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Decades of EU energy policy: towards politically driven markets

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ABSTRACT

Looking back over the last 30 years, the European Union's energy policy has gone through multiple significant changes. The national monopolies have been broken up and markets have been liberalised. However if we focus on the last 10 years, the picture is very different. Trust in the invisible hand of the markets is fading away and governmental control is returning in many areas. Looking at natural gas markets and infrastructure investments, this article illustrates the change in the EU s approach from markets and market mechanisms to increasingly intrusive public sector control. Not only is the public sector deciding what to invest and where, it is now also moving towards deciding which commercial projects should go forward and which should not. Instead of markets being driven by commercial logic, the motivations behind cross-border natural gas projects are often political in nature. This is not in itself uncommon since energy and politics have always been closely connected at global level. However, it conflicts with the EU's policies in this area, which are based on liberal market thinking.

1. INTRODUCTION

Looking back over the last 30 years, the European Union (EU)'s energy policy has gone through multiple significant changes. The national monopolies have been broken up and cross-border investments have been possible (and common practice) for a few decades. Back in the 1980s, examples from the USA, the UK and other countries led to the initiation of a liberalization programme in the EU. Of course, these examples were arguably not the only drivers on the path towards liberalization. The changes that were brought about can also be contextualized by reference to the introduction of the Single European Act of 1986, which provided the Treaty framework for an EU internal market in multiple economic sectors.

As is well known, EU energy market liberalization has been carried out through a series of consecutive legislative packages commonly referred to as the 'energy market packages'. Detailed examination shows, however, that while the first and second of these packages from the end of 1990s[1] and 2003[2] can qualify as

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1 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1 and Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20.

2 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ L176/57; Dir 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37; and

'liberalisation' or 'deregulation' measures, the third package from 2009[3] and subsequent developments should only be qualified as 're-regulation' and as a move towards increased public sector involvement in the energy markets. Essentially, the initial idea of a bottom-up regulatory approach towards energy and energy markets has today been replaced by a top-down style of regulation. Both the first and second legislative packages followed a bottom-up approach to markets. Market forces and competition were to drive investments in both electricity and gas infrastructure. However, with growing fears of an investment gap[4], the 2009 legislative package followed the changes advocated earlier by the Second Strategic Energy Review[5] and marked a departure from a market-based mechanism towards a regime where the role of the state and public sector actors is increasingly significant.

As these developments have been carefully considered and discussed in the literature, this article will not rehash what has already been stated elsewhere.[6] Instead, it will focus on developments over the last 10 years. During this period, the general trend at various levels of EU regulation of energy markets has been towards an approach that is increasingly of a command and control nature and by market creation driven politically rather than commercially.

Focusing on one particular area, cross-border natural gas infrastructure investment, this article illustrates the change in the EU's approach from markets and market mechanisms to increasingly intrusive public sector control over infrastructure investment in natural gas markets. Not only is the public sector—particularly the European Commission—deciding what to invest and where, it is now also moving towards deciding which commercial projects should go forward and which should not. Instead of markets being driven by commercial logic, the motivations behind cross-border natural gas projects are often political in nature. This is not in itself uncommon since energy and politics have always been closely connected at global level. However, it conflicts with the EU's policies in this area, which are based on liberal market thinking.

2. INFRASTRUCTURE DEVELOPMENT IN THE EU

There are two types of infrastructure investment in EU natural gas markets. 'Normal' investments in network infrastructure, both national and cross-border, are those made by network operators, typically transmission system operators (TSOs). While significant network investments are also made by distribution system operators, these are typically not cross-border investments (although they could be). In addition to 'normal' infrastructure investments in cross-border infrastructure by a TSO, 'merchant' infrastructure investment is also possible. These are private (non-TSO) investments in cross-border infrastructure projects that may be excluded from the scope of the normal rules on third party access and regulated return for a limited time period if the nature of the project so demands.[7]

Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L176/1.

3 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L211/1; Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15; Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36; Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55; Dir 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 [2009] OJ L211/94.

4 The reasons for the investment gap were partially lack of investments but more importantly the ambitious market and sustainability objectives of the EU.

5 See Commission, *EU Energy Security and Solidarity Action Plan: 2nd Strategic Energy Review* (MEMO/08/703, 13 November 2008).

6 For earlier discussion, see I del Guayo and J-C Pielow, 'Electricity and Gas Infrastructure Planning in the European Union' in M Roggenkamp and others (eds), *Energy Networks and the Law: Innovative Solutions in Changing Markets* (OUP 2012) 358–64; and K Talus, 'European Union Energy: New Role for States and Markets' in A Belyi and K Talus (eds), *States and Markets in Hydrocarbon Sector* (Palgrave 2015) 198–213.

7 art 36 of the Gas Market Directive.

In principle, the starting point for any natural gas infrastructure investment, including cross-border infrastructure, is that it is market based. The role of the public sector or the government is only to set certain objective requirements (technical and financial, for example) for the permitting of new investments. Article 4 of Directive 2009/73/EC (hereinafter the 'Gas Market Directive') regulates national permitting procedures for natural gas facilities in cases where these facilities fall within the scope of the Directive. Where the national system of an EU Member State includes an authorization scheme (permission, approval or other) for the construction or operation of natural gas facilities like pipelines, this scheme must comply with the requirements of Article 4 of the Gas Market Directive.

Article 4 (2) provides as follows:

> 2. Where Member States have a system of authorisation, they shall lay down objective and non-discriminatory criteria which shall be met by an undertaking applying for an authorisation to build and/or operate natural gas facilities or applying for an authorisation to supply natural gas. The non-discriminatory criteria and procedures for the granting of authorisations shall be made public. Member States shall ensure that authorisation procedures for facilities, pipelines and associated equipment take into account the importance of the project for the internal market in natural gas where appropriate.

There is no obligation under EU law for there to be a national authorization scheme for new pipelines or other natural gas facilities. Member States may restrict themselves to the application of national environmental or planning rules. However, if a Member State chooses to create such schemes, the criteria used for granting authorization must be objective and non-discriminatory. They must also be transparent and publicly available. In line with this, any changes to the authorization criteria must be published in good time prior to their entry into force.[8] One of the rationales of these non-discriminatory requirements is to prevent discrimination against non-national investors.

3. INVESTMENT IN CROSS-BORDER INFRASTRUCTURE

The obligation to ensure that sufficient investment is made in the networks falls on the TSO. The Gas Market Directive requires that natural gas TSOs must ensure 'operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or Liquefied Natural Gas (LNG) facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations'.[9] There are also specific rules governing investment in cross-border infrastructure. Article 13(2) of the Gas Market Directive provides that '[e]ach transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.'[10]

This means that it is the TSO's responsibility to ensure that sufficient investment is made in transmission networks, including cross-border interconnectors. Funding for such investment come through network tariffs the total amount of which is determined and approved by the national regulators. These regulators set the third party access tariffs or the methodologies underlying the calculations of tariffs. Given that the revenue from these tariffs constitutes the TSO's main source of income, it needs to cover both network-related operation and maintenance costs as well as investment and construction costs.

8 C Jones, *EU Energy Law – Volume I: The Internal Energy Market – The Third Liberalisation Package* (Claeys & Casteels 2010) 26.
9 Gas Market Directive, art 13.
10 ibid, art 13(2).

There is accordingly a regulatory push to invest in cross-border infrastructure in the natural gas sector. Such investment is also promoted and coordinated at regional and EU level through mandatory planning: under Regulation 715/2009/EU[11] natural gas TSOs are required to develop a 10-year EU-wide network development plan every two years. These plans must cover a variety of issues and their main objective is to identify investment gaps in the EU energy networks, with special focus on cross-border capacities. They are based on annual national and biannual regional investment plans, both of which are also mandatory for TSOs.[12]

Guayo and Pielow have discussed in detail the central role played by the public sector in the regime based on the 2009 Energy Market Package, and use the term 'regulation of self-regulation'.[13] In many ways, this is undoubtedly an illustrative way of describing the system. Just consider Article 22 of the Gas Market Directive. This provision gives public authorities, in certain situations, a significant role in accepting and modifying the annual 'ten-year investment plans' submitted by a TSO while monitoring to ensure that these plans are also followed in practice. On top of this, however, the involvement of the public sector and the politically driven style of market creation today go further than 'regulation of self-regulation'. Furthermore, the public sector is to an increasing degree directly involved in energy investment.

Public sector involvement in energy markets has progressively increased over the last 10 years.

This has been achieved, in particular, on the basis of certain specific regulatory tools relating to European energy infrastructure investment. The key enactments in this regard are Regulation (EU) No 347/2013,[14] [hereinafter the 'Project of Common Interest (PCI) Regulation'], which concerns projects of common interest, and Regulation (EU) No 1316/2013[15] (the 'Regulation on Connecting Europe Facility'). These two legal instruments are discussed next together with the EU Treaty framework for trans-European network investments.

4. THE PCI REGULATION AND PUBLIC SECTOR DRIVEN INFRASTRUCTURE INVESTMENTS

While Article 194 of the Treaty on the Functioning of the European Union (TFEU), which deals with energy, includes promotion of the 'interconnection of networks',[16] the current PCI Regulation and the Regulation on Connecting Europe Facility have different legal bases. Article 170(1) TFEU lays down a legal basis for secondary EU law on trans-European networks, and provides that 'the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures'.

Article 170(2) provides as follows:

> Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link islands, landlocked and peripheral regions with the central regions of the Union.

11 Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36.

12 Investment planning is regulated through internal market directives (national plans) and through regulations covering cross-border situations (Regulation 715/2009, regional and EU-wide planning for gas markets).

13 del Guayo and Pielow (n 6) 358–59.

14 Regulation of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 [2013] OJ L115/39.

15 Regulation of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010 [2013] OJ L348/129

16 For a detailed examination of art 194 of TFEU and its relations with other Treaty articles, see K Talus and P Aalto, 'Competences in EU Energy Policy' in J Wouters and R Leal-Arcas (eds), *Research Handbook on EU Energy Law and Policy* (Edward Elgar 2017).

Pursuant to Article 171 TFEU, in order to achieve these objectives the EU shall, among other things, 'establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest'. In respect of energy, the PCI Regulation does exactly this: it contains rules and guidelines on projects of common interests.

The PCI Regulation:

- addresses the identification of projects of common interest in electricity, gas, oil and carbon dioxide;
- facilitates the timely implementation of projects of common interest by streamlining, coordinating more closely, accelerating permit-granting processes and enhancing public participation;
- provides rules and guidance for the cross-border allocation of costs and risk-related incentives for projects of common interest; and
- determines the conditions for eligibility of projects of common interest for EU financial assistance.

Through the framework regulated by the PCI Regulation, particular infrastructure projects are identified as 'projects of common interest' and as 'priority projects' with a view to receiving financial assistance from the EU. In order to be designated as a PCI project, the infrastructure must contribute to specific objectives that relate to market integration, security of supply and/or sustainability.[17] On the strength of this status, these projects are more likely to receive financial assistance from the EU (though this is not certain) and obtain other advantages through the specific regulatory regime created by the PCI Regulation. This regime regulates the following issues:

i. The creation of a national 'competent authority' that has specific functions in relation to PCI projects.
ii. The establishment of mandatory timelines for environmental assessments and the licensing of PCI projects.
iii. The creation of a national manual for the granting of PCI permits. This is intended for all stakeholders and outlines all regulatory aspects of a PCI project at national level, including all necessary permits and licences, public participation opportunities and more.
iv. The imposition of an obligation to ensure that the most rapid treatment that is legally possible is given to PCI projects in terms of granting permits and licences at national level.

Very significantly, and as mentioned above, PCI projects are eligible for EU financial assistance that covers studies and, under certain conditions, works as soon as such funding becomes available under the Regulation on Connecting Europe Facility. This regulation determines the conditions, methods and procedures for providing EU financial assistance to trans-European networks in order to support projects of common interest, including PCI projects in respect of energy. It also establishes the breakdown of the resources to be made available under the multi-annual financial framework for 2014–2020.[18]

In the energy sector, the maximum amount of EU financial assistance that can be obtained is usually 50 per cent of the eligible cost of studies and/or works. However, for projects those provide a 'high degree of regional or Union-wide security of supply, strengthen the solidarity of the Union or comprise highly innovative solutions', this figure can be up to 75 per cent.[19] Unlike the earlier regimes, this contribution can be very significant in terms of the final investment decision by a TSO.

17 art 4 of the PCI Regulation.

18 art 1 of the Regulation on Connecting Europe Facility.

19 ibid,nationality,EU) No 1316/2013pe',is correct as instered. art 10.

5. PCI AND AD ADMINISTRATIVE MARKET CREATION

A PCI status and public sector funding can be, and often is, decisive for an infrastructure project. It is this public funding that either makes or breaks a new cross-border project. This is particularly so as the rationale for a PCI investment is market creation or security of supply. It is of course also possible to develop an infrastructure project without the PCI status. In this case, the project needs to be commercially viable and the financing needs come from the markets (either as part of the normal TSO investment or a merchant investment).[20] In this case the project receives a 'normal' regulatory and permitting at national level and the special regime is not applicable.

The Finnish–Estonian Balticconnector project and the associated LNG terminal offer an example of the impact of public funding. The rationale of this project is to connect the Finnish natural gas market with those of the Baltic states and the main EU markets. Its original impetus was commercial and was driven by the Finnish gas company, Gasum. At that time, the project included both an LNG terminal and the pipeline component. However, the company ultimately concluded that the project was not commercially feasible and decided not to pursue the pipeline component or the LNG terminal.[21] Given that there is political pressure to open up the Finnish natural gas market for competition, the Finnish government rapidly set up a company, Baltic Connector Oy, to develop the pipeline component of the project. EU financing was eventually received for the Balticconnector pipeline, but not for the LNG facility. The main function of the pipeline connection is to open up the Finnish gas markets to potential competition. The project provides an example of the commanding role of the public sector in both cross-border investments and market creation. The Balticconnector project owes its existence to a political decision to integrate the Finnish market with those of the neighbouring states and the rest of the EU. It is not a commercially viable project. Nor is there a market demand for the project.

In many ways, the EU is moving back towards state-centred energy markets where many important decisions are made by the public sector instead of the markets, and are based on political priorities instead of commercial requirements. The permitting related discussion and Finnish market creation examples relate to the role of the public sector and the state in facilitating certain investments considered to be of 'EU interest'. Due to the market creation objective and the need to invest in cross-border capacities in order to achieve goals set by the public sector, governments and the EU are prioritizing certain projects. In many cases, though not always, this public sector funding is a *sine-qua-non* condition for the project to be developed. However, this promotion of investment often has little to do with commercial logic.

In addition to the role of the public sector in effectively making decisions over certain cross-border investments, the market-based system of the EU is now being questioned or undermined through the actions of the Commission (and certain Member States like Denmark) in relation to the ongoing Nord Stream 2 pipeline project. This project—which may be viewed as an ongoing test of market-based EU energy market policies—and the developments around it are examined below.

6. NORD STREAM 2 AND THE MARKET-BASED ENERGY POLICIES OF THE EU

Nord Stream 2 will, when completed, transport gas from Russia to Germany. The offshore section of the pipeline will extend over approximately 1200 kilometres across the seabed of the Baltic sea. Within the EU, the pipeline will cross the exclusive economic zones (EEZs) of Finland and Sweden as well as the EEZ and the territorial waters of Denmark and Germany. It will connect with the German pipeline system in onshore Germany at an exit point in Lubmin near Greifswald. The company behind the project is Nord Stream 2 AG,

20 It is of course also possible that the investment for an external pipeline bringing gas to the EU market is carried out by companies from other countries what cannot be categorized through these EU law categorizations, but in these cases, EU energy law is not applicable to the project.

21 This took place in 2015. For details, see <https://www.enerdata.net/publications/daily-energy-news/gasum-cancels-regional-lng-terminal-and-finland-estonia-gas-pipeline.html> accessed 20 August 2017.

a Swiss company owned by Russia's Gazprom. In addition to Gazprom, the project has financing from major energy companies from Austria, France, Germany and the Netherlands.

Nord Stream 2 has proven to be a divisive project. The Commission and a number of EU Member States have moved strongly against it, while other Member States view it much more favourably. Furthermore, some Member States and commentators treat it as a political project, while others regard it as a commercial project.

Like any large infrastructure project, this pipeline project is faced by regulatory, commercial and political hurdles. Largely because of its ultimate owner's nationality and also partly because of its potential impact on transit through Ukraine, the Commission has moved against the project and tried to complicate it in a number of ways, which are outlined below.

First, the Commission suggested that EU energy law and regulation apply to this offshore pipeline. This would have meant that Russia would have had to modify its internal energy laws and policies to comply with EU energy regulation, entailing the introduction of third party access to Nord Stream 2 pipeline and changes to Gazprom's export monopoly. It would also have involved separating various parts of Gazprom, in line with EU unbundling provisions. However, it is clear that the EU's energy acquis is not applicable to the pipeline as it crosses through the EEZs and the territorial waters of various coastal states and nor is it applicable in the German onshore section prior to the receiving terminal. This non-applicability of EU energy law is clear from the content of the Gas Market Directive and the network code for Capacity Allocation Mechanisms.[22] EU energy law was not intended to apply to external pipelines bringing gas into the EU's internal gas market.[23]

The application of the EU's energy acquis and the Third Energy Package starts once the pipeline connects to the EU's transmission system at an onshore receiving terminal within the EU. For the Nord Stream 2 pipeline, this means onshore Germany at an exit point near Greifswald. The current regulatory practice in relation to external pipelines bringing gas into the EU's internal market confirms the non-applicability of the EU's energy acquis.

Eventually, the Commission had to admit that EU energy law was not applicable to the Nord Stream 2 project. Once this became clear,[24] the Commission changed its approach. Instead of claiming that EU law applies to the project, the Commission currently seeks a mandate from the Council to negotiate an intergovernmental agreement (IGA) with Russia on Nord Stream 2.[25] The objective of this is to ensure that the operation of the pipeline reflects or is subject to some of the fundamental principles of EU energy law.[26]

The stated rationale for an IGA is to avoid a 'legal void'.[27] However, it is rather clear that there is no 'legal void'. The regulatory framework for a coast-to-coast pipeline is based on international law, EU law and the national law of the relevant states. Some of the operational elements may also be agreed upon between the project parties at the company level. This has been the practice in relation to a large number of international coast-to-coast pipelines. There are no special circumstances affecting the Nord Stream 2 project that would change this.

Another interesting element of the proposed IGA is its emphasis on transit through Ukraine. The draft mandate suggests as follows:

22 Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation (EC) No 715/2009 of the European Parliament and of the Council [2013] OJ L273/5.

23 For detailed analysis, see K Talus, 'Application of EU Energy and Certain National Laws of Baltic Sea Countries to the Nord Stream 2 Pipeline Project' (2017) 10 The Journal of World Energy Law & Business 1, 30–42.

24 ibid.

25 K Talus, *Nord Stream 2 Pipeline and the Application of EU Energy Law* (OGEL, July 2017) <www.ogel.org.> accessed 25 August 2017.

26 The leaked draft mandate that the Commission is seeking <http://www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf> accessed 28 July 2017.

27 ibid.

> The negotiation of such agreement should take into account the expected impact which the operation of Nord Stream 2 will have on the current gas supply from Russia to the European Union, in particular to the Central and Eastern Member States which are currently being largely supplied via Ukraine and Belarus. To ensure security of supply via a diversification of routes, those alternative transportation corridors should remain operational.

Given the EU's liberal market-based energy policies, this statement is surprising. Is it really the task of the Commission to decide where a commercial pipeline is to be built (without legally acceptable reasons) and whether commercial investors should pay significant transit fees and be exposed to significant transit risks (stemming both from lack of investment and human behaviour)?

The Commission proposal contains frequent reiterations of the need to ensure long-term transit of Russian gas through Ukraine. It is highly questionable whether an IGA concerning a single pipeline is the right instrument for this.

Taken as a whole, the various attempts either to impose EU energy law on Nord Stream 2 or to completely block the pipeline have the appearance of arbitrariness and politically motivated action camouflaged to give the appearance of legitimate regulatory or legal action. It is an excellent example of the changing approach to energy markets in the EU: while the 1980s and 1990s was a period marked by trust in markets, the last 10 years have seen this approach largely disappear. The ideology of the past was based on the idea that energy, like other sectors of the economy, responds to the economic rules of the market, going where the prices are highest, with use, substitution and investment responding to prices. Nowadays the EU's approach is marked by rapidly increasing governmental interference in the market mechanism.

The latest twist in the ongoing developments around the Nord Stream 2 project emanates from Denmark. By means of proposed amendments to the Danish Continental Shelf Act (hereinafter the 'Proposal'), the Danish government seeks to introduce a new type of permit or new permit conditions for laying power cables and pipelines for the transportation of hydrocarbons in Danish territorial waters.[28]

According to the Proposal, permits for laying transit pipelines in Denmark's territorial waters may only be issued if compatible with national foreign, security and defence policy interests. According to the government bill that accompanies the Proposal, this foreign, security and defence policy recommendation reflects a free political assessment in which a large number of different considerations are involved, including state security and defence, political issues, economic and/or military capacities and foreign policy issues, including European and alliance considerations.

The procedural elements of the Proposal comprise a scheme where the Minister for Energy, Utilities and Climate will obtain a recommendation from the Minister for Foreign Affairs that includes an assessment of national foreign, security and defence policy interests. The recommendation of the Minister for Foreign Affairs will either be positive or negative. If it is positive, the application for a permit will be subject to the usual environmental and safety assessment. If it is negative, the Minister for Energy, Utilities and Climate must decline the application for a permit on this basis.

The recommendation of the Minister for Foreign Affairs will not be a decision falling within the scope of the Danish Public Administration Act. Therefore, the Minister for Foreign Affairs is not subject to the rules under the Public Administration Act regarding consultation with the parties involved, access to documents or the obligation to provide a justification for the recommendation.

The act for the amendment of the Continental Shelf Act is scheduled to enter into force on 1 January 2018. However, the new act will apply to applications for the laying of pipelines received before the act enters into force if the processing of such an application has not yet been finalized.

The Proposal and the accompanying government bill raise serious concerns as to their compatibility with certain provisions of EU energy law, in particular Article 4 of the Gas Market Directive. Furthermore, certain elements

28 The government bill is available at < http://www.ft.dk/samling/20161/almdel/EFK/bilag/284/1772103.pdf> accessed 18 July 2017.

of both seem to violate several legal principles of EU law, in particular those of legal certainty and legitimate expectations. There must also be serious concerns as to their compatibility with international trade rules and World Trade Organisation (WTO)-related rules on transit in particular. Without entering into an examination of the legal issues raised by the Proposal, it is clear that if it is passed by the Danish Parliament, public sector involvement will be moved to another level. It aims to stop a specific commercial project, Nord Stream 2, on political grounds.

7. FINAL REFLECTIONS ON EU ENERGY POLICY AND THE NORD STREAM 2 PROJECT

What does the Nord Stream 2 project tell us about the role of the public sector in the EU natural gas markets? Given that large-scale international energy projects—like Nord Stream 2—are always politically debated and some degree of opposition is unavoidable, there is a need to achieve a clear separation between the political elements and legal issues so that the former are not confused with the permitting and regulatory or legal aspects involved. As has been noted elsewhere, 'in a community that is based on the rule of law, the rule of law should apply to all actors in the same way. In the end, this means, that economic activities in the range of the legally defined framework should be assessed under the existing regulatory criteria, but not under normative categories of good or bad. It is a question of self-confidence of Europe's liberal market approach to handle a project such as Nord Stream 2. If there is a desire to change the way politics and markets interact in the EU, this would need a more fundamental debate for which Nord Stream 2 is certainly not the right point of departure'.[29]

EU energy policy is still today claiming to rely on markets to deliver the most efficient outcome for the end-consumers. However, in reality it seems that this approach has been compromised in many areas of energy law policy. In addition to pipelines, also electricity generation is an example of this trend. One of the problems of this mixed approach is that it creates unpredictable outcomes and hence undermines investment certainty.

8. CONCLUSION

This Special Issue of the Journal of World Energy Law and Business celebrates the Journal's 10th anniversary. In this relatively short period of time, it has become the world's leading energy law journal.

The same 10 years have also seen changes in EU energy law and policy. The new legislative package of 2009 together with increasing volumes of highly detailed regulation reflect the increasingly intrusive role played by the public sector and politics. This contribution to the Special Issue has examined the latter change. Instead of the most obvious example of such intrusiveness—the role of government in the energy markets and the renewable energy sector—this article has examined the role of the public sector in the area of cross-border natural gas infrastructure development.

The examination carried out has shown how faith in the ability of the invisible hand of the markets to drive the energy sector has faded away. The market paradigm of the 1980s and 1990s was that, in a functioning market economy, energy policy is based on the politically unrestricted operations of market operators. Those days seem to be gone. Nowadays the public sector decides where to invest and when. The ongoing Nord Stream 2 saga suggests that there is a move towards the public sector also deciding which commercial investments can go ahead and which are not to be allowed to do so. The background to this lies in politics, not economics or commercial considerations. This is a development that should not take place in the context of one particular project. Instead, it should be the result of political discussion and careful thinking. It seems, however, unfortunately, that this stage of thinking and discussion might have already been bypassed altogether.

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29 S Fischer, 'Nord Stream 2: Trust in Europe' (2016) 4 (4) Policy Perspectives <https://www.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/PP4-4.pdf>.