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I. Introduction

By Directive (EU) 2019/692¹ the EU legislator has amended the Gas Directive 2009/73/EC² with effect of 23 May 2019. Key elements of the regulatory regime of Directive 2009/73, namely unbundling, third party access, and tariff regulation, shall now also apply to gas transmission lines between a third country and an EU Member State.³

It is already questionable how this amendment can be considered to enhance competition within the internal market.⁴ By definition, such third-country transmission lines do not connect Member States. Their sole effect is to increase market volume, which fosters competition and reduces prices on downstream markets. However, it is not the purpose of this article to elaborate in general on why the soundness and appropriateness of the new regulatory approach is questionable. Rather, we venture to analyze the impact, which the entering into force of the new legislation can have on third-country transmission lines that were conceptualized and financed under the old regulatory regime and are now being forced under a new and unforeseeable regulatory standard.

The new framework can bear significantly on the economic assumptions underlying such third-

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country transmission lines. Major gas infrastructure projects are characterized by special features that must be taken into consideration when defining the regulatory framework in which they operate. The significant volumes of financing often requires the conclusion of long-term agreements on the exclusive use of pipelines in order to make sure that sufficient income can be generated to recover the construction cost. Therefore, such long-term exclusive agreements are often linked to financing commitments of investors. Such financial structure would not be compatible with the normal requirements under EU gas market regulation. The direct extension of regulation, without any transition period, to also cover gas infrastructure projects already planned or financed, being under construction, or even in operation may, therefore, counteract the financing structure of such projects and thereby endanger their investment and eventually their efficient operation. This applies to gas transmission lines between EU Member States as well as to pipelines from a third country into an EU Member State.

Therefore, these special features have so far been reflected by the regulatory provisions of Directive 2009/73/EC in relation to investments in future pipeline projects within the EU. To allow and ensure investments in such new pipeline projects, Article 36 of Directive 2009/73/EC provides for an exemption from certain regulatory requirements. According to the regulatory purpose of this provision and its clear wording, the exemption under Article 36 of the Directive is based on an ex ante examination of a project the implementation of which has not yet started. In terms of its regulatory aim, the rule is thus based on the understanding that the investor can abstain from the investment if the exemption were denied.

Such an ex ante rule as in Article 36 of the Directive, however, is an insufficient tool to protect legitimate expectations of the pipeline operator and investors if the new regulatory regime has entered into force after the construction of a pipeline has started based on irreversible investment decisions.

In acknowledging this predicament, the amending Directive (EU) 2019/692 provides for a specific derogation possibility with respect to pipeline investments that have already been made at the date of the entry into force of the new legislation. Under the new Article 49a of the Directive\(^5\), the Member State where the pipeline enters EU territory may derogate from the regulatory requirements for the gas transmission line from a third country with regard to unbundling, third party access, and regulated tariffs.\(^6\)

According to the wording of Article 49a of the Directive, however, the possibility of granting a derogation is confined to gas transmission lines that were “completed before 23 May 2019”. That is the day when the amendment entered into force.\(^7\) The wording of the law renders clear results if applied to pipelines for which the technical process of construction has been finished. Yet it is questionable whether the notion “completed” is confined to the technical completion, i.e. the finalization of the construction works.

The point is that the legitimate expectations and assumptions of a pipeline operator can be equally affected by the new law if the construction of the pipeline has already started and progressed to a significant degree based on irreversible investment decisions without the

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\(^6\) Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) of Directive 2009/73/EC.

construction work having been entirely finished. Would it be a feasible approach to deny a
derogation in those cases solely based on the semantic argument that construction work
must be finished by May 23rd without considering whether the underlying investments were
already made and therefore completed in an economic sense? Could a narrow interpretation of
the notion “completed”, which confines itself to the finalization of the construction works,
amount to an unjustified discrimination with respect to cases which are economically
completed albeit not yet technically? Could such a narrow interpretation conflict with
fundamental principles of EU law? These are questions that warrant further examination in the
following article.

It is especially important to consider fundamental principles of EU law and EU constitutional
law as well as national constitutional law when it comes to the protection of legitimate
investors’ interests. It must be recognized that the rule of law and further legal principles as
enshrined in the EU Charter of Fundamental Rights require the legislator to honor legitimate
expectations of private entities in an existing regulatory framework when amending it. If
derogation powers were denied in cases where the project is economically completed albeit not
technically, this could conflict with those fundamental principles. For legitimate interest to
arise, the economic investment is decisive, not the technical completion. Therefore, a narrow
definition of the notion “completed” in a purely technical sense could give rise to objections
under fundamental principles of EU law. Rather, it must matter at what time irreversible
investment decisions have been made with respect to the construction of the pipeline. The term
“completed” therefore has to be construed in an economic sense, not in a technical sense.

II. The EU Constitutional Law Framework

1. Interpretation of Article 49a Directive 2009/73/EC (as amended) in Conformity with
Primary EU law

It is in accordance with the methodology of European law and the established practice of the
Court of Justice of the European Union (CJEU) that the provisions of European secondary law
must be interpreted in the light of the fundamental principles of primary EU law, including
European fundamental rights (i.e. EU law and the ECHR). Therefore, these standards must be
addressed when considering the notion of “completed” as used in the Directive. When
interpreting secondary EU law in conformity with primary law, all provisions of EU primary
law must be taken into account. This interpretation therefore includes, in particular, the
constitutional principles of primary EU law, as developed by the CJEU in decades of case-law
and as recognized in Article 6 of the Treaty on European Union (TEU). It also embraces the
fundamental rights requirements of primary law, as contained today in Article 6 TEU in
conjunction with the Charter of Fundamental Rights of the European Union (CFR).

The following considerations will demonstrate that Article 49a of the Directive must be
interpreted in the light of the requirements of EU primary law. This leads to the conclusion that
it is applicable to pipeline projects, which are in the process of construction and have been
completed in an economic, albeit not technical, sense by 23 May 2019. Denying such projects
the possibility of derogation, in contrast, would be incompatible with the fundamental rights
and constitutional requirements of EU primary law.

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Rejecting such an accommodating interpretation of Article 49a would therefore inevitably lead to the conclusion that the introduction of the new regulatory regime conflicts with fundamental principles of EU Treaty law and would therefore have to be considered null and void. Interpreting Article 49a of the Directive in an economic sense, which would ensure its compliance with primary law, however, would allow to avoid this nullity as a legal consequence, and to establish a coherent regulatory system.

All institutions and bodies of the Member States are bound by the requirement of interpretation and application in conformity with primary EU law. It must already apply at the level of the legislative transposition of a provision of the Directive (Article 288 (3) TFEU) into national law. The Member State legislator is required to transpose the Directive into national law in such a way as to ensure that the provisions of EU primary law are complied with. The Member State, when implementing the new legislation, will only fulfill the legislative obligation resulting from Article 288 (3) TFEU, if it takes into account the normative context of the provision of the directive. The national legislator must therefore interpret a directive in conformity with primary law when transposing it into national law. The aim should be an implementation that protects fundamental rights and that complies with the constitutional and fundamental rights requirements of EU law. Beyond the transposition process, it is mandatory that the provisions of EU primary law are complied with at the level of administrative and judicial application when enforcing the national rules reflecting the transposed directive.

The European Court of Justice (CJEU) has consistently held that the rule of law, as enshrined in EU primary law, and the fundamental rights provisions of the CFR must be applied cumulatively. In its decision-making practice, the CJEU applies these provisions of EU primary law in parallel. Therefore, a simultaneous violation of several principles or fundamental rights may be found in a given case.

In the following, it shall be explained that the need to interpret Article 49a of the Directive in conformity with primary law concerns the principle of the protection of legitimate expectations under Union law (section 2.), the fundamental rights under Union law of equal treatment (section 3.), the freedom of ownership (section 4.), and the freedom of enterprise (section 5.).

2. Violation of the Principle of the Protection of Legitimate Expectations

a) Scope of Application and Normative Content

The validity and binding nature of the principle of the protection of legitimate expectations in EU law is undisputed. The CJEU has consistently held that the principle of legal certainty belongs to the general principles of EU law. The General Court (GC) has also recently confirmed that “the principle of the protection of legitimate expectations is a general principle of EU law which, as such, is applicable in any context falling within the scope of EU law.” In settled case-law, the Court also assumes that the principle of legal certainty encompasses not only the principle of legal clarity of the rules created by the EU, but also the principle of

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11 CJEU, Decision of 11 June 2015, Case C-98/14, Berlington, ECLI:EU:C:2015:386, para. 90 f.; CJEU, Decision of 30 April 2014, Case C-390/12, Pfleger et al., ECLI:EU:C:2014:281, para. 60.
14 CJEU, Decision of 4 June 1981, Case 169/80, Administration des douanes/Société anonyme, ECR 1981, 1931,
non-retroactivity (“doctrine of prohibition of actual retroactivity”) and the requirement to protect legitimate expectations (“doctrine of legitimate expectations”).

The principle of the protection of legitimate trust is enshrined in the rule of law (Article 2 TEU). These fundamental principles of EU law are basic normative stipulations, which must be observed by any EU institution that exerts public power.\textsuperscript{15} Adherence to these principles can thus be claimed by any natural or legal person affected by EU decisions. The principle of the protection of legitimate trust is therefore a “human right”. It is not confined to citizens of the Union or companies established in the Union, but can also be invoked by all natural and legal persons subject to EU sovereignty.\textsuperscript{16}

The general principle of protection of legitimate expectations does not amount to a prohibition of legal change. Yet it requires that a transitional regime is established in order to account for the legitimate interest of any market participant.\textsuperscript{17} The rationale behind these principles is an emanation of fundamental views of justice, as reflected in the academic literature on EU law. Paul Craig stresses: “A basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions. This central precept is violated by the application of measures that were not in force when the actual events took place.”\textsuperscript{18}

The legal consequence of the principle of the protection of legitimate expectations is that the EU legislative institutions are required to find appropriate solutions, by which the new rules are gradually applied to situations which have arisen under the existing rules.\textsuperscript{19}

\textit{b) Principle of Legitimate Expectations and the Amending Directive (EU) 2019/692}

According to the above principle, the EU legislative institutions would violate the principle of legitimate expectations if they extended the regulatory regime of the Gas Directive 2009/73/EC to a pipeline from a third country to a Member State, which was economically completed at the time of the entry into force of the EU legal act, without providing for the possibility of a derogation according to Article 49a of the Directive.

Investors and operators of a gas interconnector from a third country to a Member State could not, in accordance with the general principles of EU law, rely on an unspecified legitimate expectation to not become subject to any EU energy market regulatory regime in the future. In particular, such confidence could not be inferred from the fact that the Gas Directive


\textsuperscript{16} As to the personal scope of application for third country legal persons: CJEU, Decision of 28 November 2013, Case C-348/12 P, Rat/Kala Naft, ECLI:EU:C:2013:776, para. 121 (with regard to the protection of property and freedom enterprise); similarly GC, Decision of 19 May 2010, Case T-181/08, Tay Za, ECLI:EU:T:2010:209, para. 136 (Effectiveness of judicial protection), para. 156 (Protection of Property); GC, Decision of 5 February 2013, Case T-494/10, Saderat, ECLI:EU:T:2013:59, para. 45 (rights of defence).

\textsuperscript{17} See with respect to the field of energy regulation see CJEU, Decision of 7 June 2005, Case C-17/03, Vereniging voor Energie, Milieu en Water, ECLI:EU:C:2005:362; CJEU, Decision of 17 July 2008, Case C-347/06, ASM Brescia, ECLI:EU:C:2008:416.

\textsuperscript{18} Craig, \textit{EU Administrative Law}, 3\textsuperscript{rd} ed. 2018, p. 601 f.

\textsuperscript{19} See CJEU, Decision of 27 January 2011, Case C-168/09, Flos SpA/Semeraro Casa, ECLI:EU:C:2011:29, para. 53.
2009/73/EC was not applicable to import pipelines in the past.

However, operators and developers of large gas infrastructures could legitimately rely on the expectation that their infrastructures would not suddenly and surprisingly become subject to a substantially new regulatory regime during the ongoing construction process of a new pipeline. In the provisions of Directive 2009/73/EC, namely Article 36 and Article 49a, the EU legislative authorities have expressed (and continue to express) the view that the operators of large gas infrastructures can legitimately rely on the expectation that their operations will not abruptly and surprisingly be subjected to regulation imposing a substantially new and different regime.

By establishing the exemption provision of Article 36 of the Directive (which is of no avail if investments in a pipeline infrastructure have already been made, as outlined above), the EU legislator makes it clear that investors in large gas infrastructures have a legitimate interest in an ex ante decision specifying under which concrete regulatory requirements their project will be operated.

If an exemption is made in accordance with Article 36 of the Directive, investors can then expect the continuation of the existence of the regulatory framework, as specified in the exemption decision. The purpose of this provision is two-fold: First, it empowers the regulatory authority to exempt from the possible application of certain regulatory instruments provided for by the Directive (substantive purpose). Second, by adopting a decision under Article 36 of the Directive, the regulatory authority concretizes and clarifies the specific regulatory scheme imposed upon the investor in large gas infrastructures. As a consequence, the decision reduces the considerable uncertainty of how the regulatory authority will make use of the instruments of the Directive in concreto after the completion of the project (procedural purpose). Given the economic value of an investment in large gas infrastructures, investors can get regulatory certainty by applying for a decision under Art. 36 of the Directive. Art. 36 must thus be understood as a provision ensuring respect for the basic values of the EU (Article 2 TEU in conjunction with Article 6 TEU). The EU legislator affirms this necessity, again, in Article 49a of the Directive, which provides for a derogation possibility in the event that an investment has already been made.

Before the adoption of Directive (EU) 2019/692, investors in new projects thus worked in a legal environment in which they could have the legitimate expectation that “large new gas infrastructures” located outside the EU area would not become subject to the regulatory regime of the EU Gas Directive suddenly and surprisingly. They could be confident that, even if the regulatory regime were to be extended to previously unaffected projects, the EU regulator would ensure that the special investment conditions in the gas infrastructure market would be taken into account.

Investors in a new major gas infrastructure between a third country and an EU Member State had been given sufficient grounds to have these legitimate expectations. These investors were not covered by the regime of Directive 2009/73/EC until 23 May 2019. It is inexplicable why the protection of legitimate interests should be confined to such projects that have been technically completed by May 23rd 2019, whilst denying such protection to equally irreversible and substantial investments in pipeline projects for which the construction works were not completely finished by that date.

With the enactment of Article 49a of the Directive, the EU legislator has confirmed the
The legitimacy of expectations of investors in natural gas infrastructures. In Article 49a of the Directive, the EU legislative authorities recognize that the regulatory regime introduced by the Directive can have economically intolerable and unreasonable consequences on large gas infrastructure projects. Only the adoption of a derogation regime such as in Article 49a ensures that the amendment complies with constitutional principles and fundamental rights. In recital 4 of the amendment Directive (EU) 2019/692, the EU legislator makes it clear that the lack of previous regulation on interconnectors from third countries and to third countries must be taken into account when designing the new regulatory terms.

The point of reference for legitimate expectations is “investments made” or “existing investments”. In Article 49a (1) of the Directive, the EU legislator has expressed the view that “investments made” constitute an objective and decisive circumstance which forces one to consider whether the imposition of a regulatory regime is reasonable under the rule of law and in the light of fundamental rights. This provision expressly emphasizes that “investments made” create a need for protection.

Investors in gas interconnectors from a third country could, in any event, have established legitimate expectations in the existing legislative framework, at least until 8 November 2017. On this day, the EU Commission announced its intention to amend Directive 2009/73/EC in order to regulate such gas infrastructures. Projects that were “carried out” before this date, meaning that they were initiated by investors and planners, therefore come under the protection of the principle of legitimate trust under the rule of law.

Investors in gas interconnectors from a third country to an EU Member State who launched their project before 8 November 2017 cannot be considered to have acted negligently and with lack of foresight. In view of the fact that such investments did not come under the regulatory regime of the Directive until 23 May 2019, it was not possible for them to apply for an exemption under Article 36 of Directive 2009/73/EC. The requirement of prudent and forward-looking behavior is not put into question if an investor makes an investment in such a situation.

The legal environment in which investments in gas interconnectors from a third country to an EU Member State were made was also sufficiently robust to give rise to legitimate expectations. The principle of the protection of legitimate expectations is not only applicable if the investment decision has been approved by the EU in an administrative decision. It is sufficient that the investment decision was taken in a regulatory environment that did not subject the project to the regulatory requirements, explicitly identifying it as permitted and thus recognizing the legitimate expectation to complete it as projected without later interference by the EU legislator.

Finally, legitimate expectations of investors in gas interconnectors from a third country to a Member State cannot be rejected based on the argument that public interests of the European Union took precedence over them. There are no compelling reasons to provide a derogation from the regulatory regime for certain investments in gas interconnectors from a third country to an EU Member State, but to deny that derogation for other investments for the mere technical reason that the construction works have not yet been finished. In this context, it is important to consider that investors in gas interconnectors from a third country are committed to an EU public interest, irrespective of the stage reached in the realization of the project: The

21 E.g. CJEU, Decision of 5 October 1993, Joint Cases C-13/92 et al., Driessen, ECR 1993, I-4751, para. 27 (in case of an EU regulation).
construction of a new gas interconnector from a third country to a Member State leads to an increase in transport capacity. Moreover, investments in gas interconnectors from a third country also do not lead to a restriction of competition on complementary markets. They do not affect network regulation for intra-EU networks.

If investments in a gas interconnector from a third country are, in principle, already conducive to the common good and conducive to the realization of the internal market, the interests of the investor must be given high priority within the framework of the balancing exercise to be carried out.

Moreover, even in the opinion of the EU institutions, the interest of investors in obtaining adequate protection for their legitimate expectations is of utmost importance with significant constitutional law dimensions. The EU institutions have consistently recognized that a favorable and reliable regulatory framework for large gas infrastructures is vital to the success of any investment decision. This is the reason behind the exemption provision for new infrastructure in Article 36 of the Directive (which is, however, of no avail if the investment has already been made).

Accordingly, recital 35 of Directive 2009/73/EC also refers to the “special risk profile” of such investments.

In light of this, there is no compelling reason to make distinctions within the ambit of Article 49a solely based on the technical progress of the construction works, irrespective of whether significant irreversible investments have been made into the pipeline. The absence of any compelling reason for a technical distinction based on the progress of construction works under Article 49a would eventually conflict with the constitutional law requirements of Article 296 TFEU.

There are, therefore, cogent reasons for construing Article 49a in a more accommodating way in order to include projects in which irreversible investments have been made by 23 May 2019. The drastic impact following from the regulation of gas infrastructures cannot depend on whether the construction has been completed at a certain date or not. Rather, the law must account for the completion in an economic-functional sense: it must suffice for the possibility of a derogation that the investment can no longer be reversed since major costs have irreversibly been incurred (“sunk costs”).

Moreover, according to the CJEU case-law, public interests of the EU must also be taken into account when deciding whether protection of legitimate expectations is granted. The CJEU has consistently held that “(a)ccording to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule. The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule.”

Such situation, however, would not materialize if the derogation regime of Article 49a of the Directive were rightly applied to gas infrastructure projects which

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were already economically – albeit not technically – completed on 23 May 2019. Such application would not prevent Article 49a of the Directive to apply; it would only adjust its scope of application ratione temporis.

It must also be considered that Article 49a of the Directive only provides for a temporary derogation; the regulatory regime of Directive 2009/73/EC applies once this initial period and the potential prolongation have expired. According to the assessments of the EU legislator, the temporary derogation provided for in Article 49a of the Directive corresponds with the period necessary to adequately safeguard investors’ interests with respect to large natural gas infrastructures. The EU interest in regulation is not set aside permanently.

To conclude, the legitimate interests of investors in the stability of the investment environment does not only warrant constitutional law protection. It also prevails over any regulatory aim of the EU institutions to suddenly and surprisingly modify the investment environment. Investors who had already invested in gas pipelines from a third country to an EU Member State at the time when the Directive (EU) 2019/692 entered into force must thus be granted the opportunity to obtain a derogation under Article 49a of the Directive in order to protect their legitimate expectations in the existing investment conditions. This applies irrespectively of the technical progress made in the construction of the project.

3. Violation of the Principle of Equal Treatment under Article 20 CFR

a) Scope of Application and Normative Content

According to Article 20 of the Charter of Fundamental Rights of the EU (CFR), all persons are equal before the law. The Charter establishes a general legal principle common to all European constitutional systems. The European Court of Justice has assumed early in its history that the principle of equality is one of the fundamental principles of Community (and EU) law and has constitutional status. Article 20 CFR is supplemented by the non-discrimination prohibition of Article 21 CFR.

All legal entities subject to EU law are entitled to equal treatment. Legal persons may also rely on it. The right to equal treatment is a fundamental right, which applies not only to EU citizens

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25 Description of the legislative history by: Huster, Gleichheit im Mehrebenensystem, Europarecht 2010, p. 325
and companies established in the Union, but also to all natural and legal persons.29

The right to equal treatment is subject to the general limits of Article 52 CFR. Moreover, unequal treatment of comparable groups of persons is not prohibited per se. The CJEU has consistently held that “objective grounds for justification” can explain a differentiation, so long as it is proportionate. “A difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.30

As a consequence, arbitrary grounds or purely subjective or unessential motives cannot justify unequal treatment. Occasionally, but not consistently, the CJEU grants the EU institutions a margin of appreciation in the assessment and weighing of justifications. The grounds for differentiation excluded in Article 21 CFR, however, can never justify unequal treatment under Article 20 CFR.

b) Principle of Equal Treatment and Amending Directive (EU) 2019/692

According to these principles, the EU legislator would violate Article 20 CFR and the general principle of equal treatment if it determined that investments in gas pipelines from a third country to an EU Member State could only benefit from a derogation under Article 49a of the Directive if the construction work had been finished by 23 May 2019. Any interpretation of Article 49a of the Directive that excludes the possibility of a derogation in cases in which significant investments have been made would result in an inadmissible discrimination of these projects compared to other projects already completed in terms of construction. In view of the fact that such distinction would lack any compelling reason, it would be incompatible with Article 20 CFR.

If Article 49a of the Directive were to be understood as meaning that the derogation option is confined to pipelines that are completed in a technical sense, this criterion of distinction would shape two (comparable) groups. On the one hand, technically completed projects could come under Article 49a of the Directive so that for them the regulatory burden could be temporarily lifted or alleviated. On the other hand, projects which had not yet been technically completed by 23 May 2019 would be subject to unmodified regulation – even if the investment decision had been taken and substantial investments had been made before the adoption of the amending Directive (EU) 2019/692.

These two groups, however, are comparable under EU law. All members of the two groups are companies that construct and operate gas pipelines from a third country to an EU Member State. In economic terms, they operate in the same market and have identical entrepreneurial profiles. They can be distinguished solely on the basis that construction works for some were finished while these were ongoing for others. The time of “completion of construction works”, however, is not a criterion, which would reflect any substantial difference between these groups with respect to the legislative aim of the relevant provision. The aim of Article 49a is not to

incentivize quick construction works, it is to protect legitimate investments.

There are, thus, no objective reasons justifying a distinction between different groups of undertakings according to the date of “construction completion”. There exist no legitimate reasons that could justify a further differentiation within the group of “investments made” based on the date of the finalization of the actual construction works. On the contrary, all investors that have already started their project based on irreversible investment decisions must be accorded the same degree of protection for their investment and of any legitimate expectations connected to it. Therefore, the EU legislator may not retroactively jeopardize legitimate investments based on the formal argument that construction work was not done “quickly enough”.

At this point it should again be emphasized that the EU Commission, in its proposal for the amendment of Directive 2009/73/EC, could not give any objective and valid reasons on why a distinction should be made between those projects which have already been completed in terms of investment and those which have already been completed in terms of construction.

In any event, arguments brought forward for the justification of such a discrimination could not have sufficient weight to justify the disadvantaged position of the affected individual companies. The difference in treatment would be disproportionate under all circumstances. A sudden and surprising change in the law, subjecting a “new large gas infrastructure” already under construction to a new and substantially different regulatory regime, fundamentally changes the parameters of the investment and therefore represents a significant burden for the company concerned.

As a consequence, the EU legislator would violate the prohibition of equal treatment as enshrined in Article 20 CFR if Article 49a were to be confined to cases in which the construction work has been finished, excluding cases in which significant and irreversible investments have been made without the construction work already being finished.

4. Violation of the Principle of Protection of Property (Article 17 CFR)

The European Charter of Fundamental Rights recognizes the protection of property as a central element of the protection of fundamental rights (Article 17 CFR). Provisions under European law relating to the protection of freedom of ownership have existed for a long time. Already in the first decisions of the CJEU on the existence and effect of fundamental rights under Community law, a fundamental right of protection and respect of property was recognized. The guarantee of property rights, today enshrined in Article 17 CFR, essentially corresponds with the guarantee of property rights in Article 1 of the Additional Protocol to the ECHR and is based on it.

33 CJEU, Decision of 13 December 1979, Case 44/79, Hauer, ECR 1979, 3727.
a) Scope of Application and Normative Content

The holder of the property right, according to Article 17 CFR, is “any person”. There is no provision in Union law that expressly states that companies can also invoke the Charter of Fundamental Rights. However, there is consensus that companies also can rely on the guarantee of ownership.

The protection of Article 17 CFR can only take effect where there is a property right eligible for protection. The protection of property according to Article 17 CFR (as well as that of Article 1 of the Additional Protocol to the ECHR) is not limited in its scope to tangible or intangible property. According to settled case-law, the EU courts hold that other types of property also have protection if they are based on a “legitimate expectation” (“acquired rights”). In order to be protected, a legal position must, however, be “secured”. If that is the case depends on whether the asserted legal positions are effective and can be enforced in court. The European Court of Justice has consistently held, for example, that the market position established in European market organizations as such does not come under the protection of ownership.

Article 17 CFR protects the existence of the legal position. However, the very wording of the freedom of property as enshrined in this Article makes clear that the protective scope of the fundamental right goes further. Article 17 CFR grants and protects “lawfully acquired property ... to use”. The protection under EU law is not limited to the “holding” or “having” of an object. It also embraces the active and practical use of property. EU measures that restrict the possibilities of property use can therefore prima facie fall under Article 17 of the Charter.

If the public authority impairs a legal position that has arisen, and that has been assigned to private benefit, there is an impairment of Article 17 CFR that requires justification. Article 17 CFR distinguishes between two such types of impairment. A seizure of property within

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36 European Court of Human Rights, Decision of 2 March 2005, Nr. 71916/01 et al., Maltzan et al./Deutschland, para. 74; European Court of Human Rights, Decision of 10 July 2002, Nr. 39794/98, Gratzing and Gratzingerova/Tschechien, para. 69.
40 CJEU, Decision of 30 July 1996, Case C-84/95, Bosphorus, ECR 1996, I-3953, para. 19, 22.
the meaning of Article 17 para. 1 sentence 2 CFR is a situation in which property positions are formally seized (“formal expropriation”), or in which property positions are so severely impaired that an impact arises which is akin to that of a formal expropriation. A seizure of property is only permitted if (cumulatively) there is a sufficient public interest that outweighs the interest of the holder of the fundamental right, if the procedural obligations that provide for the seizure have been observed, and if appropriate compensation is granted. Any other interference with the use of property is prohibited under EU fundamental rights if it translates into an unfair and unreasonable treatment of the holder of the fundamental right. Yet the protection of property under EU law is not unconditional and absolute. Rather, property is also subject to social obligations. If, however, the “fair balance” is not maintained when interfering with property, this constitutes a fundamentally inadmissible impairment of property.

It can be seen that, at the level of justification, European courts regularly grant the Member State’s authorities a margin of appreciation which is significant. In the area of property protection, however, the margin of appreciation is more limited than, for example, in the area of fundamental rights in the realm of “legal culture” or “politics” (e.g. Article 8, Article 10 ECHR). The more tangible the deprivation of rights caused by the impairment is, the more limited the legislative discretion is.

b) Impairment of Property by the Amending Directive (EU) 2019/692

According to these principles, the amendment Directive would violate the guarantee of property under Article 17 CFR if Article 49a were to be construed in a way as to be limited to cases in which the construction work has been finalized. Article 49a would then exclude pipelines that have been completed in an economic sense in that irreversible investment decisions have already been made, albeit construction work still being ongoing.

There is no doubt that subjecting the operation of a gas infrastructure to a regulatory regime by the EU legislator constitutes an impairment of the property rights of the owners of this gas infrastructure. This applies regardless of the state of construction. Regulation intervenes profoundly in the property rights associated with ownership and severely affects the right to use the gas interconnector.

A first impairment is caused by the requirements arising from the provisions on unbundling: The right of the owner to decide for himself how the entrepreneurial (management and operating) rights in the property are to be exercised is undermined. Furthermore, regulation on third party access to a gas infrastructure constitutes an impairment of the possibility of use as laid down in Article 17 CFR vis-à-vis the owner.

An impairment of the position in Article 17 CFR can also be caused by price regulation, which is another instrument in the regulatory toolbox. Here, too, the freedom of the owner to make independent use of his property as an inherent element of the property right, is impaired.


44 CJEU, Decision of 10 July 2003, Case C-20/00 and 64/00, Booker Aquacultur, ECR 2003, I-7411, para. 67

Finally, the property right protected under Article 17 CFR may also be impaired within the framework of regulation to the extent that the owner and entrepreneur is forced to dissolve existing contractual relationships because they are incompatible with new regulatory requirements.

The impairment of ownership, which follows from the extension of the gas Directive 2009/73/EC to interconnectors from a third country to an EU Member State, therefore requires a legal justification in order to comply with Union law.

What is decisive here is that it would constitute a violation of Article 17 CFR if a regulatory regime were applied abruptly and without a transitional period to a large gas infrastructure project, the realization of which has already proceeded significantly based on irreversible investment decisions. In this respect, it is sufficient to refer to the legislative decision to provide for the protection of existing investments in Article 49a.

As a consequence, Article 17 CFR would be violated unless Article 49a were construed in a way as to embrace third country interconnectors depending on the economic investments made. It follows from this for the transposition and for the application of the transposed directive that, for reasons of primary EU law, Article 49a must apply to pipeline projects which, irrespective of the date of their technical finalization, have been planned and irreversibly financed before 23 May 2019.

5. Violation of the Freedom to Conduct a Business (Article 16 CFR)

Article 16 CFR protects the freedom to conduct a business as a fundamental right. Enshrining this freedom in a specific article highlights the significance of entrepreneurial freedom in EU law, which includes the establishment of a free market as an essential objective (Article 3 para. 3 TEU in conjunction with Article 26 para. 2 TFEU).

a) Scope of Application and Normative Content

The fundamental right of Article 16 CFR undoubtedly applies to legal persons. The principle of the freedom to conduct a business is a fundamental right, which is not limited in scope to citizens of the Union or to companies established in the Union. It applies to all natural and legal persons active as entrepreneurs in the EU.

The scope of protection of Article 16 CFR covers companies, i.e. natural or legal persons who

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are active in a market with the intention of making a profit. In terms of content, the fundamental right is not limited to the commencement and termination of a business activity. Rather, it extends to the associated decision-making process, market conduct, and the seizing of business opportunities. It is recognized that the freedom to conduct a business embraces, in particular, the freedom of contract, the freedom of competition, and the associated business decision-making possibilities. The protection extends to the freedom to conclude contracts and to the freedom to amend existing contracts. Sovereign interventions in an existing contractual relationship thus always fall within the scope of Article 16 CFR.

Restrictions of business freedom according to Article 16 CFR are possible, but they must be proportionate. The exercise of freedom to conduct a business can therefore only be subject to those restrictions, which pursue a legitimate objective of the Union. This objective must actually serve the common good. The measure in question must not result in a disproportionate and unacceptable interference and, in particular, must not affect the essence of the fundamental right.

b) Freedom of Enterprise and Article 49a Directive 2009/73/EC (as amended)

According to these principles, the amending Directive (EU) 2019/692 would violate the freedom to conduct a business pursuant to Article 16 CFR if Article 49a were to be construed in a narrow technical sense. Moreover, the sudden and surprising regulation of projects despite these projects being economically completed based on irreversible investments, would also be a disproportionate burden for the pipeline operator and the investors. It has already been outlined above that the extension of regulation to a gas infrastructure project has far-reaching and economically serious consequences. The financial position of the operator and of investors would be tangibly affected; contracts already concluded could possibly no longer be honored.

It can be inferred from the Directive itself, however, that the EU legislator considers such possible consequences as so serious that operators should have the opportunity to apply for an ex ante exemption for new infrastructure under Article 36. Article 49a of Directive 2009/73/EC, on the other hand, shows that the legislator acknowledges the necessity to protect the status quo for projects that have already been initiated. The immediate and surprising application of the new regulatory regime to a project which is already in its implementation phase would cause precisely these impairments, which the EU legislator itself implicitly considers as problematic. In view of the fact that there are no persuasive public-interests that could justify such impact, the regulatory framework would therefore be deficient. In such cases, the CJEU assumes that a transitional solution is necessary to ensure proportionality. Only the application of Article 49a on projects based on the investments made, as opposed to the date of the finalization of the construction process, can ensure that the amended regulatory regime complies with the aforementioned fundamental principles of primary law.

54 CJEU, Decision of 11 June 2015, Case C-98/14, Berlington, ECLI:EU:C:2015:386, para. 87.

1. General Observations

The foregoing considerations must lead to the conclusion that a broad understanding of Article 49a of Directive 2009/73/EC is already required in order to protect the precedence of EU fundamental rights in the hierarchy of statutory rules (interpreting secondary law in conformity with primary law). Furthermore, as will be shown below, this understanding is also required by the teleology and systematic context of Article 49a within the amended Directive.

2. Teleology of Article 49a

The teleology of Article 49a of the Directive is not to reward operators for the fact that pipelines have already been technically finished by the date of 23 May 2019. The rationale behind the derogation provision is not to incentivize quick and timely construction work. It is to protect legitimate interests with respect to investments made in the construction of a pipeline in the assumption of the continuation of the previously existing regulatory framework. That is why the law in Article 49a of the Directive alludes to the recovery of costs with respect to the pipeline. Such recovery can only relate to an investment, which has been made. It cannot, however, relate to the construction as such. The construction as such is a factual state. It cannot itself be recovered. Only costs or investments can be recovered. The substantive standard in Article 49a of the Directive thus reflects the underlying idea of the protection of legitimate expectations relating to investments. Such investments and the underlying expectations, though, are independent of the date on which the last steps of the construction process have been or will be finished.

3. The Systematic Context of Article 49a in Relation to Article 36

There is also a systematic argument that demonstrates the expedience of a broad and functional interpretation of the notion of “completed”. It concerns the systematic relation between Article 49a of the Directive on the one hand and Article 36 on the other. The latter provision presupposes an ex ante perspective in that it examines whether a new, i.e. future project could be realized without an exemption. The applicant consequently has the opportunity, in Article 36 cases, to withdraw the project, should the exemption be denied. Accordingly, the Commission in its Fact Sheet on Directive 2019/962 states that Article 36 “aims at exempting pipelines which would not be built otherwise”. The criterion “would not be built otherwise” cannot apply to a project that has already been realized in part or in whole, since it has already been “built” in part or in whole. If the construction of the pipeline has already commenced, and if irreversible investment decisions have been made, an ex ante perspective would therefore

56 The sheer commencement of construction works or mere planning irrespective of whether the underlying investment decisions have irreversibly been made, however, could hardly suffice to create legitimate expectations which would warrant protection under Article 49a, see in that regard also Note from the General Secretariat of the Council to the Delegations, Brussels, 21 November 2018, No. Cion doc.:14204/17, Interinstitutional File:2017/0294(COD), Dok. 14560/18, p. 9 available at: http://data.consilium.europa.eu/doc/document/ST-14560-2018-INIT/en/pdf. “At this point two options are put up for discussion: Option 1: to limit the delegation clause to pipelines completed before the date of entry into force of this Directive (this option corresponds to the
be pointless when deciding on an exemption or a derogation. The relevant assessment standard for a derogation under Article 49a of the Directive therefore cannot be whether the pipeline would not be built in the event that the derogation were denied, because the pipeline is already being built. Withdrawing the project is not a viable option anymore. Even the Commission highlights that Article 36 and Article 49a have distinct legislative aims and are governed by different principles.

The fact that a certain investment structure has irreversibly been chosen for a project renders any speculation on whether the project could possibly have been realized by a different financing structure moot. In a situation where the construction of the pipeline is already under way and the investment decisions have irreversibly been made at the time the new regulatory regime entered into force, all speculations on whether a different financing structure would have enabled the project to be built even without any exemption or derogation are futile. As a matter of fact, that is the very reason why the law stipulates in Article 49a a derogation regime distinct from that of the exemption rule already existing under Article 36 of the Directive.

Against the backdrop of the entirety of these considerations, there is no single compelling reason why the applicability of the derogation regime of Article 49a should depend on the date upon which the construction work has been technically finished. Even the Commission

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Note that Article 36 para. 2 makes no difference in this regard. It merely stipulates that capacity expansions on an existing pipeline can be treated akin to the new construction. In both contexts, however, an ex ante perspective is decisive for granting an exemption.

It is therefore questionable whether Article 36 is applicable to pipeline projects that have already been built or for which the final investment decision have already been made, see Talus, EU Gas Market Amendment – Despite of Compromise, Problems Remain, 19 February 2019, available at: https://www.ogel.org/journal-advance-publication-article.asp?key=594, p. 10: “Here it must be noted that the wording of Article 36 would suggest that it may not be available for projects where the final investment decision has been taken.” Others consider Article 36 to be applicable while remaining silent about the inconsistencies this precipitates with respect to the inappropriate ex ante standard, see Oxford Institute for Energy Studies, Gas Directive Amendment: implications for Nord Stream 2, March 2019, p. 7, available at: https://www.oxfordenergy.org/wpcms/wp-content/uploads/2019/03/Gas-Directive-Amendment-Insight-49.pdf.

Commission, Fact Sheet, Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC), Brussels, 8 November 2017, available at: https://europa.eu/rapid/press-release_MEMO-17-4422_en.htm, para. 6: “6. Why does the proposal not include a Commission decision on granting the derogation for existing pipelines? The Commission proposal on derogations concerns gas pipelines already in operation. The logic of the derogation is therefore very different than the one used in exemption procedure under Article 36 of the Gas Directive, which aims at exempting pipelines which would not be built otherwise and which bring competitive and security of supply benefits. In view of the above, such a procedure would not be useful and in addition would create significant additional administrative burden.”

See already to this effect Talus/Hancher, Exploring the limits of EU’s unbelievable behaviour on Nord Stream 2, 29 May 2019, available at: https://www.euractiv.com/section/energy/opinion/exploring-the-limits-of-eus-unbelievable-behaviour-on-nord-stream-2/: “The amendment is drafted in such a way that all existing pipelines can enjoy a derogation from EU gas market rules under the new Article 49a of the Gas Market Directive. This derogation is however available for pipelines that are ‘completed before the date of entry into force of this Directive’. The discriminatory treatment of Nord Stream 2 follows from the fact that it is the only import pipeline where the final investment decision has been made and significant capital committed, and so cannot benefit from the derogation. This is not an accidental outcome. It has been clear from an early stage that the only reason for the amendment to the current gas market rules is to target the Nord Stream 2 project. The various positions taken by the EU and its Commission have been highly controversial.”; see also Talus, EU Gas Market Amendment –
concedes that the legislative aim of Article 49a is to avoid adverse effects resulting from an immediate entering into force of the new legislation. In its Staff Working Document the Commission states 61: “The new Article 49(9) envisages that a Member State may grant a derogation for existing gas pipelines to and from third countries from the provisions of Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) of the Gas Directive. This possibility should ensure that there is sufficient flexibility to avoid any adverse effects of the proposed application of EU market rules to such infrastructure. Thereby, due account is also taken of the lack of specific rules in this area since the adoption the Gas Directive in 2009.” Moreover, the Commission in its legislative proposal outlines with respect to the aim of Article 49a of the Directive 62 that it is “to take account of complex legal structures already in place which may require a case-specific approach”. These adverse effects on complex legal structures already in place, however, which the entering into force of the new regulatory regime can have, are independent of the date of the finalization of the actual construction works. The relevant parameter must therefore be the completion of the investments in terms of final investment decisions, not the technical process of actually building the pipeline.

4. The Systematic Context of the Notion “Completed” with Respect to Other Objective Reasons for a Derogation under Article 49a

The following should also be noted: According to Article 49a of the Directive, derogations from the regulation of gas transmission lines between a third country and a Member State are to be based on “objective reasons”. The recovery of investments made is mentioned as an example. Other objective reasons can therefore justify a derogation. One such conceivable objective reason could be the fact that in a given case the application of the new regulatory regime on a third-country transmission line could not and would not yield any positive effect on competition. That could be a situation in which a pipeline provides no opportunity for discrimination, foreclosure, or exploitation vis-à-vis other gas producers or market participants. If a pipeline originates from a point where no competitor could possibly seek to access it, the operation of this line cannot lead to a foreclosure. The sole effect that it is likely to achieve is to increase the downstream market volume leading to a decline in prices and a fostering of competition. On the other hand, imposing regulation on such a pipeline would increase administrative cost and concomitantly gas prices, which would precipitate less favorable effects on downstream consumers. Under these conditions, it would therefore be conceivable to grant a derogation.

When following this assumption, however, we cannot see any reason why the feasibility of a derogation should be confined to pipelines that already exist as fully functional at the 23rd of May 2019. Rather, it would be equally expedient to grant a derogation if their construction was

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finished at a later date. Again, the notion of “completed” should be construed as to relate to the irreversibility of the investment decision, yet not to the finishing of the construction process. Article 49a of the Directive is an emanation of the economic determinants and effects of transit lines from third countries, it is not a provision that deals with the quickness of the construction process of such pipelines as an end in itself.

5. The Semantical Scope of the Notion of “Completed”

The semantical meaning of the word “completed” is compatible with such an interpretation that is guided by the economic rationale rather than exclusively by technical aspects. Under EU law, the semantic interpretation of a legal notion is based on the usual meaning in everyday language. For a coherent legal construal of notions, however, is also mandatory to take “into account the context in which they occur and the purposes of the rules of which they are part”.

The word “fertiggestellt”, as used in the German language version of the Directive, is not confined to a technical dimension. It would not follow from the usual meaning in everyday language that only the completion of the construction works could be meant. Rather, it is possible to apply the verb “fertigstellen” to an economic project, such as the financing and the taking of investment decisions underlying a construction work, as well.

The French language version of the Directive uses the word “achevées”. The verb “achever” in its usual meaning is deemed to express the finalization of a thing or a conduct. The dictionary Larousse provides the following definition: “Finir une chose, une action commencée ; terminer : Achever un travail. Achever de mettre au point un appareil.” This, too, does not convey a clear limitation in the sense that the verb were confined to aspects of a technical finalization as opposed to the economic finalization of a construction project.

The English language version of the Directive relies on the notion “completed”. The verb “to complete”, however, is equally ambiguous with respect to the matters at hand. The Oxford Dictionary of English provides the following two possible meanings: “1 finish making or doing;…2 provide with the item or items necessary to make (something) full or entire.” Based on the second variant, the notion of “completed” can be interpreted in the present context as to relate to the finalization of the investment decisions as the items necessary to make the pipeline full or entire, so that all items for its realization are being provided.

The wording of the Directive therefore allows for an interpretative approach, which relates to the economic determinants of the pipeline versus the mere technical finalization of the construction process. As outlined above, this economical-functional approach is expedient in order to honor the teleology behind Article 49a of the Directive. Moreover, it is mandatory in order to comply with fundamental principles as enshrined in EU primary law and the EU Charter of Fundamental Rights.

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65 Available at: https://www.larousse.fr/dictionnaires/francais/achever/691.
IV. In the Alternative: Consequences of a Structural and Technical Understanding of Art. 49a of Directive 2009/73/EC

Given the foregoing considerations, an understanding of the term “completed” in an economic and functional sense is compulsory. Yet even if one assumed, in arguendo, that the notion referred to the technical process of construction rather than to the underlying investment decisions, the law would require further interpretation. If Article 49a related to the finishing of the construction process, the notion of “completed” could only relate to those parts of the pipeline that lie within the geographical area in which the Directive is applicable. Since the scope of the application of the Directive is limited in geographical terms, the same would then hold for the assessment of the completion of the pipeline. That means that Article 49a would be applicable if the construction were (technically) completed by May 23rd 2019 at least in those areas in which the Directive will be enforceable. Other parts of the pipeline, however, which lie outside the realm of EU law, would be irrelevant for the notion of “completed”.

This conclusion can be drawn from the fact that the Directive claims no extraterritorial application in the area of the high seas or in the territory of a third country. Therefore, completion in those areas must be irrelevant to the question of whether a derogation regime under Article 49a can be applied.

As a consequence, a derogation under Article 49a must be feasible so long as the relevant infrastructure was completed to a significant extent in the Directive’s geographical scope of application before 23 May 2019. With regard to gas transmission lines, this step is completed when the pipes have been laid.

V. Comment on the Potential Relevance of Constitutional Law in the Member States

For the sake of completeness, it shall be pointed out that EU Member States must also adhere to the fundamental principles and guarantees as enshrined in the national constitutions of the Member State when transposing an EU directive; such principles and rights are also relevant when applying the transposed directive in a Member State. While national law cannot set aside or supersede EU law, the German Federal Constitutional Court (Bundesverfassungsgericht), for instance, has ruled that German state authorities must construe German statutes transposing EU directives in conformity with the fundamental rights of the Grundgesetz (GG) to the extent that EU law provides room for the national legislator. As a consequence, the German legal provisions transposing the directive have to be construed and interpreted in the light of the constitutional guarantee of the freedom to exercise a profession (Article 12 GG), on the guarantee of property (Article 14 GG) including the right to use gas transmission lines, on the principle of equality before the law (Article 3 GG), and on the principle of the rule of law and the principle of the protection of legitimate expectations included therein (Article 20 GG). It could be shown here that a restrictive interpretation of Article 49a of the Directive and the German statute transposing this provision would raise serious issues of fundamental rights conformity. Moreover, most recently the German Federal Constitutional Court has declared its willingness to interpret German law in light of its understanding of EU fundamental freedoms.67 This far-reaching decision implies that the German Federal Constitutional Court

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67 German Federal Constitutional Court (Bundesverfassungsgericht), Decision of 6 November 2019, 1 BvR 276/17, ECLI:DE:BVerfG:2019:rs20191106.1bvr027617 (the Court did not publish an official English translation).
will bring its understanding of EU fundamental rights to bear in cases such as the one discussed here. It is, however, beyond the scope of this article, to expound further on these matters of EU Member State constitutional law and on the role of EU Member State constitutional courts.

VI. Conclusion

The entirety of the afore considerations must lead to the following normative understanding of the notion of “completed” in Article 49a of the Directive: It must be construed as to relate to the economic determinants of the pipeline, while it cannot be confined to the mere technical finalization of the construction process. A derogation under Article 49a of the Directive must therefore be possible if the construction of the pipeline has already started and progressed at May 23rd 2019 to a significant degree based on irreversible investment decisions even though the construction work might not have been entirely finished at that date. As outlined above, this interpretation is expedient in order to honor the teleology behind Article 49a of the Directive, and it is in line with the broad semantical meaning of the word “completed”. Most importantly, this interpretation is mandatory in order to comply with fundamental principles as enshrined in EU primary law and the EU Charter of Fundamental Rights.