

POLITICAL ECONOMIC CRIME NOVEL

Nord Stream 2: A Political Economic Crime Novel and Its EU Legal Consequences

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Hardly any other energy infrastructure project is as politically and legally controversial in the EU as Nord Stream 2, with the project company's headquarters in Zug, to export gas from Russia through the Baltic Sea to Germany. This European infrastructure project is an excellent example of the intertwined economic, political and legal implications inherent in any such energy project in the EU single market.

Just like an exemplary model case of a European law textbook, the following article aims to give an insight into the constantly developing new architecture of European energy law in the internal gas market, together with its European policy background, by means of concrete individual questions raised by this case. To this end, it proposes to take the concrete legal questions of this case and selectively illustrate the detailed and complex nesting of European law competences of the EU with the national competences of an EU Member State, here the Federal Republic of Germany, that regulates the EU internal gas market. This article focuses on the legal regime of exemptions from the legally required competitive conditions for the EU internal gas market, which is established by the relevant EU Gas Directive 2009/73EG in its Article 36 and Article 41a and its German implementation under Article 28a and 28b EnWG (Energiewirtschaftsgesetz, i.e. Energy Industry Act). This also includes a detailed presentation of the history of amendments to these standards. Finally, it should be made clear which legal, political and ultimately also economic risks await any investor in infrastructure projects with a construction period of several years on the EU internal market should they try to push through their large-scale project unchanged during the amendment of decisive relevant legal regulations by standard-setting EU authorities and against expanding political resistance in the EU and in EU Member States. These risks affect every investor who is involved in the EU internal market.

Keywords: Nord Stream 2, EU gas market, competition requirements, Russia, Gazprom, European energy

security, Energy Charter Treaty, US sanctions, German Federal Network Agency, German Energy Industry Act (EnWG=Energiewirtschaftsgesetz).

1 The Nord Stream 2 Project

In accordance with the agreement dated 4 September 2015, the Russian PJSC (Public Joint Stock Company) Gazprom, initially holds 51% of the shares in the Nord Stream-2 AG (Aktiengesellschaft) project company, which is entered in the Commercial Register of the Swiss Canton of Zug. The western minority partners BASF/Wintershall and E.ON, OMV and Shell each hold 10% of the shares, and the French company Engie (formerly GDF (Gas de France) Suez) holds 9%. Parallel to Nord Stream 1, Nord Stream 2 with two additional threads is expected to deliver another 55 billion cubic meters of gas per year from the Russian Baltic Sea port of Vyborg to the German port of Lubmin near Greifswald.¹

From the very beginning, Nord Stream 2 was even more controversial in the EU than Nord Stream 1. As before, the geopolitical interests of Russian President Putin were again highlighted, namely that gas exports to the Federal Republic of Germany, the largest importer of Russian gas in Europe, would then bypass the territory of Ukraine, and that after the expiry of the gas export agreement with the Ukrainian Naftogaz on 31 December 2019, completely replacing said agreement and thus depriving Ukraine of an powerful instrument for resisting Russia's economic and political pressures.

The renowned German Institute for Economic Research (*Deutsches Institut für Wirtschaftsforschung*, DIW), Berlin, came to the conclusion that Nord Stream 2 is unnecessary for gas supplies to German and European

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¹ An extensive international legal literature has accompanied the progress of construction of this article. See most recently Anke Schmidt-Felzmann, *Gazprom's Nord Stream 2 and Diffuse Authority in the EU: Managing Authority Challenges Regarding Russian Gas Supplies Through the Baltic Sea*, 42(1) J. Eur. Integration 129–141 (2020). Valentin Jeutner, *Amendments, Annexations, Alternatives: Nord Stream 2's Contemporary Status Under EU and International Law*, 12 J. World Energy L. & Bus. 502–512 (2019). Martin Nettesheim & Stefan Thomas, *EU Market Regulations of Offshore Transmission Lines: The Derogation for Completed Projects (Art. 49a of Directive 2009/73)*, 2019(5) Oil, Gas & Energy L. Rev. (OGEL) 1–21 (November 2019).

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and furthermore is environmentally harmful and economically unviable.² Even the Russian state bank Sberbank complained – quite courageously³ from within the ‘Putin system’ – that Gazprom could not make a profit from the construction of Nord Stream 2, but that the pipeline instead only served geopolitical interests and supply line for a small, closed group of Russian suppliers.⁴ So much for the political and economic background of the project.

2 Recent EU Energy Policy

2.1 Shift of competence in energy law from the Member State to the EU

Since 2009, several factors have had a fundamental and increasingly formative influence on gas industry relations between the EU and the Federal Republic of Germany on the one side and Russia on the other: the EU reforms to privatize former public-law companies providing public services and to liberalize these markets have led to more frequent and more intensive political intervention by the EU and by the Member States in the European gas market, with the result that the EU gas and energy market is becoming increasingly politically determined. The European and German ‘*Energiewende*’ (energy turnaround) with its new EU climate and energy policies and corresponding legislative initiatives made the implementation and design of long-term gas supply contracts politically and legally more uncertain and unpredictable. Since the Treaty of Lisbon in 2007, the distribution of legislative and executive competences in energy policy, which is divided between the individual national Member States and supranational EU institutions, has increasingly shifted in favour of the EU.

The gas supply crises between Russia and Ukraine in 2006 and 2009 and the interruption of transit through Ukraine in 2009 undermined the political and economic confidence in the reliability and security of Russian gas supplies of the EU and many of its Member States. This confidence was destroyed once and for all by the Russian annexation of the Crimea in February 2014, in violation of international law.

2.2 National hurdles in approval processes for laying the Nord Stream 2 pipeline

The Eastern European Member States in particular urged the EU to respond to Russia’s policy of Crimean annexation with economic sanctions. The EU Commission’s energy security strategy adopted in May 2014⁵ and the framework strategy for an EU energy union⁶ adopted in 2015 are also the result of a changed EU attitude towards Russia. Both documents highlight security of supply and diversification of energy sources and suppliers as key strategic objectives of EU energy policy. The Eastern European EU Member States perceived Russian gas supply policy as an effort by Russia to ‘weaponization of gas’, i.e. as an economic instrument to enforce Russia’s foreign and security policy interests.⁷ This

assessment influenced the EU’s view of Russian gas pipelines to Europe and to individual Member States. It has stressed the geopolitical dimension of almost every long-distance gas supply contract since – a dimension that German chancellors and ministers regularly pretended to ignore publicly and that Chancellor Merkel officially abandoned for the first time on the occasion of the visit of Ukrainian President Poroshenko on 10 April 2018 in Berlin.⁸

In contrast to Nord Stream 1, the resistance of the EU and individual EU Member States to Nord Stream 2 intensified to a degree that the federal governments under Chancellor Merkel had not expected since its inception in 2005. In the eyes of the opposition in the EU, Nord Stream 2 violated the political, although not legally binding, principles of the Energy Union, on which the EU and all Member States had previously agreed, namely: diversification of energy sources and, above all, energy suppliers, and security of supply.

In August 2016, the Polish Antimonopoly Commission (UOKiK) expressed strong concerns about the approval of the Nord Stream 2 section through Polish territorial waters in the Baltic Sea, because it believed that the project would give Nord Stream 2’s five Western European shareholders an excessive and therefore illegal share of the Polish power supply

² Anne Neumann, Leonard Göke, Franziska Holz, Claudia Kemfert and Christian von Hirschhausen, *Erdgasversorgung, Weitere Ostseepipeline ist überflüssig*, DIW Wochenbericht (*Natural Gas Supply: Further Baltic Sea Pipeline Is Superfluous*), 27 DIW Wochenbericht 1 (2018), https://www.diw.de/documents/publikationen/73/diw_01.c.593445.de/18-27-1.pdf.

³ The co-author of Sberbank – Analysis, Alexander Fak, was dismissed after the publication of the report. Max Seddon, *Fak Off as Sberbank Fires Analyst for Provocation Too Far*, *Financial Times*, 23. Mai 2018.

⁴ Alex Fak & Anna Kotelnikova, *Gazprom: Performing As Designed, SBERBANK CIB, Investment Research, Russia, Oil and Gas, Tickling Giants* (May 2018), s. 3, https://globalstocks.ru/wp-content/uploads/2018/05/Sberbank-CIB-OG_Tickling-Giants.pdf.

⁵ European Energy Security Strategy, Communication from the Commission to the European Parliament and the Council of 28 May 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0330&from=EN>.

⁶ Energy Union package of 25 Feb. 2015, https://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0002.01/DOC_1&format=PDF.

⁷ Study by the Scientific Service of the European Parliament, *The Quest for Natural Gas Pipelines: EU and Eastern Partner Energy Policies: Security Versus Transit Benefits* (July 2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/586626/EPRS_STU\(2016\)586626_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/586626/EPRS_STU(2016)586626_EN.pdf).

⁸ Press conference from the Chancellor on 10 Apr. 2018: ‘From this you can already see that this is not only an economic project, but that of course political factors must also be taken into account.’, <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenz-von-bundeskanzlerin-merkel-und-dem-staatspraesidenten-der-ukraine-petro-poroshenko-1008752>.

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market.⁹ This decision forced the five investment companies to transfer their shares in the project company to PJSC Gazprom as the sole shareholder, while at the same time committing themselves to take over 50% of the project costs and thus exchanging the ownership position for a weaker creditor position.¹⁰

Sweden, which for its part has grown concerned about Russia's military activities in the Baltic Sea, which have been steadily increasing since 2014, requested at the end of January 2017 that the EU Commission review the political and legal implications of the Nord Stream 2 project. Denmark acceded to this request and adopted a law authorizing Danish authorities to prohibit the construction of Nord Stream 2 through Danish territorial waters in the Baltic Sea for security and foreign policy reasons.¹¹ It was only on 30 October 2019 that the Danish authorities approved an alternative route around Bornholm offered by Nord Stream 2.¹² In October 2016, members of the European Parliament called for urgent intervention by the Commission to stop the Nord Stream 2 project.¹³ This political background significantly influenced the individual steps of the EU Commission's legislative initiatives, such as its simultaneous legal debates on the legality of the construction of Nord Stream 2.

3 The European Legal Dimensions of the Nord Stream 2 Project

3.1 The Third Gas Directive

The European Union sets various requirements in energy law. It shares competence in this area of law with the Member States in accordance with Article 4(2)(i) TFEU (Treaty on the Functioning of the EU). According to Article 194 (1) and (2) TFEU, the EU shall adopt, in accordance with the ordinary legislative procedure, standards, i.e. directives or regulations, for the regulation and functioning of the EU energy market in order to a) ensure the functioning of the energy market, b) guarantee the security of energy supply in the Union, ... and d) promote the interconnection of energy networks.¹⁴

In addition, Article 216 TFEU allows the Union:

“to conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”¹⁵

This Third EU Energy Package was the last major legislative package of the EU to transform the European electricity and gas market into a free, competitive and integrated market and to dissolve the privileges of national, formerly state-owned and vertically organized energy suppliers, which owned and operated both energy production and transport infrastructure. This Third Energy Package consisted of three Regulations and two

Directives, namely the Regulation establishing an Agency for the Cooperation of Energy Regulators (EC 713/2009),¹⁶ the Regulation on conditions for access to the network for cross-border exchanges in electricity (EC 714/2009),¹⁷ the Regulation on conditions for access to the natural gas transmission networks, including the Gas Access Regulation (EC 715/2009),¹⁸ the Directive on the

⁹ Communication of the Polish Antimonopoly Commission UOKIK of 12 Aug. 2016, https://www.uokik.gov.pl/news.php?news_id=12511.

¹⁰ Nord Stream 2 was originally established as a joint venture between Gazprom and five Western European gas trading companies, i.e. Unipr, Wintershall, Shell, OMV and Engie, but this shareholder structure was changed due to the objections of the Polish Antimonopoly Commission and the initiation of infringement proceedings. PJSC Gazprom became the sole shareholder. UOKIK is also taking action against the financing participation of the former co-shareholders, *see* communications of 8 Nov. 2019 and 3 June 2020, <https://www.uokik.gov.pl/search.php?szukaj=nord+stream+2>.

¹¹ Article 3a(2) of the Danish Lov om ændring af lov om kontinentalsoklen, LOV No 1401 of 5 Dec. 2017 (as amended by Bekendtgørelse af lov om kontinentalsoklen og visse rørdningsanlæg på søterritoriet, LBK No 1189 of 21 Sept. 2018), cited from Jeutner, at 509, fn. 46. *Energate-Messenger* 1 Dec. 2017, <https://www.energate-messenger.ch/news/179211/neue-rechtliche-huerde-fuer-nord-stream-2->

¹² <https://www.nord-stream2.com/media-info/news-events/nord-stream-2-granted-a-construction-permit-by-denmark-139/>, https://ens.dk/sites/ens.dk/files/OlieGas/permit_nord_stream_2.pdf.

¹³ Compare proposal for an LNG (Liquified Natural Gas) and storage strategy, by the EU Commission of 16 Feb. 2016, which was adopted as a resolution by the European Parliament on 25 Oct. 2016, <https://www.europarl.europa.eu/legislative-train/theme-resilient-energy-union-with-a-climate-change-policy/file-comprehensive-strategy-for-lng-and-storage>, and many other subsequent official documents of the Commission and Parliament.

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) of 26 Oct. 2012, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>. This is the consolidated version of the Treaty establishing the European Economic Community as it was renamed on 1 Dec. 2009, following amendments made by the Lisbon Treaty (2007) and all previous treaties.

¹⁵ *Ibid.* The architecture of European energy law, which was fundamentally changed by the Third Energy Package of 2009, is grounded primarily on the constitutional basis of these two Art.

¹⁶ Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, in: *Official Journal of the European Union* No L 211 of 14 Aug. 2009, at 1–14.

¹⁷ Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, in *Official Journal of the European Union* No L 211 of 14 Aug. 2009, at 14–35.

¹⁸ Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, in: *Official Journal of the European Union* No L 211 of 14 Aug. 2009, at 36–54.

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Internal Electricity Market (EC 2009/72)¹⁹ and the Directive on the Internal Gas Market (EC 2009/73).²⁰ Particularly important for the regulation of the gas market in the EU are the so-called Gas Directive and the Regulation on conditions for access to the gas transmission networks.²¹ The Gas Directive requires infrastructure projects in the EU internal gas market to comply with four essential conditions: (1) to unbundle vertically integrated natural gas undertakings, i.e. in accordance with their Article 9 et seq., separate business entities owning the transmission system from those performing supply and production functions, (2) to also grant third parties access to the pipeline network in accordance with Article 32, and (3) to disclose a transparent calculation of the tariffs of the gas price to the buyer and of the usage fee to the third party user of the pipeline network in accordance with Article 41.

To date, the Nord Stream 2 project has been a matter of application and interpretation of this Gas Directive, in particular compliance with and exemption from these competition conditions and the deadlines by which an application for exemption must be submitted.

3.2 The legal problems with Nord Stream 1

The construction of Nord Stream 1 already incited unambiguous legal criticism in the EU Commission and in individual Member States. The criticism related to the German territorial connection pipeline OPAL (Ostsee-Pipeline-Anbindungsleitung – Baltic Sea pipeline link) to Nord Stream 1 from the Baltic Sea port of arrival in Lubmin near Greifswald to Brantov/Olbernhau in the Czech Republic. W & G Transport Holding GmbH, an indirect subsidiary of the German Wintershall Holding GmbH and the Russian PAO Gazprom, still holds an 80% stake in the OPAL today. Due to Gazprom's high market share in the EU gas supply market and its infrastructure, critics considered the diversification of the EU gas supply and third party access to the pipeline to be violated, both conditions of the new gas directive for competition in the EU internal gas market and thus for the approval of a gas pipeline in the EU.²² On 25 February 2009 the Federal Network Agency, as the competent German regulatory authority, granted an exemption in accordance with § 28a Energiewirtschaftsgesetz (EnWG) – German Energy Industry Act –, which exempted OPAL from the conditions of the EU Gas Directive EC 2009/73²³ and granted W & G Transport Holding GmbH a 50% shareholding. At W & G's request, the Federal Network Agency later modified the approval once again by granting W & G, as an indirect subsidiary of PAO Gazprom, the right to acquire another 30% of the supply capacities of the other 50% share in an auction in a settlement agreement dated 25/26/28 November 2016.

The EU Commission confirmed the two approvals by the German Federal Network Agency for exemption from the conditions of the EU Gas Directive.²⁴ In 2016, Poland filed an action against this confirmation of approval by the EU Commission with the European Union Court of

First Instance (CFI), whose ruling of 10 September 2019 annulled this settlement agreement.²⁵ The Federal Network Agency then ordered OPAL to implement this measure immediately.²⁶ On 20 November, the Federal Republic of Germany lodged an appeal with the European Court of Justice against this ruling,²⁷ which, however, does not have a suspensive effect. As a result, the capacity of OPAL and thus of Nord Stream 1 has only been utilized at 50% to date.

3.3 Attempts to apply internal gas market rules to Nord Stream 2

3.3.1 A negotiating mandate for the EU commission?

Due to the growing opposition to the Nord Stream 2 project, the EU Commission undertook various approaches to extend the scope of the competitive conditions required by the Gas Directive, under which a transmission infrastructure had to meet, to Nord Stream 2 in the Baltic Sea beyond the immediate land territory of the Federal Republic of Germany and thus into the EU.

¹⁹ Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, in: Official Journal of the European Union No L 211 of 14 Aug. 2009, at 55–93.

²⁰ Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, in: Official Journal of the European Union No L 211 of 14 Aug. 2009, at 94–136.

²¹ *Handbook on Energy Law and Policy* (Rafael Leal-Arcas & Jan Wouters ed., Cheltenham: UK 2017).

²² For a detailed analysis see Katja Yafimava, *The OPAL Exemption Decision: Past, Present, Future*, OIES (Oxford Institute for Energy Studies) Paper NG 117, (Oxford Jan. 2017), <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/01/The-OPAL-Exemption-Decision-past-present-and-future-NG-117.pdf>.

²³ <https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2009/090225GasOPAL.html>. Whereas an EU regulation has the force of directly applicable law in the individual EU Member States, EU directives only oblige the individual EU Member States to adopt national laws with the same content, as here in §28a and b EnWG.

²⁴ Decision of 28 Oct. 2016 C(2016) 6950 final, at 31, https://ec.europa.eu/energy/sites/ener/files/documents/2016_opal_revision_decision_en.pdf, https://ec.europa.eu/energy/sites/ener/files/documents/2009_opal_decision_de.pdf.

²⁵ <http://curia.europa.eu/juris/document/document.jsf?docid=187577&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=4895857>.

²⁶ https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2008/BK7-08-009/BK7-08-009-E2_OPAL_Ausnahmeentscheidung_download_bf.pdf?__blob=publicationFile&v=3.

²⁷ Case C-848/19 P, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=222692&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4899132>.

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Thus, the EU Commission²⁸ first submitted a draft amendment to the EU Council, which, on the constitutional basis of the previously cited Article 216 TFEU, authorized it to negotiate a framework agreement between the EU and Russia on the Nord Stream 2 project and thus to take over the national energy policy competences otherwise belonging to the Federal Republic of Germany.²⁹

Since neither of the EU and Russia have legislative powers for the offshore pipeline outside the EU and Russia's territory, the EU Commission claimed a 'legal loophole' that³⁰ would require the EU to negotiate a specific legal regime with Russia that would apply only to the construction and operation of Nord Stream 2.³¹

The legal department of the Council of the EU rejected this Commission proposal in its 'Legal Opinion' of 27 September 2017.³² They hold there is no 'legal loophole', as the pipeline section in the Baltic Sea legally follows the international law rules of the United Nations Convention on the Law of the Sea of 23 June 1998.³³ The EU Council would accordingly be, of course, free to entrust the EU Commission with such a negotiating mandate, but this is not legally necessary.³⁴ Because of the shared competence in this policy area, the EU Council could only take this decision on a mandate by a qualified majority of state representatives, but this was not possible because of the rejection of the mandate by key EU states such as the Federal Republic of Germany and France.

3.3.2 Amendment of the Gas Directive EC 2009/73

After this failed attempt, the EU Commission has now, with a proposal of 8 November 2017, sought to amend this Gas Directive itself in such a way that the unbundling of transport and energy production, third party access to transport infrastructure as well as transparent pricing and contract design, as conditions for regulated competition in the EU internal gas market, also apply to pipelines from third countries up to the limit of the EU's legislative power,³⁵ i.e. up to the land border or the border of the exclusive economic zone at sea of an EU Member State.³⁶

This first amendment proposal extended the rules applicable to the internal gas market for subsea pipelines to the maritime zones of the coastal, connecting and exclusive economic zones (EEZ) defined by the UN Convention on the Law of the Sea (UNCLOS). The proposed amendment now includes an 'interconnector' as legally defined in Article 2(17) of the Gas Directive 'a transmission line *which crosses or spans a border between Member States or between Member States and third countries up to the border of the territory of the Union*'.³⁷ In the old version, it was simply defined as 'a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States'.^{38,39}

However, another legal opinion of the Legal Service of the European Council has now rejected the right of

the EU to extend the territorial scope of its legislative competence to the EEZ into the waters of an EU coastal state, because this territorial extension would be contrary to Article 55 et seq. of the UNCLOS.⁴⁰

²⁸ The EU Council, also known as the EU Council of Ministers, is under Art. 16 TEU and Art. 237 et seq. TFEU, the other legislative body of the EU besides the EU Parliament, which as an intergovernmental body is made up of the representatives – the respective ministers of the individual EU Member States.

²⁹ This proposal is not publicly available. It can only be cited in its essential elements from the legal opinion of the Legal Service of the Council of the European Union and, accordingly, can only be quoted from the 'Opinion of the Legal Service', which itself is only available on the Internet as a 'leaked' English-language document. Opinion of the Legal Service of the Council of the European Union (27 Sept. 2017), doc. 12590/17 (Opinion). <http://www.politico.eu/wp-content/uploads/2017/09/SPOLITICO-17092812480.pdf>. The EU Council's refusal to issue DG Energy's original proposal for a negotiating mandate for the EU Commission led to a call to the EU Ombudsman. On 31 Mar. 2020, this confirmed the legality of the refusal, <https://data.council.europa.eu/doc/document/ST-7073-2020-INIT/en/pdf>.

³⁰ Opinion, at 4, para. 14.

³¹ *Ibid.*

³² Opinion, at 23, para. 96.

³³ United Nations Convention on the Law of the Sea of 23 June 1998, Official Journal of the European Community, EC 1998 L 179/3, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:179:0003:0134:EN:PDF>.

³⁴ Opinion, para. 44.

³⁵ Compare Klaus-Dieter Borchardt, EU – Commission, Directorate-General Energy, Director Internal Energy Market, in his hearing before the European Parliament, Committee on Industry, Research and Energy, of 11 Oct. 2017 on the status of the mandate for negotiations between the EU Commission and the Russian Federation on a framework agreement for Nord Stream 2, in which he presents the Commission's alternative considerations for a regulation through an amendment of the Gas Directive EC 2009/73.

³⁶ The UN Convention on the Law of the Sea distinguishes between the coastal sea and the contiguous zone of a state up to twenty-four nautical miles (ca.44,4,2km) from its coastal edge and its exclusive economic zone up to 200 nautical miles (370,4km) from its coast, Art. 3, Art. 33 and Art. 55.

³⁷ Proposal for a Directive amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8. Nov. 2017, COM(2017) 660 final, 2017/0294 (COD). (Proposal).

³⁸ Directive 2009/73/EC, Official Journal of the EU L 211/94ff, at 102, of 14 Aug. 2009, Art. 2(17).

³⁹ There are a number of other innovations, particularly with regard to the consultation obligations between the regulatory authorities of the affected Member States, but none of these can jeopardize the approval of Nord Stream 2.

⁴⁰ Legal Opinion of the Legal Service of the Council of Europe, Directive 2009/73EC – compatibility with UNCLOS (UNCLOS), of 1 Mar. 2018, para. 17, at 8, <https://www.politico.eu/wp-content/uploads/2018/03/NS2-Gas-Legal-Opinion-March-2018.pdf>.

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3.3.3 The final agreement of the EU trilogue

The subsequent political debates and negotiations between EU Member States, the EU Council and the EU Commission on this amending directive, which, as expected, dragged on for some time, experienced a sudden and fundamental about-face at the Council meeting of 8 February 2019.⁴¹ Paris quite surprisingly gave up the previous obstructive prevention of the amendment of the Gas Directive 2009/73/EC, which it had shared with Berlin, and joined the supporters of the amendment.⁴² Thus, overnight, the German prevention⁴³ veto was broken and a qualified majority for the adoption of the amending directive in the EU Council of Ministers was achieved. The EU Council hastily adopted the Franco-German agreement negotiated overnight, at the meeting of the Permanent Representatives Committee on 8 February 2019, to instruct the Council to negotiate a compromise with representatives of the EU Parliament.⁴⁴

The compromise, which was swiftly negotiated at the meeting of this trilogue of EU legislative bodies on 12 February 2019, contains all the essential elements of the original Commission proposal. Only now, according to the opinion of the Legal Service of the EU Council, the territorial scope of the EU has been extended by recasting the legal definition of distribution management only to the territorial sea of the Member State and no longer to the EEZ.⁴⁵

Apart from this extension of the scope of an amended gas directive, which is now only possible to a limited extent in territorial terms, the other major innovation concerns the regime of legal exceptions. According to Article 36(1) of the old version of the Gas Directive, the competent regulatory authority – for the Federal Republic of Germany, the Federal Network Agency – could, at the request of the operators of a new transmission line, exempt it under certain conditions from compliance with the known principles of competition by granting an exemption.⁴⁶ These conditions for an exemption include that, according to Article 36(1)(a), the construction of this transmission line shall enhance competition in gas supply and security of supply, ... and that the exemption under (b) does not adversely affect competition or the effective functioning of the Internal Gas Market or the efficient functioning of the regulated system to which the transmission line is connected.⁴⁷

The regulatory authority shall notify this exception, together with the justification and all relevant documents, to the Commission without delay, Article 36 (8) of Directive 2009/73/EC. The Commission may, within two months, or four months if necessary, request the regulatory authority to amend or withdraw the exemption.⁴⁸ This exemption mechanism was set in motion by the operators for the approval of the Nord Stream 1 project, as described above.

The amending directive now adopted by the EU trilogue has, in addition to this previous exception, introduced the further possibility of applying for a ‘derogation’ whose conditions are less strict and is not subject to

control by the EU Commission but requires the completion of the project by the entry into force of this amending directive EU2019/692. This new regime of derogations now distinguishes between

(a) those transmission lines which are newly completed after the entry into force of this amendment to the directive; and

(b) those under construction but completed before the entry into force of the amendment to the Gas Directive.

For the new transmission lines, after the entry into force of the amendment, – Alternative (a), Article 36(1) of the previous version of the Gas Directive shall apply unchanged.

For transmission lines under Alternative (b), on the other hand, the amending Directive now introduced the possibility in a new Article 49a for the pipeline section from the first interconnection point – (which may be located on the border between the exclusive zone of the territorial sea of a Member State and the open sea, author’s note) – up to the border of the territory of the Union, to authorize operators to derogate temporarily from the known principles of competition ‘provided that the derogation would not be detrimental to competition or the effective functioning of the internal market in natural gas, or to security of supply in the Union’.⁴⁹ This derogation can only apply for a limited period of time and is no longer to be submitted to the EU Commission for control. In addition, only the quoted authorization requirement applies to a ‘derogation’, while the derogations for the new transmission lines of alternative (a) are subject to the other remaining provisions of Article 36(1) (b)–(e). The ‘derogation’ is therefore easier and can only be approved by the national, here: German regulatory authority, unlike a regular exemption, which in addition, according to Article 36 (9) still has to be confirmed by the EU Commission or can be revoked by it.

⁴¹ *Schwere Verstimmung zwischen Berlin und Paris wegen Nord Stream 2 (Severe Disruption Between Berlin and Paris due to Nord Stream 2)*, FAZ (8 Feb. 2019).

⁴² *Und plötzlich ist Frankreich gegen die geplante Pipeline (And Suddenly France Is Against the Planned Pipeline)*, Süddeutsche Zeitung of 7 Feb. 2019, <https://www.sueddeutsche.de/wirtschaft/nord-stream-frankreich-russland-1.4318851>.

⁴³ This included Belgium, the Netherlands, Austria and, before that, France, all countries in which the European project participants in Nord Stream 2 were registered with their headquarters. These are BASF/Wintershall, Uniper (formerly E.ON), both Germany, Engie (formerly GDF Suez), France, OMV, Austria, and Shell, Belgium/Netherlands.

⁴⁴ <https://www.consilium.europa.eu/en/press/press-releases/2019/02/08/gas-directive-council-agrees-negotiating-mandate/>.

⁴⁵ Article 1 No.1 of the current – only available in English – amendment version for Art. 2 No.17 of the Gas Directive, <https://data.consilium.europa.eu/doc/document/ST-6351-2019-INIT/en/pdf>.

⁴⁶ Article 36, para. 1 Gas Directive 2009/73EC, Official Journal of the EU L 211/94ff, at 119.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 120.

⁴⁹ Amending Directive Art. 1, at 8 and 9.

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The time limit by which a derogation can be requested related primarily to the Nord Stream 2 project. This is because the project operators had announced the firm objective of completing the project by 31 December 2019.

3.3.4 Adoption of the amending directive

After the trilogue decision things moved very quickly. The EU Parliament adopted its version of the amending directive on 4 April 2019,⁵⁰ which was formally adopted by the EU Council on 17 April 2019 as EU Directive EU 2019/692.⁵¹ This Directive came into force twenty days after publication in the Official Journal of the EU⁵² on 23 May 2019 and required the individual EU Member States, above all the Federal Republic of Germany as the main party affected, to transpose it into national law within nine months, i.e. by 24 February 2020. This amendment had thus become legally effective in time for the European elections of 23–26 May 2019. The EU won the race against time between the legal force of the amendment to the Gas Directive, with its mandatory competitive conditions also for the part of Nord Stream 2 located in the German territorial sea off Greifswald, and its completion. Nord Stream 2 could no longer claim the easier exemption conditions for a deviation from the known competition conditions, but at best the exemption of Article 36 of the Gas Directive 2009/73/EC, which had been in force all along.

3.4 National implementation in German federal law

The Federal Government implemented this amendment to the Gas Directive in its section 28b of the Energy Industry Act (EnWG). The parties of the Federal Government did not adopt the provision of Article 49a of the amended Gas Directive with the same wording. Instead, the time limit was moved from the catalogue of strict admissibility requirements ('if condition') to the 'softer introductory text' of section 28b (1) EnWG,⁵³ which the Bundestag then adopted on 13 November 2019. The purpose of the amendment to the Gas Directive was to privilege the protection of confidence in existing investments, the governing parties argued, which is why 'all circumstances of the individual case must be taken into account when determining whether the pipeline was completed before the entry into force date'.⁵⁴ In the Bundestag debate, the opposition criticized that this rewording meant a softening of the deadline criterion, according to which the Federal Network Agency could, in case of doubt, disregard this deadline requirement 'in individual cases' with regard to investments already made.⁵⁵

4 Preliminary End of the Nord Stream 2 Project and the Legal Consequences

On 20 December 2019, within the framework of the National Defence Authorization Act 2020 passed by the US Congress,⁵⁶ US President Trump signed the

Protecting Europe's Energy Security Act, an immediately legally effective law that will impose sanctions on all companies involved in the construction of a pipeline from Russia to the EU.⁵⁷ Within twenty-four hours, the Swiss-Netherlands Allseas Group S.A., Chatel-Saint-Denis, Fribourg, which played a major role in laying the pipes for Nord Stream 2, ceased its activities.

President Putin, on the other hand, declared on 11 January 2020 that the project would be completed by the first quarter of 2021 at the latest using Russian technology alone.⁵⁸ Experts doubt their capacity to do so because it would require a rare, highly specialized technology.⁵⁹ On July 15, 2020, the US Department of State (DoS) updated its guidance regarding the applicability of secondary sanctions under Section 232 of the Countering America's Adversaries Through Sanctions Act (CAATSA) to foreign persons who are involved in Nord Stream 2. At September 7th, 2020, in the wake of the medical care in a Berlin hospital of the Russian opposition activist Alexei Nawalny after his poisoning in Russia, Chancellor Angela Merkel's spokesman shared the statement of German Foreign Minister Maas: "I certainly hope that the Russians will not force us to change our position on Nord Stream 2". The US Senators who initiated this sanctions bill are seeking to extend the sanctions to all companies even indirectly involved in the construction of Nord Stream 2 in a further clarification bill.⁶⁰ So the political economic crime novel continues.

⁵⁰ <https://data.consilium.europa.eu/doc/document/PE-58-2019-INIT/en/pdf>.

⁵¹ <https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/council-adopts-gas-directive-amendment-eu-rules-extended-to-pipelines-to-and-from-third-countries/>.

⁵² Directive (EU) 2019/692 of the European Parliament and of the Council of 17 Apr. 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, Official Journal of the EU, L 117/1 (3 May 2019), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:117:FULL&from=EN>.

⁵³ <http://dip21.bundestag.de/dip21/btd/19/148/1914878.pdf>.

⁵⁴ *Ibid.*

⁵⁵ Julia Verlinden, (MdB) Bündnis 90/Die Grünen, Minutes of the German Bundestag, 19th parliamentary term 126th session, 13 Nov. 2019, p. (B) 15742., <http://dipbt.bundestag.de/dip21/btp/19/19126.pdf#P.15735>.

⁵⁶ <https://www.congress.gov/bill/116th-congress/senate-bill/1790>.

⁵⁷ See previously Jörg Himmelreich, *Deutsche Heucheleien* ('German Hypocrisy'), NZZ (1 Aug 2017).

⁵⁸ Joint press conference with Chancellor Merkel (Moscow 11 Jan. 2020), <https://www.bundeskanzlerin.de/bkin-de/aktuelles/pressekonferenz-von-bundeskanzlerin-merkel-und-dem-praesidenten-von-russland-wladimir-putin-1711802>.

⁵⁹ <https://www.worldoil.com/news/2020/2/14/us-says-sanctions-mean-russia-can-t-finish-nord-stream-2-pipeline>.

⁶⁰ <https://www.shaheen.senate.gov/news/press/senators-shaheen-cruz-lead-bipartisan-bill-to-impose-sanctions-for-involvement-in-russias-nord-stream-2-pipeline> 'Endspiel in der Ostsee' ('Endgame in the Baltic'), *Süddeutsche Zeitung*, 12 June

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Irrespective of the outcome of this project and the question of whether and when Nord Stream 2 will actually be technically completed, the amendment under European and German law has been. Therefore, the question now arises as to what legal consequences this amendment will have for Nord Stream 2 – and for all other new infrastructure projects in the gas and electricity industry in the EU internal market.

As far as the legal consequences are concerned, the following is based on the more likely scenario that the Nord Stream 2 project will be completed at some point, if only because PJSC Gazprom and the European financing partners will make every effort not to completely write off the investments of more than EUR 5.8 billion made so far.

After completion of the Nord Stream 2 project, its pipeline section in the German territorial sea off Greifswald will be subject to the competition rules of the EU Gas Directive 2009/73EG, as adopted by the German Energy Industry Act (EnWG). These are the principles of unbundling the company units which own the transmission system from those which perform the functions of supply and production – Article 9 of Directive 2009/73/EC, Sections 8 to 10e of the EnWG –, also granting third parties access to the transmission system – Article 32 of the Directive, section 20 of the EnWG – and making its tariffs transparent and comprehensible – Article 41 of the EU Directive, section 28 of the EnWG.

In order to free itself from these competitive conditions, Nord Stream 2 AG applied to the German Federal Network Agency as the competent regulatory authority on 10 January 2020 for a temporary exemption from these rules in accordance with section 28b of the German EnWG.⁶¹

This application for is for a simplified exemption under the newly inserted section 28b EnWG. This simplified exemption is, however, excluded because, according to the introductory sentence of Article 28b(1) EnWG, it only applies to transmission lines completed before 23 May 2019. That is obviously no longer the case. It is true that the long delay to a possible completion is due in part to US sanctions, the legal validity of which is in question, and thus to circumstances beyond the control of Nord Stream 2. Nonetheless, it must be taken into account that even without sanctions, this pipeline would not have been completed until the first quarter of 2020 at the earliest. And finally, Nord Stream 2 AG had argued⁶² that, for this cut-off period, the term completion should not merely be understood in a purely constructional and technical sense, but should also take into account the almost completed functionality of the whole project and the fact that, by the time the new Gas Directive had entered into force, Nord Stream 2 had already invested billions of Euros in reliance on the previous legal situation.⁶³ As expected, the German Federal Network Agency rejected⁶⁴ this application on 15 May 2020 and thus drew the right conclusions from its questionable and objectionable exceptional approval for OPAL for the Nord Stream 1 project. Nord Stream 2 has filed an appeal

against this refusal with the competent Higher Regional Court in Düsseldorf at June 18th, 2020.

If, on the other hand, the Federal Network Agency had disregarded this considerable deadline in a broader interpretation of ‘the circumstances of the individual case’ due to the investments already made – as the critics of the new Article 49a of EU Directive 2019/692, which in this respect is not transposed identically with section 28b EnWG –, an exemption interpreted in such a way by the Federal Network Agency would not have been valid. Such a broad interpretation of the expiry date in section 28b (1) EnWG would flagrantly contradict the strict deadline regulation of the newly inserted section 49a in the old Gas Directive 2009/73EG.

The EU Commission could then have challenged the Federal Republic of Germany and, if necessary, brought an action before the ECJ (European Court of Justice) for failure to transpose an EU directive in a legally compliant manner and to adapt this regulation unambiguously to the prescribed deadline regulation as a mandatory prerequisite. The exemption based on such an unlawful law would in turn have been itself unlawful. The Federal Network Agency therefore had to apply the deadline regulation as strictly in the constructional sense and reject the exemption application according to §28b EnWG, as it did with its decision of 15 May 2020.⁶⁵

4.1 Alternative: Exemption according to Article 36 paragraph 1 2009/73EC

Nord Stream 2 AG would then only have to apply for the general temporary exemption under Article 36 (1) 2009/73EG and Article 28a (1) EnWG for new infrastructure completed after the entry into force of the amended EU

⁶¹ Bundesnetzagentur (Federal Network Agency) ref. BK7-20-004 Nord Stream 2 procedure, here the justification for an additional decision BK7-20-004 B1 of 17 Mar. 2020, at 3, https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_B1_Beiladungsbeschl_nicht_BDBext.pdf?__blob=publicationFile&v=2.1. Alternative: facilitated exemption under s. 28b EnWG and Art. 49a EU 2019/692.

⁶² *Bundesnetzagentur bestätigt EU-Regulierung für Nord Stream 2* (‘German Federal Network Agency confirms EU regulation for Nord Stream 2’), (Handelsblatt 30 Apr. 2020).

⁶³ Martin Nettesheim, OGEI, vol. 12, 5, November 2019, 1, (pp 4). His arguments are based on the protection of legitimate expectations that Nord Stream 2 could have achieved by having begun the construction before the amendment of Art.49a. But as mentioned in the text, the ignorance of the protest of many EU member states and EU institutions by Nord Stream 2 does certainly not found a legitimate expectation.

⁶⁴ https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/DE/2020/20200515_NordStream2.html.

⁶⁵ https://www.bundesnetzagentur.de/DE/Service-Funktionen/Beschlusskammern/1_GZ/BK7-GZ/2020/BK7-20-0004/BK7-20-0004_Verfahrenseinleitung.html;jsessionid=0BC45E773C2B078C6B9E644CD1DF4890?nn=361360.

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Directive under all the conditions mentioned in Nos. 1–5, which must be met cumulatively.

It is already questionable whether – as the first condition – this ‘investment would improve competition in gas supply and security of supply’, since Nord Stream 1 and 2 do not serve to create additional gas supply capacities, but rather to replace the existing gas supplies transported through Ukraine and Poland. The fact that Gazprom is still able to export sufficient quantities of gas to Germany without difficulty, simply by continuing to use the existing pipeline through Ukraine for the next five years until 31 December 2024 by extending the supply contract with the Ukrainian Naftogaz, shows that there is no need at all to improve security of supply.

In any event, however, such an exemption would violate the condition set out in section 28a (1) No. 5 EnWG, as this exemption would have an adverse effect on the EU internal gas market. This is because, contrary to the diversification requirements of the EU energy security strategy, the EU’s existing dependence on Russian gas exports through Gazprom would be entrenched⁶⁶ and, if gas demand were to grow in the short to medium term, would even be increased, as long as renewable energies do not reduce or even replace gas demand in the course of a German and European *Energiewende*. A temporary exemption from the German Federal Network Agency for Nord Stream 2 without any adaptation to the requirements of the competition rules for the EU internal gas market is therefore excluded.

The EU Commission, too, which would have to confirm such a conventional exemption by the German Federal Network Agency under Article 36 (8) 2009/73EG – in contrast to the simplified exemption under section 28 b EnWG –, would also require the Federal Network Agency to revoke its decision under Article 36 (9) 2009/73EG, as the conditions for this are not met.

4.2 Third alternative: Fulfilment of competitive requirements by the Nord Stream 2 project

As all legal possibilities to obtain a permit for the Nord Stream 2 project by means of a simplified or conventional acceptance permit are ruled out, PSCJ Gazprom, as a 100% shareholder, would only have the option of adapting the project to the competition requirements of the Gas Directive.⁶⁷ It is true that only the section of the route under the territorial sea of the Federal Republic of Germany is subject to EU competition rules. However, as it is difficult to technically interrupt the pipeline at the border between the territorial sea and the exclusive economic zone where the rules no longer apply, the rules necessarily apply to the entire route of the pipeline from its start in the Russian Baltic Sea port of Vyborg to the German town of Lubmin.

(1) The Nord Stream 2 project company and its wholly owned shareholder PSCJ Gazprom would have to make the tariff charges for transport through the pipeline as well as the sales price calculations for gas sales transparent. This will be extremely difficult for Gazprom, since its gas export business is not only subject to purely economic

criteria; it also serves as an instrument to reward political desirable conduct with more favourable prices – cf. Belarus – or to exert political pressure with corresponding sales price increases.⁶⁸

(2) Under the unbundling obligation, PSCJ Gazprom would have to give a third company access to the pipeline and a substantial part of the transport capacity of the pipeline to this third company, and this from the very beginning in the Russian Baltic Sea port, because it is technically impossible to give a third party access to the pipeline on the high seas.

(3) In order to meet the unbundling requirement, PSCJ Gazprom would have to transfer ownership of the pipeline to another natural or legal person. To get involved in such an export alliance with the gigantic Russian state monopolist seems to be a rather unattractive proposal for other Russian gas producers or potentially even international network owners. In the political-economic intertwining of politics, business and the secret services in the ‘Putin system’, Putin undoubtedly may find a ‘third party’ who formally fulfils the criteria of economic, organizational and accounting unbundling from PAO Gazprom as per the Gas Directive.

Approval by the German Federal Network Agency could therefore only be granted subject to conditions that would require Nord Stream 2 to strictly comply with these competitive conditions. In the end, Nord Stream 2 will have to take these competition requirements into account as far as possible.

4.3 Pending legal proceedings

On 20 May 2019, the European Court of Justice dismissed Nord Stream 2’s action for review of the EU2019/692 amendment as inadmissible.⁶⁹

Nord Stream 2 AG, as a project company under Swiss law, has⁷⁰ initiated arbitration proceedings to resolve the dispute in accordance with Article 26 paragraph 4 a) i) of the 1998 Energy Charter Treaty under the rules of the Washington Convention on the Settlement of Investment

⁶⁶ With 39.4% of EU gas imports in the first half of 2019, Russia is by far the largest gas supplier to the EU with a similar share of supply for many years, see *EU Imports of Energy Products Recent Developments*, Eurostat report Nov. 2019, at 3, <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46126.pdf>.

⁶⁷ Jörg Himmelreich, *Vom Kreml in die Ostsee* (‘From the Kremlin to the Baltic Sea’), FAZ (3 Dec. 2019), <https://www.faz.net/einspruch/rechtsfragen-rund-um-nord-stream-2-16517164.html?GEPIC=s3&premium=0xa93b26923da912dbff39971825dad2b6>.

⁶⁸ Angela Stent, *Putins Russland (Putin’s Russia)* 224 (Rowohlt Verlag, Hamburg 2019); so also already Jörg Himmelreich, *Herrscher der Pipeline* (Ruler of the Pipeline), in *International Policy*, 2, at 56, 59 (2007).

⁶⁹ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200062en.pdf>.

⁷⁰ Washington Convention of 14 June 1968, <https://www.admin.ch/opc/de/classified-compilat/19650042/index.html>.

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Disputes between States and Nationals of Other States of 14 June 1968.⁷¹ The project company is thus establishing protection of confidence for its investments already made in the amount of EUR 5.8 billion (as of May 2019) in accordance with Article 10 (1) of the contract. For anyone who, despite the fact that permits are still outstanding – Denmark had only granted its permits on 30 October 2019 –, and against the protest of an overwhelming majority of EU Member States that has been growing ever more vehement since the project began and only intensified over the course of construction, and without taking into account the concerns of the Commission and the EU Parliament,⁷² stubbornly and ruthlessly believes that it will be possible to push through an infrastructure project against the political resistance of the relevant EU institutions, it will ultimately be quite difficult to invoke the protection of legitimate expectation.

Russia has not ratified the Energy Charter Treaty and has not acceded to the Treaty with effect from 18⁷³ October 2009; meanwhile Switzerland is a member of this treaty. Whether the Swiss company Nord Stream 2 AG, as a wholly owned indirect subsidiary of the majority state-owned Russian PAO Gazprom, the company of a state that has withdrawn from the Charter Treaty, can invoke its protection simply because it has its headquarters in Switzerland seems highly doubtful. It is not compatible with the Charter to claim rights under the Charter in this way indirectly through a State enterprise, while at the same time evading its obligations as a State.

5 Concluding Observations

After years of bitter dispute in the EU as a reflection of increased political and economic tensions in the EU's relations with Russia, but also among the EU Member States in their relations with Russia, the legislative revision of the Gas Directive 2009/73/EC has been concluded with the EU Directive 2019/692. Germany's Federal Network Agency has not approved a simplified exemption under section 28b of its Energy Industry Act (EnWG). It remains to be seen whether the Federal Network Agency will grant a conventional exemption permit pursuant to section 28a EnWG and under what conditions if Nord Stream 2 AG applies for such an exemption. It is to be assumed that the EU Commission would use any German approval that was granted without strict compliance with each of the EU competition requirements as an opportunity to revoke it and would request the Federal Network Agency to correct the approval accordingly within one month.

The whole legislative process shows the complexity of the European legislation that has to be taken into account by every company involved in infrastructure projects in the EU gas and energy market.

Incidentally, this economic crime novel is a textbook example of the economic consequences that occur when companies believe that they can ignore the political framework conditions in the EU and individual EU Member States in such a politicized, EU-regulated economic sector such as the gas industry, but also the energy industry in general. The strategic error in Zug and Berlin was to believe that, with particularly intensive economic lobbying⁷⁴ and Berlin's political influence in the EU, the project could be implemented in the Federal Republic on the terms of the majority state-owned Russian company Gazprom.

The ongoing political struggle to prevent or enforce the completion of Nord Stream 2 by all means possible will continue in the arbitration proceedings under the Energy Charter and probably in a lawsuit before the Higher Regional Court of Düsseldorf against the decision of the Federal Network Agency.⁷⁵ In this respect, the political economic crime novel Nord Stream 2 remains legally exciting. *To be continued ...*

⁷¹ Announcement by Nord Stream 2 AG dated 26 July 2019 about the announcement of its action, <https://www.nord-stream2.com/de/media-info/neuigkeiten/nord-stream-2-fordert-die-aufhebung-diskriminierender-eu-massnahmen-durch-den-gerichtshof-der-europaischen-union-133/>. Energy Charter Treaty Secretariat, List of Cases as of 1 June 2020, <https://www.energychartertreaty.org/details/article/nord-stream-2-ag/>. *Nord Stream 2 Sues EU for Discrimination*, Frankfurter Allgemeine Zeitung (27 Sept. 2019).

⁷² See fn. 15.

⁷³ Report of the Scientific Service of the European Parliament, The Energy Charter 11 (July 2017), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607297/EPRS_IDA\(2017\)607297_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607297/EPRS_IDA(2017)607297_EN.pdf).

⁷⁴ According to official data from 1 Jan. 2016–31 Dec. 2019 about EUR 2 mil., which of course is only the tip of an iceberg, <https://lobbyfacts.eu/representative/8899ff36f0014d6796eab21f2b8a4a1f/nord-stream-2-ag>. This figure does not even include the annual salary of Nord Stream's chief lobbyist in Berlin, the German former chancellor Gerhard Schröder, which he receives as chairman of the Nord Stream 2 AG shareholders' committee and is presumed to be around EUR 250,000. See, <https://www.nord-stream.com/de/wer-wir-sind/aktionaersausschuss/>, <https://www.vermoeenmagazin.de/gerhard-schroeder-vermoeen/>.

⁷⁵ <https://www.handelsblatt.com/politik/deutschland/gaspipe-line-bundesnetzagentur-bestaetigt-eu-regulierung-fuer-nord-stream-2/25793014.html?ticket=ST-3848084-FkNvMXMhgrTwdyCOLWxl-ap6u>.