

TOPICAL ISSUES OF DEVELOPMENT OF THE ENERGY LAW IN THE EUROPEAN UNION: DISCUSSION CONCERNING THE NORD STREAM-2 PROJECT (PART 1)

DOI 10.18572/2410-4390-2018-2-80-84



Gudkov Ivan V.

Candidate of Legal Sciences
Assistant Professor of the Department of Legal Regulation
of Fuel and Energy Complex of the International Institute
of Energy Policy and Diplomacy of the MGIMO University

Abstract: *The Nord Stream-2 offshore pipeline project supported by a number of key Western European member states of the European Union (hereinafter referred to as the EU) and their major energy companies faces political opposition on the part of the European Commission (hereinafter referred to as the Commission), which shares a loudly articulated critical position of a group of the Baltic States and the countries of Eastern Europe. [1]*

Political opposition is expressed in a variety of declarative statements and appeals but has no legal effect, and in practical terms it is not able to prevent the construction of the relevant infrastructure.

In view of this circumstance, the Commission tries to have such a regulatory impact on the project so that at least the relations with regard to its operation would fall within its sphere of influence so that it could participate in determining the parameters of its functioning.

Initiatives of the Commission are thoroughly verified by the legal services of both the Commission itself and other institutions of the European Union (including the Council of the European Union) for compliance with the principles and rules of the applicable law.

The main task of the verification is to prevent adoption of inappropriate measures that can be successfully challenged in the courts.

Opinions of the legal services enjoy considerable authority although they are not mandatory for EU institutions, and they are usually given the most serious consideration in decision making.

The conclusions formulated by the legal services of the EU institutions in verification of the measures proposed by the Commission in connection with the Nord Stream-2 project are beyond the scope of this particular project in terms of their significance, and they seem very important for understanding the scope of the EU energy law as a whole and the content of a number of its essential provisions in particular.

The first three sections of this article provide an overview of the key findings formulated by the legal services of the EU institutions in verification of the Commission's initiatives related to the Nord Stream-2 project.

This article reflects the author's personal point of view and does not represent the official point of view of any institution or organization.

Keywords: energy law, energy law of the European Union, international legal regulation, gas pipeline, Nord Stream-2.

1. Inapplicability of the TEP to Offshore Pipelines between the EU and Third (Non-EU) Countries

The Commission (or rather its profile Directorate General for Energy) initially tried to justify application of the current EU energy laws to the Nord Stream-2 project. [2]

It insisted that the project falls under the Third Energy Package of the EU (hereinafter referred to as the TEP) and, accordingly, must comply with the general requirements of the EU Third Gas Directive on the Separation of Vertically Integrated Enterprises, Operator Certification, Third-Party Access and Tariff Regulation. [3]

In practical terms, the subordination of the project to these standards could create certain difficulties for attraction of external financing for construction (due to the requirements for access of third parties and regulation of tariffs), and at the operational phase, it would make it impossible to maintain the existing ownership structure (due to the requirements for separation and certification). [4]

At the same time, the project would be deprived of the opportunity to obtain an individual investment incentive exemption from the general TEP regime since Article 36 of the Third Gas Directive currently in effect makes it possible to issue relevant exemptions only to new large network infrastructure facilities such as “interconnectors”: pipelines connecting the EU member states with each other, but not with third countries.

The intention of the Commission to apply the TEP to the project encountered justified criticism of the legal services of the Commission itself¹ [5], the Council of the EU²[6] as well as the Federal

Network Agency of Germany — the energy regulator of the EU member state accepting the project. [7]

The essence of the criticism was that the TEP cannot and should not regulate offshore pipelines for gas import from third countries since the literal interpretation, the purpose of adoption, and the established practice give evidence of its inapplicability to this kind of gas transportation infrastructure. [8]

2. Initiative to Conclude International Treaty: Attempt to Agree on Extraterritorial Operation of the TEP Principles

Having been forced to acknowledge the inapplicability of the TEP to the project [9], the Commission proceeded to the next step: proposed to conclude a special international treaty between the European Union and Russia that would regulate relations with regard to operation of Nord Stream-2 (hereinafter referred to as the international treaty).

The draft mandate for negotiations, which the Commission requested from the EU Council in June 2017, indicated the main objective of this treaty: “to ensure a consistent regulatory regime that promotes market functioning and reliability of supplies to the EU”.

To achieve this goal, the Commission planned to incorporate in the international treaty provisions that extend the key principles of the TEP (separation, access of third parties, tariff regulation) to the operation of the pipeline, which, in its opinion, is necessary to eliminate the “legal vacuum” or “conflict of laws”.

¹ Gurzu A. Legal opinion undermines EU's ability to block Nord Stream pipeline // Politico. February 7, 2016.

² Yafimava K. The Council Legal Service's assessment of the European Commission's negotiating mandate and

what it means for Nord Stream 2. OIES. October, 2017. // <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/10/The-Council-Legal-Services-assessment-of-the-European-Commissions-negotiating-mandate-and-what-it-means-for-Nord-Stream-2.pdf>.

Moreover, the Commission proposed to include measures “mitigating” the “potentially negative impact of the project on the market” and contributing to the reliability of gas supplies in the international treaty.

The negative impact is understood by the Commission as the replacement of existing routes for gas supply to the EU with a new “dominant transport corridor” that can strengthen the market position of the Russian gas supplier. Accordingly, the Commission refers the “conservation of long-term transit of gas through the existing routes, including through Ukraine, after 2019 (*when the current contract for transportation of Russian gas through Ukraine expires – author’s note*)” to “mitigating measures”. Specific rules that should be included in the international treaty for practical implementation of these “mitigating measures” have not been formulated by the Commission.

Having analyzed the draft mandate submitted by the Commission, in September 2017, the legal service of the Council of the EU issued an opinion which disposed of the key arguments of the Commission and recognized the absence of a legal need to conclude the international treaty. [10]

In particular, the legal service established the absence of the “legal vacuum”, “conflict of laws” and the lack of evidence of a causal link between the measures requested by the Commission and the relevant objectives of the EU energy policy.

In its turn, Russia announced its lack of intention to negotiate with the EU on the international treaty, and without its consent this initiative could not be implemented. [11]

3. Initiative to Amend the TEP: Simulation of “Conflict of Laws” and Expansion of the EU Competence

Having faced the blocking of the proposed international treaty on Nord Stream-2, the Commission did not withdraw the draft mandate from the EU Council but exerted additional efforts to make it feasible.

In November 2017, it initiated amendments to the TEP by introducing a draft amendment to the Third Gas Directive (hereinafter referred to as the draft law) [12] to the EU Council.

According to this draft law, the TEP applies to gas pipelines “to and from third countries” (hereinafter referred to as the gas pipelines from third countries) located within the “jurisdiction of the European Union”. In particular, it refers to the sections of gas pipelines from third countries located in the territorial seas and the exclusive economic zones (the EEZs) of the EU member states.

The draft law qualifies the gas pipelines from third countries as “interconnectors” (for which a change in the current definition of the term is envisaged) and extends the general requirements of the TEP to them.

Herewith, which is very important, the draft law provides for two different exceptions from the general requirements of the TEP, depending on whether the pipelines from third countries are existing or new.

For the existing (built as of the effective date of the proposed amendments) gas pipelines from third countries, the receiving member states of the EU have the right to issue temporary individual derogations of the general requirements of the TEP. Their issue is subject to the absence of negative impact on competition, the functioning of the domestic market and the reliability of supplies.

The EU member states independently, without the supervision of the European Union, verify the fulfillment of these conditions, and determine the terms of the derogations.

For the new (the construction of which is not completed as of the effective date of the proposed amendments) gas pipelines from third countries, the regime of temporary individual exemptions is provided for on the basis of Article 36 of the Third Gas Directive. [13]

The regime of exemptions has a more severe nature (as compared to the regime of derogations). In order to obtain an exemption, the project owner shall prove fulfillment of five conditions specified in Article 36 of the Third Gas Directive, which include improving the reliability of supplies and increasing competition (that is, it is not sufficient to justify the absence of a negative impact on these parameters). Moreover, it shall prove the impossibility of investing in the project without exemptions: this condition means that

the project in its active investment phase has no right to claim exemption.

An important difference between derogations and exemptions is also that the EU member states are less independent in granting exemptions as compared to issue of derogations: although issued by national energy regulators, exemptions are subject to the EU control. The Commission has the right to demand change or cancellation of relevant decisions if it considers that the conditions specified in the Directive are not met. In practice, the Commission usually requires amendment of the decisions on exemptions — additional procompetitive conditions that directly affect the basic economic parameters of the projects, including the capacity available to the owners of gas pipelines.

Adoption of the draft law proposed by the Commission is likely to provoke a “conflict of laws” or, at least, would cause a “conflict of jurisdictions” between the European Union and third countries in regulation of offshore cross-border gas pipelines.

While provoking such a conflict, the Commission prepares the grounds for authorizing the EU to conclude international treaties (including those related to Nord Stream-2), within which a relevant conflict could be resolved by means of negotiations. [14] Herewith, with regard to those new gas pipelines from third countries that are in an active investment phase, according to the Commission’s plan, conclusion of the international treaty will be the only option for settlement of the relevant conflict since the regime of exemptions from the general requirements of the TEP is not available to them.

In March 2018, the legal service of the Council of the EU presented an opinion assessing the compliance of the draft law with the international law of the sea and the EU law. [15]

First, the legal service recognized that the extension of the TEP standards to the EEZ of the EU member states would violate the UN Convention on the Law of the Sea of 1982 (hereinafter referred to as the Convention). This

extension specifically conflicts with Article 56 of the Convention, which establishes a closed list of rights of coastal states in the EEZ, which is limited to economic exploitation of natural resources and protection of the environment. It also violates the freedom of pipe laying in the EEZ provided for by Article 58. These conclusions are based on a literal interpretation of the provisions of the Convention and the practice of their application by the International Tribunal for the Law of the Sea [16] and the Court of Justice of the EU. [17]

Second, although the European Union has the right to extend the TEP standards within the territorial seas of its member states, it is not absolute, but, based on Article 2 (3) of the Convention, is subject to “compliance with the Convention and other rules of the international law”.

Third, the regime of derogations proposed by the Commission for existing gas pipelines from third countries undermines the principles of uniform law enforcement and non-discrimination since the draft law does not provide for either objective criteria for granting derogations or a mechanism for their control.

The main consequence of the draft law is expressed in the radical expansion of the external energy competence of the European Union. Article 3 (2) of the TFEU grants to the EU exclusive competence to conclude international treaties capable of “affecting or changing” the scope of EU law.

If the draft law is adopted, legislators will include relations with regard to operation of gas pipelines from third countries in this sphere and, therefore, give the EU an exclusive competence over their international legal regulation.

As a result, the EU member states will not only lose the right to conclude new international treaties with third countries on cross-border gas infrastructure, but will also be obliged to take measures to terminate the existing international treaties regulating relevant relations so that the European Union would become their party. ■

Reference List

1. Gudkov I.V. Political and Legal Aspects of Implementation of the Nord Stream-2 Cross-Border Gas Pipeline Project // Oil. Gas. Law. 2017. № 1., № 2.

2. Krukowska E. Russian Gas Link Extension May Face EU Law Compliance Risk. // Bloomberg Business. February 4, 2016.
3. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.
4. Riley A. Nord Stream 2: A Legal and Policy Analysis // CEPS Special Report No. 151. November, 2016.
5. Gurzu A. Legal opinion undermines EU's ability to block Nord Stream pipeline // Politico. February 7, 2016.
6. Yafimava K. The Council Legal Service's assessment of the European Commission's negotiating mandate and what it means for Nord Stream 2. OIES. October, 2017. // <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/10/The-Council-Legal-Services-assessment-of-the-European-Commissions-negotiating-mandate-and-what-it-means-for-Nord-Stream-2.pdf>.
7. Gurzu A. German regulator at odds with Brussels over Nord Stream 2 // Politico. March 8, 2017.
8. Talus K. Application of EU energy and certain national laws of Baltic Sea countries to the Nord Stream 2 pipeline project // The Journal of World Energy Law & Business. 2017. № 10; Gudkov I.V. Political and Legal Aspects of Implementation of the Nord Stream-2 Cross-Border Gas Pipeline Project // Oil. Gas. Law. 2017. № 2.
9. Peker E. EU Says It Can't Block Russia-Backed Nord Stream 2 -- EU's executive arm proposes negotiations with Moscow to ease the security concerns of some member states // The Wall Street Journal. March 30, 2017.
10. Yafimava K. The Council Legal Service's assessment of the European Commission's negotiating mandate and what it means for Nord Stream 2. OIES. October, 2017. // <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/10/The-Council-Legal-Services-assessment-of-the-European-Commissions-negotiating-mandate-and-what-it-means-for-Nord-Stream-2.pdf>.
11. Vladimir Chizhov: Russia will not Negotiate with the EU on Nord Stream-2 // TASS. October 27, 2017.
12. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas // COM (2017) 660 final.
13. Gudkov I.V. Exemptions from the General Legal Regime as a Means for Attraction of Investments in New Projects of Gas Infrastructure in the Territory of the European Union. Energy Law Forum. 2016. № 2 .
14. Explanatory Memorandum. COM (2017) 660 final.
15. Gurzu A. Council legal service shoots down Commission gas proposal // Politico. March 5, 2018; Gotev G. EU Council removes Nord Stream 2 legal hurdles // Euractive. March 5, 2018; Gurzu A. Commission's gas proposal would take power from EU countries // Politico. March 27, 2018.
16. St. Vincent and the Grenadines v. Guinea. Judgement of 1 July 1999. ITLOS Reports (1999), para 131.
17. Judgement of March 29, 2007, Case C-111/05 Aktiebolaget NN v. Skatteverket // EU:C:2007:195, para 59. The legal service also used references to the following EU court decisions: Judgement of October 20, 2005 Commission v. UK. Case C-6/04 // EU:C:2005:626, paras 115-117; Judgement of February 27, 2002 Herbert Weber v Universal Ogden Services Ltd. Case C-37/00 // EU:C:2002:122, paras 31-36. Judgement of March 19, 2015 Kik. Case-266/13. // EU:C:2015:188, para 41.