

October 2017

The Council Legal Service's assessment of the European Commission's negotiating mandate and what it means for Nord Stream 2

1. The EC's request for a mandate: the rationale

On 12 June 2017 the Directorate General for Energy ('DG Energy') of the European Commission (EC) submitted to the Council of the European Union (EU) ('Council') a Draft Recommendation (or mandate) for a decision authorising the negotiation of an agreement between the EU and Russia:

on the operation of Nord Stream 2 pipeline in order to ensure a coherent regulatory framework contributing to market functioning and security of supply in the Union.¹

DG Energy stated that the purpose of such agreement:

should be to ensure that the Nord Stream 2 pipeline is operated in accordance with a mutually agreed regulatory framework which incorporates the core principles of international law and European Union law on energy, taking into account at the same time the impact of the pipeline's operation on the current gas supply from the Russian Federation to the European Union, including through Ukraine.²

The main premise on which the EC's request was based is the alleged applicability of the Third Gas Directive to part of the Nord Stream 2 pipeline under the jurisdiction of the EU and Germany; this would result in a 'conflict of laws' in respect of Nord Stream 2 (as other parts of the pipeline would be governed by other legal regimes) or a 'legal void' (as neither the EU nor its member states have jurisdiction on the part of Nord Stream 2 outside their territory). DG Energy stated that this agreement is needed to avoid both of these situations.

In this author's view it is impossible to know with any certainty (and it could be argued both ways) whether the EC's quest for a negotiating mandate is:

- a genuine 'good faith' attempt on the part of the EC to negotiate with the Russian government to ensure that Nord Stream 2, when built, would not lead to a sharp reduction of transit across Ukraine and concentration of a significant share of Russian gas exports on one (Nord Stream 1 and 2) route, or
- a ploy to ensure that Nord Stream 2 will not be built or will be significantly delayed, reflecting political opposition in respect of the project from several EU member states.

¹ *Draft Recommendation*, p. 6. The Draft Recommendation was leaked to the media and is available in the public domain, see www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf.

² *Negotiating Directives*, as quoted in the *Opinion of the Legal Service of the Council*, para 68, p. 17. The *Opinion* was leaked to the media and is available in the public domain.

2. The Council's legal service assessment: no legal rationale for the mandate

On 27 September 2017 the Council's legal service delivered its assessment of the EC's request.³ It rejected the EC's premise and stated explicitly that the Third Gas Directive⁴ (which contains the rules of the EU energy *acquis* to which DG Energy referred in the Draft Recommendation) 'does not apply to the Nord Stream 2 pipeline' (para 44).⁵ It had arrived at this conclusion on the basis of a detailed analysis of the Directive, rehearsing all the relevant arguments, and demonstrating that the application of the Directive to an offshore import pipeline from a third country (such as Nord Stream 2) would not be coherent given the legislator's intent and the Directive's actual wording.⁶ In so doing, the assessment rejected the possibility of a 'conflict of laws' between Russian law and the internal EU energy *acquis* (in particular the Third Gas Directive) in respect of Nord Stream 2 as this 'would necessarily presuppose' the applicability of the Third Gas Directive to Nord Stream 2 which, the Council's legal service concluded, was not the case.

In addition to rejecting the existence of a 'conflict of laws', the assessment rejected the existence of a 'legal void' in respect of Nord Stream 2, stating that:

the offshore parts of the pipeline would in any event be subject to the relevant rules of international law, including the law of the sea (para 16) [and that the] third state [Russia] ... and the Member State concerned [Germany] and the Union ... would in any event have jurisdiction to regulate the operation [of Nord Stream 2] at the respective points of departure and arrival of the pipeline on their territory, and there is no third point of entry or exit along the pipeline. (para 17)⁷

The assessment of the Council's legal service should not have come as a surprise to the EC given that its own legal service had delivered a similar assessment more than a year ago; this also rejected the applicability of the Third Gas Directive to Nord Stream 2.⁸ However, although the EC had accepted the results of the assessment by its own legal service at the time, with its spokesperson saying:

there are no legal grounds for the Commission to oppose Nord Stream 2 ... because (EU) rules do not apply to the offshore part of the pipeline

(thus confirming the Third Gas Directive's non-applicability to Nord Stream 2⁹), it had nonetheless, contrary to this advice, still decided to submit the Draft Recommendation to the Council. The EC's determination to advance the draft mandate, despite its legal weakness (exposed by both the EC's and the Council's legal services) is unusual and seems likely to reflect opposition towards Nord Stream 2 from several (central European, Nordic, and Baltic) member states.¹⁰

³ *Opinion of the Legal Service of the Council*.

⁴ *Third Gas Directive*, (OJ L 211/94).

⁵ *Opinion of the Legal Service of the Council*. Here and elsewhere references refer to the relevant paragraphs of the *Opinion*, unless indicated otherwise.

⁶ For a comprehensive analysis of application of EU energy law to Nord Stream 2 see Talus (2016), especially pp. 5–8.

⁷ *Opinion of the Legal Service of the Council*.

⁸ 'Legal opinion undermines EU's ability to block Nord Stream pipeline', *Politico*, 7 February 2016. Although the opinion of the EC's legal service is not available in the public domain, its initial assessment (which is publicly available) suggests non-applicability of the Third Gas Directive to Nord Stream by stating *inter alia* that 'the legislator has not foreseen' its application to 'a pipeline crossing an external border', furthermore, it notes in respect of specific provisions of the Directive such as ownership unbundling, TPA, and tariff regulation that 'EU law as it stands has not foreseen any mechanism that could achieve the goals of the [Third] Gas Directive with regard to such pipelines', see *Legal Questions*, pp. 2–3. It is worth noting that the legal opinion of the German federal government has also concluded that 'offshore interconnections from third countries to the European Union are not subject to the provisions of the third energy market package', see: *Letter from the German regulatory authority*.

⁹ WSJ (2017).

¹⁰ It is worth noting that after the Council's legal service had delivered its opinion, Poland produced its own legal assessment, according to which the EU energy *acquis* is 'directly applicable to the offshore part of the Nord Stream 2 pipeline that will be laid within the limits of territorial seas of EU Member States or on the bed or subsoil of EU Member States', thus rejecting the conclusion of the Council's legal service, see Biznes Alert (2017b).

Overall, the assessment has unequivocally confirmed the absence of a *legal* rationale for the granting of a mandate to negotiate an EU–Russia agreement on Nord Stream 2. Furthermore it stated that:

the decision whether or not to negotiate the envisaged agreement [with Russia] is not related to a legal need deriving from these notions [in other words, ‘conflict of laws’ and ‘legal void’] but instead a matter of political choice (para 25, emphasis added).¹¹

This conclusion is especially embarrassing for the EC as its vice president in charge of the Energy Union, Maroš Šefčovič, has previously stated that Nord Stream 2 would ‘end up in court’ if no such bilateral agreement were concluded.¹²

3. The EC’s response: creating a legal rationale for a mandate by amending the Third Gas Directive

The weakness of the EC’s legal position in respect of the draft mandate resulted in Miguel Arias Cañete (EU Commissioner for Climate Action & Energy) announcing (during the Nord Stream 2 debate at the European Parliament on 14 September 2017) the EC’s intention to seek amendments to the energy *acquis* in order to make it applicable to offshore import pipelines from third countries.¹³ (Notably, prior to this announcement, on 12 September 2017, Cañete and Šefčovič sent a letter to the chair of the European Parliament’s Committee on Industry, Research and Energy (ITRE), Jerzy Buzek, summarising the results of the EC legal service’s assessment confirming *inter alia* that by not providing ‘specific rules on pipelines from third countries’, the legislator ‘did not intend’ the central rules of the Third Gas Directive (such as unbundling, TPA, and tariff regulation) to apply to such pipelines).¹⁴

On 11 October 2017, two weeks after the Council’s legal assessment was made public, DG Energy’s Director, Internal Energy Market, Klaus-Dieter Borchardt, told the European Parliament’s ITRE Committee that a legislative proposal to amend the Third Gas Directive, so that it would become applicable to Nord Stream 2, would be presented in the first half of November 2017.¹⁵ These amendments will be subject to a so-called ‘fast-track’ procedure (rather than the ordinary ‘co-decision’ procedure, which is significantly more time consuming due, *inter alia*, to a requirement to conduct an impact assessment in respect of suggested amendments).¹⁶ According to Borchardt, should the amendments be approved, the amended Third Gas Directive would enter into force by the end of 2018 at the latest.¹⁷ Notably, no specific detail, either on scope or content of these amendments, appears to be available in the public domain,¹⁸ although it is understood that these would only apply to new – as opposed to existing – offshore pipelines.

The support of a qualified majority (QM) of member states would be required for the amendments to take effect. In line with the existing voting procedure (‘the double majority rule’), a QM is reached if the following two conditions are met:

- (a) 55 per cent of EU member states vote in favour, and

¹¹ *Opinion of the Legal Service of the Council*.

¹² Clean Energy Wire (2017).

¹³ *Statement on Nord Stream 2 project* by Miguel Cañete, Commissioner for Climate Action and Energy, European Parliament (plenary), 14 September 2017 (video of Nord Stream 2 debate).

¹⁴ *Letter from vice president of the EC for the Energy Union and Commissioner for Climate Action & Energy to the chair of ITRE*.

¹⁵ *Negotiation mandate for Nord Stream 2: state of play*.

¹⁶ It is questionable whether the fast-track procedure is appropriate, given the significant potential impact these amendments are likely to have on the regulatory treatment of import pipelines from third countries.

¹⁷ *ibid*.

¹⁸ FTI Consulting (2017).

(b) the proposal is supported by member states representing at least 65 per cent of the total EU population.¹⁹

In the light of the Council's legal service assessment (which stated explicitly that there could be a potential conflict of laws should the EU energy *acquis* be amended in such a manner as described above²⁰), the statements of Cañete and Borchardt appear to suggest that the EC is planning to *create* a conflict of laws where none currently exists.²¹ Furthermore, it could be argued that the EC is doing so in order to create a *legal* rationale for securing a Nord Stream 2 mandate, should its first attempt to secure the mandate under the existing energy *acquis* fail.

Strengthening its legal argument in support of the mandate might not be the only explanation behind the EC's amendment proposal, especially given Borchardt's own admission that even if Nord Stream 2 were to be made compliant with the amended energy *acquis*, it would still be unlikely that the project would be in conformity with the Energy Union objectives.²²

An additional explanation could be that the EC's amendment proposal constitutes an important step in enabling it to further advance its new gas market reform proposal (expected by 2020), which includes a (draft) Governance Regulation. This aims at 'operationalising' the Energy Union objectives and establishing a 'robust political process' between the EC and member states for achieving these objectives.²³ Such a regulation would strengthen the EC's ability to ensure a certain degree of compliance of new offshore import pipelines with these objectives, although it would still not provide a guarantee which, according to Borchardt, could only be possible if the EC were to have the power to veto any offshore import pipeline.²⁴ However, he acknowledged that this might be both politically impossible and subject to a legal challenge at the World Trade Organisation (WTO).²⁵

4. The Council's legal service assessment: granting the mandate would be a political choice

Given the lack of a legal rationale for the mandate, the political rationale remains to be answered by the Council itself. Contrary to some media commentary,²⁶ the legal service's assessment did not advise the Council against the decision to approve the mandate, it merely stated that as there was no legal rationale, any such decision would necessarily have to be political. The legal service does not – and cannot – express a view of the desirability and/or necessity of a political choice.

However, it also noted that any such political choice would also necessarily have a legal dimension. Specifically, the assessment stated that prevention or restriction of recourse to direct supply routes

¹⁹ An explanation of the voting procedure and the QM rules is available on EUR-Lex website, http://eur-lex.europa.eu/summary/glossary/qualified_majority.html.

²⁰ *Opinion of the Legal Service of the Council* (paras 22–23, p. 6).

²¹ For analysis of the risks of expanding the geographical scope of EU energy law, see Talus and Wüstenberg (2017).

²² *Negotiation mandate for Nord Stream 2: state of play*. The concept of the Energy Union, the EU's most recent energy policy framework, is set out in the *Communication from the Commission to the Parliament and Council*: 'A framework strategy for a resilient Energy Union with a forward-looking climate change policy', which lists several dimensions of the Energy Union such as 'energy security, solidarity and trust' (which, it is suggested, could be measured by net import dependence, supply concentration index (SCI), and N-1 rule, see *Second Report on the State of the Energy Union*) and 'a fully integrated European energy market' (it is suggested that this could be measured by market concentration index, wholesale gas prices, and switching rates (households), see *Second Report on the State of the Energy Union*), the Energy Union's objectives being 'greater energy security, sustainability and competitiveness' while 'diversification of energy sources, suppliers and routes is crucial for ensuring secure [...] energy supplies'.

²³ *Draft Governance Regulation*.

²⁴ *Negotiation mandate for Nord Stream 2: state of play*.

²⁵ Interestingly, Borchardt noted that the WTO dispute resolution panel, which has been adjudicating a case brought by the Russian government against the European Commission in respect of certain provisions of the EU energy *acquis*, appears to believe that designation of certain infrastructure projects as 'projects of common interest' (PCIs) is discriminatory, see *Negotiation mandate for Nord Stream 2: state of play*.

²⁶ Euractive (2017).

(such as Nord Stream 2) in the event of a crisis affecting the flows of energy on the territory of transit countries (Ukraine/Moldova and/or Poland/Belarus, among others),

would certainly not be in line with any concept of security of supply [and therefore is] not only a matter of political choice, but one that must be addressed in accordance with the primary objective of the Union's energy policy as defined by the EU Treaties.²⁷ (Emphasis added.)

In so doing, the assessment not only rejected the existence of a legal rationale for negotiating an EU–Russia agreement, but also cautioned against any such agreement being non-compliant with the Treaties, as far as the primary objective of the EU's energy policy is concerned.

Crucially, the assessment stressed that the mandate, if approved, should not and could not aim at 'precluding the construction or opening of the pipeline'.²⁸ This would make it very difficult for any relevant (littoral) member state (Germany, Sweden, Finland, and Denmark) to delay permitting procedures to Nord Stream 2 on the grounds of pending approval of the mandate by the Council. Furthermore, the legal service's view that the opening of an additional route is positive for security of energy supplies makes it very difficult for any relevant member state to argue that Nord Stream 2 would endanger security of supply.

It is worth noting that although the assessment made by the Council's legal service is not binding on the Council, it would be highly unusual and unlikely for member states *not* to take the utmost account of it, not least because they are aware that the Council's decision granting the mandate and authorising negotiations must be able to stand the test of judicial review. The assessment, by virtue of being very specific in respect of, *inter alia*: the legal basis of the mandate, the purpose and the need of the agreement, the applicability of the internal EU energy *acquis*, and the allocation and the use of competences, has made it extremely difficult for member states to deviate substantively from it when reaching a decision.

5. The Council's legal service assessment: shared competences and the mandate

Prior to considering the implications of the mandate being granted (or not), it is important to note that, according to the assessment made by the Council's legal service, the EU does not have exclusive competence in respect of an agreement for which the mandate is sought,²⁹ and its competence is shared with member states, thus suggesting that the EU alone may not conclude the agreement. This being the case, member states may exercise their competence to the extent the EU has not exercised its own. Notably:

It is for Member States to choose whether or not to conclude an international agreement unless they, as Council members, allow the Union to conclude the agreement alone.³⁰

Alternatively, the agreement could be concluded:

jointly by the Member States and the Union as a mixed agreement if the Union already has or exercises competence for part of the agreement.³¹

The assessment also explores the possibility of replacing a mixed agreement (requiring common accord³²) with a Union-only agreement (requiring QM or unanimity) and appears to reject it – for at least as long as the agreement remains one 'of individual scope' as it is at present, rather than one

²⁷ *Opinion of the Legal Service of the Council* (paras 11–12, p. 4).

²⁸ *Ibid.* (para 98, p. 24).

²⁹ *Ibid.* (para 61, p. 15).

³⁰ *Ibid.* (para 62, p. 15).

³¹ *Ibid.* (para 62, p. 15).

³² 'Common accord' means agreement of all Member States.

establishing ‘a framework of general application’.³³ This suggests that the common accord of all member states would be required for the mandate to be granted, and should any member state disagree, the Council would not be able to approve the mandate. Thus if Germany – where Nord Stream 2 is planned to be connected to the EU internal gas market – does not support the mandate, the EC will not be authorised by the Council to negotiate.

However, even if one were to assume that a QM of member states would be sufficient for the Council to authorise the mandate (contrary to the assessment made by the Council’s legal service), the situation is unlikely to change while the EC appears to be short of the support required from member states for securing a QM. Notably, shortly after the EC had submitted its request for a mandate to the Council, the German chancellor, Angela Merkel, stated that the mandate was ‘unnecessary’.³⁴ On 26 June 2017, the mandate was discussed at an informal meeting of the EU energy ministers. According to the EC’s vice president, **Šefčovič**, thirteen member states (Nordic, eastern European, and Baltic countries as well as Italy) have all expressed their support.³⁵ Although Šefčovič said he was ‘definitely optimistic about getting the mandate’, energy ministers from many other member states, including those whose companies are Gazprom’s partners in the Nord Stream 2 project (Germany, Austria, and France) refrained from expressing their opinions at the meeting.

Interestingly, support for the mandate appears to have declined further since then as, according to DG Energy deputy director general, Borchardt, in October 2017 seven or eight member states were in support of the mandate, around twelve member states remained neutral or uncommitted, with the remaining member states being against the mandate.³⁶ This arithmetic suggests that the EC is significantly short of a QM, in respect of both the number of member states which would be required to support it, and the percentage of member states’ population.

6. The Council’s legal service assessment: necessity, relevance, and sufficiency of the measures proposed in the draft mandate

The EU has competence (shared with member states in the field of energy) to:

(...) conclude an agreement with one or more third countries (...) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties³⁷ (Emphasis added.)

these objectives being to:

ensure the functioning of the energy market [and] security of energy supply in the Union.³⁸

The EC’s draft mandate seeks to achieve these objectives by regulating the operation of Nord Stream 2 on the basis of a framework, to be mutually agreed with the Russian Federation government, such that it would:

- reflect certain principles of EU energy law such as unbundling, TPA, tariff regulation, and transparency (thus ‘externalising’ them towards Russia as a common legal regime), and
- include ‘appropriate measures to ensure the possibility of mitigating the potential negative market impact’ of Nord Stream 2.³⁹

However, the EC failed to justify the *necessity* of these measures for achieving the aforementioned objectives. According to the assessment, the EC’s explanatory memorandum (accompanying the draft

³³ Ibid. (paras 94–96, p. 23).

³⁴ Reuters (2017c).

³⁵ Reuters (2017d).

³⁶ *Negotiation mandate for Nord Stream 2: state of play*.

³⁷ *Opinion of the Legal Service of the Council*, (para 63, p. 16), quoting (Art 216(1) TFEU, see Annex.

³⁸ *Opinion of the Legal Service of the Council*, (paras 63 and 65, p. 16), quoting Art. 194 TFEU, para 1, see Annex.

³⁹ *Negotiating Directives*, as quoted in the *Opinion of the Legal Service of the Council*, para 71, p. 17.

mandate) made it 'impossible' to establish whether these measures would be necessary for achieving them,⁴⁰ while noting that for the Council's decision to authorise negotiations to stand the test of judicial review, the Council should be satisfied that without these measures the objectives of Union energy policy could not be achieved.⁴¹ The assessment adds that the purpose of 'externalising' certain principles of EU energy law:

in no way allows the Council to regard as established their necessity for the achievement of the objectives of the Union's energy policy, which has until now produced no relevant development of secondary law.⁴²

In so doing, the statement makes it clear that the EC's criticism in respect of Nord Stream 2 not being compliant with the Energy Union policy objectives⁴³ has no *legal* basis because the Energy Union policy has not produced any relevant secondary legislation with which such compliance could be assessed.⁴⁴ The assessment further states that the proposed mitigation measures:

are not identified with any specificity and are therefore unable to demonstrate a link between the operation of the Nord Stream 2 pipeline and any substantiated market or security concern for energy supply into the Union.⁴⁵ (Emphasis added.)

All of this suggests that prior to making a decision authorising negotiations, the Council would likely request the EC to provide justification for all the aforementioned measures.

The assessment further notes that, apart from failing to justify the necessity of the proposed measures, the EC had failed to demonstrate their *effectiveness (relevance)* in mitigating the alleged negative impact of Nord Stream 2 on the functioning of the internal energy market and security of supply, and specifically on the diversification of supply routes. Furthermore, it notes that the EC failed to convincingly demonstrate the risk which Nord Stream 2 could pose to such diversification.⁴⁶

The assessment also points out that due to the EC's failure to provide a more *precise* definition of the proposed measures, it is 'not inconceivable' that an EC–Russia agreement, negotiated on the basis of the draft mandate, might include measures:

aimed at ensuring a proportionate diversification of supply routes [thus having] the effect of restricting the available capacity of the Nord Stream 2 pipeline.⁴⁷

The assessment notes that:

Not only the elimination of a pipeline from a Member State's choice of supply routes, but even restrictions on its operation, could in principle, depending on their scope and effects, affect the rights of the Member State as regards the general structure of its energy supply.⁴⁸

Notably any measures amounting to:

⁴⁰ Ibid. (para 73, p. 18).

⁴¹ Ibid. (para 74, p. 18).

⁴² Ibid. (para 76, p. 19).

⁴³ See footnote 21.

⁴⁴ Such secondary legislation, in the form of (draft) Governance Regulation, is currently under development. It aims to 'operationalise' the Energy Union objectives and to ensure that the EU and member states collectively adhere to these objectives, on the basis of monitoring of the aforementioned indicators. Furthermore, it defines 'a robust political process between Member States and the EC [...] in view of the achievement of the Energy Union objectives' in respect of national energy and climate plans, including infrastructure, on the basis of integrated 10-year national energy & climate plans (starting 2021–2030) containing national objectives/targets and policies in respect of each dimension of the Energy Union. This Regulation is not expected to enter into force until ~2020.

⁴⁵ *Opinion of the Legal Service of the Council*, (para 77, p. 19).

⁴⁶ Ibid. (para 78, p. 19).

⁴⁷ Ibid. (para 88, p. 22).

⁴⁸ Ibid. (para 88, p. 21).

regulating structurally [gas supply] would risk affecting a Member State's choice between different energy sources pursuant to the second subparagraph of Article 194(2) TFEU [and therefore could not be decided] without the participation of or against the will of the Member State concerned⁴⁹

as parts of the mandate containing any such measures would fall under the exclusive competence of the member states concerned. This suggests that the draft mandate could not be approved by the Council unless there is common agreement of all member states, including those (such as Germany) whose choice between different energy sources might be affected by measures proposed in the draft mandate.

7. Future scenarios for Nord Stream 2: a way forward with or without the mandate

Scenario A: Council rejects the draft mandate and does not authorise negotiations

It is possible (and appears most likely) that no common accord among member states will be reached in the Council in respect of the draft mandate, leading the Council to reject the EC's request. In so doing, the member states will have taken a political decision not to authorise the EC to negotiate an agreement with the Russian government. Consequently, the EC would have neither political nor legal legitimacy for opening negotiations with Russia, and the matter would be closed until and unless the EC decides to re-submit an amended mandate (see Scenario C below).

Under this scenario, Nord Stream 2 would continue to proceed, with pipe laying scheduled to start in Q2 2018. However, prior to being able to start laying the pipe, the Nord Stream 2 consortium would need to secure permits to build and operate the pipeline from five (littoral) states – Russia, Finland, Sweden, Denmark, and Germany. (It is planned that the pipeline will be built through the exclusive economic zones (EEZ) and/or territorial waters of these five states). The permitting process, which started in early 2016, is running concurrently in line with the national legislation of these countries, and is expected to be completed in all five countries by Q2 2018, matching the pipe laying schedule.

The project's impact on the environment is the main factor being assessed during national permitting, based *inter alia* on the environmental impact assessments (EIA). Given that the Nord Stream 2 pipelines are designed to closely follow the route of the existing Nord Stream 1, it would be difficult to argue that their impact on the environment would be sufficiently different from that of Nord Stream 1 (which has operated impeccably since its construction in 2011–2012) to provide a basis for the rejection of permits on environmental grounds.

Under applicable *existing* legislation there are no legal – other than environmental – grounds for refusing national permits to Nord Stream 2. However, in April 2017 Denmark, the only country (apart from Russia and Germany) across whose territorial waters Nord Stream 2 is planned to be built, initiated a draft law⁵⁰ which, if adopted (which appears likely due to reported bipartisan support for it in the national parliament⁵¹) would allow the Danish government to refuse construction of Nord Stream 2 in its territorial waters on foreign and security policy considerations (whereas previously such rejection would have only been possible on environmental grounds).⁵² If the Danish government were to decide to use this law to stop construction of Nord Stream 2 in its territorial waters, Nord Stream 2 would be forced to re-route north of Denmark in order for the pipeline to be built in the Danish EEZ (where the new law would not apply). As a Danish permit would also be needed in respect of the northern route, Denmark could still raise objections on environmental grounds. However, these would most likely be insufficient for rejection of the permit. Although the new law would not stop the project, the subsequent rerouting would

⁴⁹ Ibid. (para 79, p. 19).

⁵⁰ Reuters (2017b)

⁵¹ EUobserver (2017).

⁵² Reuters (2017b).

lead to increased costs and delays (by making it impossible to start pipe laying in Q2 2018 which, given the weather-related limitations of the Baltic Sea, could delay pipe laying into spring 2019).

It is worth noting that it was partly in response to the joint letter sent in April 2017 by Denmark and Sweden to the EC, asking the latter to ‘intervene’ in the Nord Stream 2 project prior to them having to finalise their decisions on permits,⁵³ that the EC initiated its quest for a mandate. If the Council were to reject the mandate, thus implicitly suggesting that it does not consider Nord Stream 2 to be a foreign and security policy issue, then Denmark’s decision to stop the pipeline being built in its territorial waters on the basis of these considerations would mean it was adopting a position different from that of the EU as a whole, which would be highly unusual (albeit not impossible).

Scenario B: the Council approves the draft mandate and authorises negotiations

It is also possible that the member states will find a common accord in respect of the draft mandate, thus enabling the Council to approve it and authorise negotiations. For this scenario to materialise, the consent of Germany would be absolutely necessary. Granting such consent would suggest a change in the official position of that country’s government, as articulated in June 2017 by Chancellor Merkel, who said:

I think some legal questions need to be clarified in relation to Nord Stream 2 ... Otherwise it is an economic project and I don’t think we need an extra mandate for it.⁵⁴

Given that the conclusions of the Council’s legal service (on the lack of a legal rationale for the mandate) reinforced Germany’s position, there is no apparent reason why this would change. The only reason for any such change could be the changed composition of the German government after the parliamentary elections held in September 2017 – which is yet to be finalised but still headed by Merkel – which could make a *political* decision to approve the mandate.

While this Comment does not aim to explore whether there might be a political rationale for the German government to decide in favour of the mandate (either from a domestic German perspective or from a wider perspective of Germany’s role in the EU),⁵⁵ it notes that Germany – and the EU overall – has a strong energy (gas) interest in Nord Stream 2 being built as it would bring Russian gas to Europe to compensate for rapidly declining domestic gas production.⁵⁶

This suggests that the new German government would only agree to the mandate if it could be assured that it could not, and would not, be used to *significantly* delay construction or operation of the project. However, there are multiple possibilities for the mandate to be used for such delays. One possibility is that the Russian government might refuse to enter negotiations with the EC, on the grounds of there being no legal rationale for doing so – using the assessment of the Council’s legal service to support that position. Under this scenario, Nord Stream 2 would be able to proceed normally, but it would become increasingly difficult politically for Germany to continue supporting it. Furthermore, even if the Russian government were to decide to enter negotiations, there would be a significant potential for negotiations to fail due to potentially irreconcilable differences in the EC and Russian positions in respect of applicability of EU energy law principles and provisions to offshore pipelines. Finally, even if the EC and Russia were to succeed in eventually negotiating the agreement, there is a very strong possibility that the European Parliament could reject it. This would not be an unlikely development, given the Parliament’s well-known extremely negative attitude towards Nord Stream 2. For example, in February 2017 the Parliament’s ITRE committee, chaired by the veteran Polish politician Jerzy Buzek, sent a letter to the European Council stating that Nord Stream 2 ‘contradicts’ the need for diversification of energy routes and suppliers while ‘exposing and deepening the vulnerability of a number of member

⁵³ Reuters (2017a).

⁵⁴ Reuters (2017c).

⁵⁵ Notably, the new German coalition has not yet been established and might not be established until early 2018, thus suggesting that there might be no decision from Germany on the draft mandate until the new government is formed.

⁵⁶ For a detailed analysis of the possibilities of reducing European dependence on Russian gas amidst declining domestic production, see Stern (ed.) (2014); for analysis of Dutch gas production see Honoré (2017).

states and undermining the energy security of the EU as a whole'; the letter was signed by members of the European Parliament (MEPs) representing all main parties.⁵⁷ One month later, in March 2017, sixty five MEPs from all main parties sent another letter to the president of the European Council, Donald Tusk, the president of the European Commission, Jean-Claude Juncker, the high representative of the EU for foreign affairs and security policy, Federica Mogherini, the vice president of the EC for the Energy Union, Šefčovič, and the commissioner for climate action and energy, Cañete, calling for those addressed 'to take urgent action to ensure' that Nord Stream 2 is stopped.⁵⁸

It was partly in response to these letters (as well as to the letter from Sweden and Finland, referred to earlier) that the EC initiated its quest for a mandate. Buzek has since stated that he 'cannot imagine' that the Parliament 'would accept any project not be in line' (sic) with EU law, thus implying that the Parliament would not support the agreement unless it ensures application of the EU energy law provisions (as opposed to principles).⁵⁹ As the Russian government would be extremely unlikely to accept application of EU law provisions to Nord Stream 2, this statement suggests that the potential for the Parliament to derail the agreement is significant. Furthermore, even if the European Parliament were to approve the agreement, there would still be a possibility that some member states' national parliaments would reject it.

This short overview of risk factors suggests that even should the mandate be granted, there is no guarantee that Nord Stream 2 will not be delayed or stopped altogether. In our view, this significantly weakens (but does not exclude) the chances of the German government supporting the mandate.

Scenario C: the Council rejects the draft mandate and requests the EC to prepare another draft

It is also possible that the member states, not having reached a common accord, might indicate their willingness to consider an amended draft mandate which took into account shortcomings identified by the Council's legal service.

An amended mandate would have to include the following:

- detailed and explicit justification of the necessity of the proposed measures for achieving the Treaty's objectives;
- demonstration of a linkage of the proposed measures to 'an actual threat' to the EU's existing energy policies and of their ability to effectively remedy such a threat;
- guarantee that the proposed measures do not amount to 'having the effect of preventing the construction or operation' of Nord Stream 2 or to 'affecting such operation in a disproportionate manner'.

The EC could re-submit the amended draft mandate after launching its proposal to amend the Third Gas Directive (as explained above) in November 2017. This would enable it to argue that, due to the proposed amendments to the Directive, there would be an actual conflict of laws on Nord Stream 2 in the future, thus suggesting that there could be a legal (as opposed to a political) rationale for the Council to grant the mandate. However, the Council could take the view that the EC was deliberately creating such a conflict to obtain a mandate, given that the EC had continued to advance these changes after the assessment of the Council's legal service had explicitly stated that these would result in the conflict of laws. If the Council were to take such a view, it might still decide to reject an amended mandate.

Summary on scenarios:

Under any scenario, irrespective of whether the (original or amended) mandate is granted or rejected, there is no legal basis for either the EU or member states to stop *construction* of Nord Stream 2; this

⁵⁷ *Letter from the European Parliament's ITRE committee to EU Energy Council.*

⁵⁸ *Letter from members of the European Parliament.*

⁵⁹ Biznes Alert (2017a).

would only happen if Gazprom or the Russian government decided to abandon the project. There is a possibility that some member states may try to *pretend* that there is a basis for rejecting the project on environmental or foreign policy/security grounds, which could probably delay the project. For example, pipe laying could potentially be delayed by a year (or two, at most) should Denmark object to construction in its territorial waters on the basis of its (yet to be adopted) new law, and then complicate permitting in respect of the alternative (northern) route. However, any such attempts are unlikely to lead to cancellation of the project. Overall, this suggests that Nord Stream 2 is likely to be built, but could be delayed beyond 2020.

Conclusions

The EC's determined quest for a Nord Stream 2 negotiating mandate demonstrates its readiness (due to pressure from a few Member States) to advance its political agenda towards Russia – and in particular, the preservation of Russian gas transit across Ukraine – via legal/regulatory action. In pursuing this objective, it has actively tested the limits of the existing *acquis*. It appears to have reached these limits with its initiative to secure a mandate to negotiate an agreement with Russia on the operation of Nord Stream 2, as the Council's legal service has concluded that there was no legal rationale for doing so, thus making it a matter of a political choice for the Council of member states. However, the EC appears to be uncomfortable with the idea of *explicitly* political decisions being made at the EU level in respect of energy, particularly in relation to Russian gas imports. This is exemplified by its latest initiative – to amend the existing EU energy *acquis* to apply to offshore pipelines coming from outside the EU – thus potentially creating a legal rationale for a negotiating mandate. In addition, draft Governance Regulation is expected to establish a political process between the EU and member states for achieving the Energy Union objectives which are envisaged to be made part of the *acquis* by 2020. These initiatives suggest that the EU is determined to continue using the legal/regulatory framework as the means of achieving its political objectives, and amending that framework to achieve those objectives.

Glossary

Council – Council of the European Union
DG Energy – Directorate General for Energy
EC – European Commission.
EIA – Environmental impact assessment
EU – European Union.
MEP – Member of the European Parliament.
QM – Qualified Majority.
TFEU – Treaty on the Functioning of the European Union.
WTO – World Trade Organisation.

Bibliography

Official documents

Communication from the Commission to the Parliament and Council: ‘A framework strategy for a resilient Energy Union with a forward-looking climate change policy’, COM (2015)80 final, 25 February 2015, available at http://eur-lex.europa.eu/resource.html?uri=cellar:1bd46c90-bdd4-11e4-bbe1-01aa75ed71a1.0001.03/DOC_1&format=PDF.

Consolidated version of the Treaty on the functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–390, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

Draft Governance Regulation: Proposal for Regulation of the European Parliament and of the Council on the Governance of the Energy Union, 30 November 2016, COM(2016) 759 final, available at <https://ec.europa.eu/energy/en/new-governance-deliver-objectives-energy-union>.

Draft Recommendation: Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline, Council Document 10249/17, as quoted in the Opinion of Legal Service of the Council and available here www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf.

Legal Questions: Legal questions regarding the Nord Stream II project available in ‘Commission internal documents on Nord Stream 2’, *Politico*, 12 March 2017, www.politico.eu/pro/commission-internal-documents-on-nord-stream-2/.

Letter from members of the European Parliament: ‘Urgent action required to stop the Nord Stream 2 project’, Letter from members of the European Parliament to the president of the European Council, Donald Tusk, the president of the European Commission, Jean-Claude Juncker, high representative of the EU for foreign affairs and security policy, Federica Mogherini, vice president of the EC for the Energy Union, Maroš Šefčovič, and commissioner for climate action and energy, Miguel Arias Cañete, 30 March 2017, available at www.laimaandrikiene.lt/index.php?id=12&tx_ttnews%5Btt_news%5D=3602&cHash=30e3f703c939c39cddf9563a7e1d40b&L=1.

Letter from the European Parliament’s ITRE committee to EU Energy Council: ‘Diversification of energy routes and suppliers: an essential complementary measure for the success of the Energy Union objectives’, 23 February 2017, www.politico.eu/wp-content/uploads/2017/02/8704_Buzek_Energy-Council_NS2_HK_SCAN-2.pdf.

Letter from the German regulatory authority (Bundesnetzagentur) to Director General of DG Energy, Dominique Ristori, 3 March 2017, available at <http://en.euractiv.eu/wp-content/uploads/sites/2/2017/03/German-regulator-on-Nord-Stream-2.pdf>.

Letter from vice president of the EC for the Energy Union and Commissioner for Climate Action & Energy to the chair of ITRE: 'Request pursuant to the Framework agreement – Nord Stream 2', Letter from vice president of the EC for the Energy Union, Maroš Šefčovič, and Commissioner for Climate Action & Energy, Miguel Arias Cañete, to the chair of the European Parliament Committee on Industry, Research and Energy (ITRE), Jerzy Buzek, 12 September 2017, available at www.politico.eu/wp-content/uploads/2017/09/NS2-SPOLITICO-17091912000.pdf.

Negotiating Directives: Annex to the Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline, Council document 10249/17 ADD 1, as quoted in the *Opinion of the Legal Service of the Council*.

Negotiation mandate for Nord Stream 2: state of play: Klaus-Dieter Borchardt, Director for Internal Energy Market at DG Energy, European Parliament (ITRE committee meeting), 11 October 2017, video presentation, available at www.europarl.europa.eu/ep-live/en/committees/video?event=20171011-1430-COMMITTEE-ITRE.

Opinion of the Legal Service of the Council: Opinion of the Legal Service of the Council of the EU, available in 'Council's legal arm shoots down Nord Stream 2 mandate request', *Politico*, 28 September 2017, www.politico.eu/pro/councils-legal-arm-shoots-down-nord-stream-2-mandate-request/.

Second Report on the State of the Energy Union: Second Report on the State of the Energy Union, Commission staff working document, Monitoring progress towards the Energy Union objectives – key indicators, Brussels, SWD(2017)32 final, 1 February 2017, available at https://ec.europa.eu/commission/sites/beta-political/files/swd-energy-union-key-indicators_en.pdf.

Statement on Nord Stream 2 project by Miguel Cañete, Commissioner for climate action and energy, European Parliament (plenary), 14 September 2017, (video of Nord Stream 2 debate), available at www.europarl.europa.eu/ep-live/en/plenary/video?debate=1505373471175.

Third Gas Directive: Directive (EC) of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211.94.

'Legal opinion undermines EU's ability to block Nord Stream pipeline', *Politico*, 7 February 2016, available at www.politico.eu/pro/nord-stream-gazprom-russia-pipelines-gas/

Research papers and articles

Biznes Alert (2017a): 'Buzek: the European Parliament may stop Nord Stream 2 (interview)', 19 July 2017, *Biznes Alert*, available at <http://biznesalert.com/buzek-european-parliament-may-stop-nord-stream-2-interview/>.

Biznes Alert (2017b): 'Poland smashes Nord Stream 2. We reveal legal opinions', 17 October 2017, *Biznes Alert*, available at <http://biznesalert.com/poland-smashes-nord-stream-2-reveal-legal-opinions/>.

Clean Energy Wire (2017): 'European Commission warns Moscow', *Clean Energy Wire*, 16 June 2017, available at <https://www.cleanenergywire.org/news/nrw-curb-wind-power-germany-criticises-us-russia-sanction-plans/european-commission-warns-moscow>.

EUobserver (2017): 'New Danish law could block Russian pipeline', *EUobserver*, 11 October 2017, available at <https://euobserver.com/nordic/139382>.

Euractiv (2017): 'Polish expert cries foul at Council's Nord Stream 2 position', *Euractiv*, 4 October 2017, available at http://www.euractiv.com/section/energy/news/polish-expert-cries-foul-at-councils-nord-stream-2-position/?utm_term=Autofeed&utm_campaign=Echobox&utm_medium=Social&utm_source=Twitter#link_time=1507096447.

FTI Consulting (2017): 'Energy Union – on track?', *FTI Consulting*, 11 September 2017, available at http://fticommunications.com/2017/09/energy-union-track/?utm_source=t.co&utm_medium=social&utm_campaign=09112017_ftisc-to_energyunion.

Honoré (2017): Honoré, A., 'The Dutch Gas Market: trials, tribulations, and trends', OIES Paper NG 118, Oxford Institute for Energy Studies, May 2017, available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/05/The-Dutch-Gas-Market-trials-tribulations-and-trends-NG-118.pdf>.

Reuters (2017a): 'EU seeks to negotiate with Russia over Nord Stream 2 gas pipeline', *Reuters*, 29 March 2017, available at <https://uk.reuters.com/article/uk-russia-gazprom-eu-pipeline/eu-seeks-to-negotiate-with-russia-over-nord-stream-2-gas-pipeline-idUKKBN17034H>.

Reuters (2017b): 'Denmark seeks to change law on pipelines amid Nord Stream 2 divisions', *Reuters*, 9 April 2017, available at <https://uk.reuters.com/article/uk-denmark-gazprom-pipeline/denmark-seeks-to-change-law-on-pipelines-amid-nord-stream-2-divisions-idUKKBN17B039>.

Reuters (2017c): 'No need for EU mandate to negotiate Nord Stream 2 – Merkel', *Reuters*, 15 June 2017, available at <https://www.reuters.com/article/germany-estonia-nordstream/no-need-for-eu-mandate-to-negotiate-nord-stream-2-merkel-idUSB4N1G002D>

Reuters (2017d): 'Thirteen EU nations back plan for talks with Russia over gas pipeline', *Reuters*, 26 June 2017, available at <https://www.reuters.com/article/eu-gazprom-nordstream/update-1-thirteen-eu-nations-back-plan-for-talks-with-russia-over-gas-pipeline-idUSL8N1JN3KB>.

Stern (ed.) (2014): Dickel, R., Hassanzadeh, E., Henderson, J., Honoré, A., El-Katiri, L., Pirani, S., Rogers, H., Stern, J., Yafimava, K., 'Reducing European dependence on Russian gas: distinguishing natural gas security from geopolitics', OIES Paper NG 92, Oxford Institute for Energy Studies, October 2014, available at <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2014/10/NG-92.pdf>.

Talus (2016): Talus, K., 'Application of EU energy and certain national laws of Baltic sea countries to the Nord Stream 2 pipeline project', *Journal of World Energy Law and Business*, March 2017.

Talus and Wüstenberg (2017): Talus, K., and Wüstenberg, M., 'Risks of expanding the geographical scope of EU energy law', *European Energy and Environmental Law Review*, October 2017.

WSJ (2017): 'EU Says It Can't Block Russia-Backed Nord Stream 2 Pipeline', *WSJ*, 30 March 2017.

Annex

Article 194 TFEU⁶⁰

1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- (a) ensure the functioning of the energy market;
- (b) ensure security of energy supply in the Union;
- (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- (d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).

3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature.

Article 216 TFEU⁶¹

1. The Union may 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, within the framework of the Union's policies, 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.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

Acknowledgements

I would like to express my gratitude to Professor Jonathan Stern, founder and distinguished research fellow, and Dr James Henderson, director, at the Natural Gas Research Programme at the Oxford Institute for Energy Studies, for reading and commenting on the paper. I also thank Catherine Gaunt for excellent editing and Kate Teasdale for administrative support. Responsibility for the views expressed and the conclusions reached in the paper is solely mine.

⁶⁰ *Consolidated version of the Treaty on the functioning of the European Union.*

⁶¹ *Ibid.*