount to regulating structurally the gas supply of one or several Member States from a third country, except by means of a mixed agreement or an agreement subject to unanimity in the Council.
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