

Regulation of Nord Stream 2: Rule of law, equal treatment and due process

A view from the project developer

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A little over a year ago, five major European energy companies and Gazprom started working on the Nord Stream 2 project. Representing an investment of about €8 billion, it is one of Europe's largest infrastructure projects, with the aim of providing a reliable gas supply for the coming decades.

Over the last 12 months, Nord Stream 2 has reached four important milestones: contracts for the construction of steel pipes have been awarded, the operators for weight coating facilities have been chosen, the application for a construction permit in the Swedish route section has been submitted and the first pipes have been delivered to a port in Finland.

In the next months, the contract for the offshore construction ships will be finalised, and during next year remaining applications and documentation will be submitted to the authorities in Finland, Denmark, Germany and Russia.

At the same time, Nord Stream 2 has been actively engaged in public discussions to explain the business rationale behind the project and to report on its progress. Given its immense scale and its multinational character, the project has given rise to many divergent views, but as in any discussion, those expressed in the strongest language or the loudest voices are not necessarily the most correct ones. This Commentary considers and attempts to clarify some of the popular misconceptions surrounding this undertaking.

Nord Stream 2 does not operate in a legal void - it is strictly regulated by EU law, international conventions and national legislation

One topic of special interest in Brussels has been the regulatory framework that is applicable to Nord Stream 2. Some observers have asserted that Nord Stream 2 would proceed in a "legal void", i.e. that the project would be completely unregulated or would be subject to Russian regulation all the way until the pipeline's landing point in Germany. Such claims, however, are unfounded.



official position on questions of EU policy. The views expressed are attributable only to the author in a personal capacity and not to any institution with which he is associated.

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Nord Stream 2 is an offshore pipeline, leaving the Russian territory, going through the Baltic Sea and arriving in the EU at the German border near Greifswald. The offshore pipelines must comply with a complex regulatory framework, including international conventions, EU law and national legislation of the countries under whose jurisdiction they fall. The same rules apply to all market participants.

After its starting point in Russia, Nord Stream 2 will cross offshore the Exclusive Economic Zones (EEZs) of Finland, Sweden and Denmark before arriving in Germany. The authorities of these countries are responsible for applying and monitoring compliance with all applicable laws and regulations. Under EU law, all EU directives must be implemented into national law and then applied by the national authorities. Also, other international conventions have been integrated into the national laws of these countries, e.g. the United Nations Convention on the Law of the Seas (UNCLOS) and the Espoo Convention on transboundary environmental impact assessment.

In each section along the route, the applicable national laws specify the precise procedures to be followed for permit applications, environmental impact assessments, public consultations and potential appeals. A multitude of authorities are involved in monitoring compliance with all applicable rules, and in conducting transboundary consultations with all the coastal states of the Baltic Sea.

Russian law of course applies, but only within the section of the route that lies in Russian territory. According to the established legal principle of territoriality, no country can enforce its laws outside its own territory.

In 2013, the European Commission even issued a guidance document that refers to the first Nord Stream project as a reference case for future large-scale transboundary projects.¹ No concerns were raised at that time about a possible “legal void” by the European Commission, nor by any national regulator or any other authority.

Today, for Nord Stream 2, precisely the same legal framework will be followed. And if Nord Stream 2 would fail to comply with the necessary procedures, the competent authorities in the concerned countries would decline to issue the construction permits – and hence there would be no pipeline. Drawing on the experience of the first Nord Stream project, however, we are confident that all legal and environmental requirements for the implementation of Nord Stream 2 will be met.

No special deal for Nord Stream 2 – same rules apply to all pipelines

It is important to note that no authority within the EU has ever applied the provisions of the third energy package (TEP) to any of the five existing pipelines that are comparable to Nord Stream 2. In the Mediterranean Sea, there are four comparable pipelines that bring gas from a third country outside the internal market to the external borders of the internal market: Transmed, Greenstream, Maghreb-Pipeline and Medgaz. They transport gas from North African countries to a delivery point on the Mediterranean coast of Italy and Spain.

Furthermore, a new Mediterranean pipeline, the Galsi project from Algeria to Italy, has been planned to become operational only in 2018. So far, we have not heard of any plans to make it subject to TEP, either. And in the Baltic Sea, the first Nord Stream pipeline has been operating for several years. Neither during the permitting process nor during operations did any competent regulator or the European Commission suggest that the project should become subject to the TEP.

¹ <http://ec.europa.eu/environment/eia/pdf/Transboundary%20EIA%20Guide.pdf>

Like all the projects mentioned above, Nord Stream 2 is a pipeline that brings gas from a country outside the internal market to the external borders of the internal market. Not even one of such pipelines in Europe is subject to the rules of the TEP. And there are clear legal reasons for this firmly established practice, as described further below.

“Equal treatment for equal cases” is a constituting principle of the rule of law, which is one of the fundamental values on which the EU is based. Arbitrary treatment for political reasons is the exact opposite of the rule-of-law. Nevertheless, that does not seem to stop some opponents from demanding special treatment for Nord Stream 2 – not because there would be legal grounds for such treatment, but just because they are politically opposed to the project.

Internal market regulation applies inside the internal market – not outside

Some opponents have claimed that Nord Stream 2 would refuse to comply with EU law. But it is not up to Nord Stream 2 to reject or accept the application of any laws. We follow the instructions of the competent authorities in the countries under whose jurisdiction the pipeline falls. Nord Stream 2 cannot choose by itself which laws to follow. The project simply must comply with all applicable regulation.

The Third Gas Directive contains a number of detailed definitions for different categories of pipelines to which it applies, such as “transmission network”, “interconnector”, “upstream pipeline network” and “direct line”. None of the various definitions covers any of the pipelines that bring gas from a country outside the internal market to the external borders of the internal market.

The legislative history of the gas directives confirms this argument: during the legislative process of the First Gas Directive, the Council’s Legal Service issued a formal opinion confirming that the directive’s legal basis restricts its scope of application to the “internal market only”.²

The Council’s legal experts explicitly stated that rules concerning the import of gas from non-EU countries could not be adopted on the internal-market legal basis of the First Gas Directive. Today, the legal basis for the Third Gas Directive is precisely the same. There is no indication in any legislative material that this approach changed when the Third Gas Directive was enacted.

Therefore, it is fully appropriate that none of the national regulators nor the European Commission has called for the application of the TEP provisions to any pipeline that brings gas from a third country to the external borders of the internal market, including the first Nord Stream pipeline.

Nord Stream 2 falls into the same category. Where the pipeline terminates at its landing point, gas is fed into the transmission system within the internal market. Nobody disputes that the provisions of the TEP will apply from there onwards. The intention of the EU to have a cross-border market in which everyone can sell and buy gas at European hubs, is fulfilled by third party access from that point further downstream. This is the aim of the TEP and not the political intention of some to artificially bring the influence of the TEP outside EU territory.

When the EU member states along the route of Nord Stream 2 transposed the Third Gas Directive into national legislation, they followed this logic, which in turn follows from the legal

² Council Legal Service; Contribution of the Legal Service to the proceedings of the Energy Working Party", 3 June 1997, 8757/97.

basis, the content of the directive and established practice: the provisions of the TEP apply to gas transmission within the internal market, not outside.

In Finland for instance, the national law implementing the UN Convention on the Law of the Sea contains a list of laws that apply within the country's Exclusive Economic Zone. The provisions of the TEP were never added to this list of laws applicable in Finland's EEZ and accordingly were not applied to the first Nord Stream pipeline.

The European Commission has never reprimanded EU member states for implementing the TEP in such a way that it cannot be applied in the EEZ. This is further evidence that there has never been any intention to apply the provisions of the TEP to pipelines bringing gas from a third country to the borders of the internal market.

The Legal Service of the European Commission has apparently also come to the same conclusion in an internal legal opinion: according to media reports, the Legal Service has concluded that that "the EU cannot claim any applicability of its energy legislation to any part of Nord Stream 2".³ This document has not been made available outside the Commission.

Despite these recent developments, some still advocate that Nord Stream 2 should be subject to special legal treatment that departs from the treatment accorded to comparable pipelines. From the perspective of the businesses or investors involved, this would set an unfortunate precedent. As the guardian of EU Treaties, the European Commission must ensure that EU law is applied based on the rule of law and not based on political sentiment selectively, nor arbitrarily. Anything else would contradict the basic values of the EU.

Rule of law vs. political arbitrariness

Large-scale projects always spark heated public debates. We at Nord Stream 2 are committed to addressing the concerns voiced over this project as best as we can and are working hard to increase public acceptance of our project – as any developer of such a large-scale project would. Moreover, we are prepared to entertain and respond to a diverse range of opinions about our project.

This is a standard and desirable part of any public debate in democratic societies. For that reason, we have already entered into dialogue with the general public, various interest groups and decision-makers around the Baltic Sea and in Brussels.

At the same time, the rule of law, which is a founding principle of the EU, does not permit arbitrary application of established laws and regulations simply in response to current political sentiment. This would violate many of the very basic values on which the European Union and its member states are founded. Consequently, Nord Stream 2 expects no special treatment or exceptions from established legal practice – either in favour of or against the project.

We have full confidence in the authorities of the countries along the route of Nord Stream 2 to apply all relevant legislation with the greatest degree of diligence, reliability, consistency and transparency – including EU law and international conventions.

As Energy Commissioner Miguel Arias Cañete recently acknowledged in response to a parliamentary question on Nord Stream 2, "the authorisation of the construction of infrastructure projects remains in the competences of Member States. As long as EU legislation is not violated, the Commission will not interfere".

³ "Legal opinion undermines EU's ability to block Nord Stream pipeline", *Politico*, 7 February 2016 (www.politico.eu/pro/nord-stream-gazprom-russia-pipelines-gas/).