
European Law and Regulation of Energy Security and Natural Gas Flows in the Light of Current Challenges

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Summary: Russia's plan to build Nord Stream 2 pipeline before the end of 2019 as well as the construction of EUGAL, TurkStream and its continuations to Bulgaria and Greece aim to weaken Ukrainian economy, make Eastern and Central Europe more vulnerable, and disrupt the EU solidarity and Transatlantic strategic cooperation. Despite commercial gains for Germany, this project together with EUGAL undermines principles of subsidiarity and solidarity in the EU. Geopolitical implications of Russian natural gas trade politics require stronger legislation and energy market regulations in the EU. It could be done in the framework of the existing Third Energy Package and Gas Directive or with a new agreement with Russia and Ukraine.

Keywords: Nord Stream 2 – EUGAL – energy security – energy strategy – Russia's energy geopolitics

1. Introduction

Russia plans to build Nord Stream 2, a new natural gas pipeline to Europe through the Baltic Sea doubling capacities of the existing Nord Stream pipeline (55 bcm). Germany, Sweden, and Finland gave permits for the construction of Nord Stream 2 pipeline in their exclusive economic zones and territorial waters. Only in Denmark, the final decision is still under debate. However, Gazprom suggests re-routing of the initial plan from Denmark territorial waters to international waters. Russia is in a hurry with their new gas infrastructure plans because at the end of 2019 the Agreement for natural gas transportation between Gazprom and Naftogaz Ukraine ends. Current Agreement gave Ukraine the opportunity to win the Stockholm court case for the compensation of the unused but guaranteed volumes of the transit via Ukraine.

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Ukrainian gas infrastructure was only 61% loaded in 2017¹ but still was the main route for Russian gas to Europe. Russia plans to construct several new pipelines before the end of 2019: (1) Nord Stream 2 (55 bcm), EUGAL (55 bcm), TurkStream (31.5 bcm), pipelines from TurkStream to Bulgaria and Greece. Planned transit of 55 bcm via Nord Stream 2 and EUGAL is more than the whole transportation of Russian gas to Europe via the main line in 2017, which goes through Ukraine and the Slovak Republic (52.5 bcm). The rationale of the Nord Stream 2² states that it is a commercial project without political implications and re-routing strategies. However, in connection with EUGAL project, it is clear that geographically they are oriented not on the growing natural gas markets in the Netherlands and United Kingdom (due to a decrease in natural gas production in those countries), but on Central and Eastern Europe (Austria, Czech Republic, Slovak Republic, Hungary), Italy, and Balkan states (Slovenia, Croatia, Serbia). The growing demand in Germany could be assured by existing infrastructure in Ukraine, Slovak Republic, Czech Republic, and Austria. The rationale of the first Nord Stream project was the same as for the Nord Stream 2 pipeline; however, after its launch in 2011 the transit through Ukraine decreased by 18.7 bcm in one year. The significant part of that decrease was cutback of gas transit from Russia to Germany via Ukraine-Slovak Republic-Czech Republic line and Ukraine-Slovak Republic-Austria line. According to International Energy Association data, in 2017, only 2 bcm of total 53.44 bcm of Russian natural gas supply to Germany was going via Ukraine.

Moreover, in April 2018 first part of the TurkStream pipeline (16.75 bcm of 31.5 bcm) was already constructed and it will cut off 12–13 bcm of annual transit via Ukraine, Romania, and Bulgaria to Turkey. In June 2018, Bulgaria started a tender for the construction of the pipeline to the border with Turkey to make a connection with the TurkStream³, which contradicts Brussels plans to build LNG terminal in the port of Varna for the alternative to Russian gas in Central, Eastern, and South Europe. At the same time, Bulgarian politicians delay construction of the interconnector from Greece that is aimed to transport natural gas from Azerbaijan, which will go via Southern Gas Corridor⁴.

¹ Estimations based on International Energy Association data on transit via Ukraine in 2017 and 142 bcm capacity of the Ukrainian gas transportation system. Data available online at <http://www.iea.org/gtf/#>

² A New Pipeline for Europe's Energy Future. Nord Stream 2 Project official website. Available at: <https://www.nord-stream2.com/project/rationale/>

³ Bulgaria to build new link to Turkey in hope of Russian gas. REUTERS. Available at: <https://www.reuters.com/article/bulgaria-turkey-pipeline/bulgaria-to-build-new-link-to-turkey-in-hope-of-russian-gas-idUSL8N1TS2WM>

⁴ SOUTHERN GAS CORRIDOR. Available at: <https://www.tap-ag.com/the-pipeline/the-big-picture/southern-gas-corridor>

Therefore, there are clear political goals of such projects as Nord Stream 2, EUGAL, and TurkStream: (1) to weaken the Ukrainian economy (in 2014–2017 Ukraine had 2–3 bln Euro annual revenue from the transit, in 2017 the revenue was 2.6 % of GDP), (2) to have a strong position for the talks on a new agreement and minimization of the share of natural gas transit via Ukraine, (3) to make Europe more dependent on Russian energy politics as well as to have better foot on Germany energy market and better geopolitical positions in Europe. In such a situation, from the perspective of energy security, it is crucial to review the principles of the regulation of the natural gas flows within the EU. It should be consistent with the EU Energy security strategy, LNG market development strategy, Gas Directive of the Third Energy Package, and Association Agreement with Ukraine.

2. European law and regulation of energy security and natural gas flows

According to the Treaty of Lisbon, there are two basic principles regulating energy security and market in Europe: (1) the principle of subsidiarity, and (2) principle of solidarity⁵. Both of them are under question in the case of Nord Stream 2 pipeline. First, the Nord Stream 2 project is understood by Germany as being more effectively regulated on the level of Member States, while European Commission and some other Member States assume that the EU should intervene because it is capable of acting more effectively than the Member States alone. Second, the project undermines the solidarity of the European states when some countries are in opposition to the Nord Stream 2, while Germany is strongly supporting it. The European Commission insists that such projects as Nord Stream should be discussed at European and/or regional level to ensure that energy security of one state does not undermine the security of the other⁶. Moreover, European Commission policy memo on the short-term resilience of the European gas system shows that in case of 6-month disruption of natural gas supply from Russia the most vulnerable are East and Central-European states, Balkans, Baltic states, and Finland⁷.

⁵ The Treaty of Lisbon. Energy. *EU LEGISLATION* [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:ai0024&from=SK>

⁶ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. *European Energy Security Strategy*, COM/2014/0330 final [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0330&qid=1407855611566>

⁷ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the short term resilience of the European gas system. Brussels, 16. 1. 2014

The second crucial piece of legislation regulating the EU energy sector is the Third Energy Package consisting of two Directives and three Regulations⁸. It aims to create a single EU energy market, provide security of supply, and better pricing. It also provides anti-monopoly regulations to cope with companies who try to win dominant positions on the EU internal market. However, it is not implied to the projects in the exclusive economic zones of the Member States, which was the aim of the European Commission proposition on its changes⁹. The proposed amendment's goal was to complement Gas Directive (2009/73/EC) and make it regulating not only pipelines within EU jurisdiction but also those that go from third countries to the border of the EU.

Therefore, currently, Third Energy Package does not apply to Nord Stream 2 but previously was used in the case of South Stream project from Russia to Bulgaria rejection. However, EUGAL pipeline, which is the continuation of the Nord Stream 2 to Czech Republic border could be regulated under the Gas Directive of the Third Energy Package. EUGAL (55 bcm) more than doubles capacities of the existing OPAL pipeline (goes along the same line with EUGAL project, transportation capacity – 35 bcm) and is equal to planned capacities of Nord Stream 2. At the same time, OPAL pipeline was under consideration for a partial exemption from certain obligations, including the obligation of Third-party access and unbundling because the level of risk was such that investment could not take place. Consequently, it is a crucial question for the construction and operation of EUGAL pipeline. In case of partial exemption from Third Energy Package obligations, it could lead to re-routing of natural gas supply from the transit via Ukraine to Baltic Sea route and make Eastern Europe and Balkans more vulnerable to Russian gas politics.

Ukrainian officials were not admitted to negotiations on OPAL pipeline because Ukraine is not a stakeholder in the project. However, according to the Association Agreement between Ukraine and the EU, both sides should communicate with each other on projects that are considered a threat to energy security. Moreover, the accession of the neighbor countries to the Energy Community is part of the Energy Strategy of the EU¹⁰. It should include not only one-sided

COM(2014) 654 final [online]. Available at: https://ec.europa.eu/energy/sites/ener/files/documents/2014_stresstests_com_en.pdf

⁸ Questions and Answers on the third legislative package for an internal EU gas and electricity market. *EUROPEAN COMMISSION MEMO/11/125*, Brussels, 2 March 2011 [online]. Available at: http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en

⁹ Commission proposes update to Gas Directive. *EUROPEAN COMMISSION*. Available at: https://ec.europa.eu/info/news/commission-proposes-update-gas-directive-2017-nov-08_en

¹⁰ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. *Implementation of the Communication on Security of Energy Supply and International Cooperation and of the Energy*

demand for transparency, and upgrading of Ukrainian natural gas transportation system but also opportunity for the Ukrainian government to participate in talks about projects that are a threat to the energy security of the state.

Concentration of 90 bcm from 110 bcm capacities of Nord Stream and Nord Stream 2 pipelines on the line to the Czech Republic border (OPAL and EUGAL pipelines) shows that it is not oriented toward growing energy markets in the EU due to the decrease in domestic production of natural gas, but it could cut off main transit line via Ukraine to Slovak Republic, Austria, Italy, Hungary, Croatia, Serbia, Czech Republic, Germany, and Slovenia. The TurkStream project at the same time cuts off second largest transit line via Ukraine to Bulgaria, Turkey, Greece, and Macedonia. Gazprom plans pipeline from TurkStream to Bulgaria but is lobbying against interconnector from Greece to Bulgaria, which aims to supply natural gas from Azerbaijan. It shows that Central and Eastern European as well as Balkan states should be involved in the debate about energy security in Europe. The one-sided decision of Germany based on its commercial interests causes the same reaction from the other states. For instance, Bulgaria decision to build the connection to TurkStream despite existing infrastructure of supply through Ukraine and Romania and planned interconnector from Greece (natural gas from Azerbaijan) also have commercial reasons but without consideration of energy security and natural gas sources diversification.

European Energy Security Strategy aims to strengthen emergency mechanisms, increase the EU's capacity in case of disruption, diversification of the external sources, and "speaking with one voice in external energy policy"¹¹. All those principles are undermined in case of energy relations with the Russian Federation as the largest external source of natural gas supply and its active involvement in the construction of the new natural gas infrastructure on the continent. Transparency on intergovernmental agreements is also a basic norm in regulating relations in the EU energy sector¹². However, the Russian approach to diplomacy and geopolitical goals in Europe undermine those principles in the cases of new agreements for the construction of gas infrastructure. Consequently,

Council Conclusions, November 2011. COM/2013/0638 final [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0638>

¹¹ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL. European Energy Security Strategy. COM/2014/0330 final. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52014DC0330&qid=1407855611566>

¹² REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. Implementation of the Communication on Security of Energy Supply and International Cooperation and of the Energy Council Conclusions of November 2011 [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0638>

the EU at least needs a special deal on the operation of the Nord Stream 2 and special regulatory norms for this project. There are examples of such agreements in case of TANAP project and Nord Sea pipelines from third countries. The basic principles of such decision and negotiations with Russian Federation should be transparency, a solidarity of the EU position, tariffs regulation, separation of supply from transmission of Russian natural gas in onshore EU territories, and energy security and lower dependence on Russian natural gas (especially in Central and Eastern Europe).

Nord Stream 2 project, as well as TurkStream continuation to Bulgaria and Greece, are also in conflict with the European Parliament resolution of 25 October 2016 on EU strategy for liquefied natural gas and gas storage¹³. Article 32 of the Resolution states that Nord Stream 2 project would have counterproductive effects on energy security and the principle of the solidarity, would give Gazprom dominant positions on the European internal gas market, and should be avoided. The Resolution also argues that Nord Stream 2 project undermines possibilities to develop better LNG infrastructure and diversify sources of natural gas supply for Europe. Article 31 states that LNG infrastructure and storage capacities are crucial for diversification strategies and lower energy dependency on supplies from the Russian Federation. In this concern cooperation with Ukraine might be useful because of the country's significant gas storage capacities. However, as stated in Article 25 of the Resolution, cooperation with Ukraine is only possible in the case of stable commercial and legal frameworks in the country. At the same time, the Resolution also assumes strategic interests of the EU to cooperate with Ukraine and also possibilities of LNG supplies to decrease Ukrainian dependence on Russian gas. The strategy of the LNG infrastructure development also assumes that if Nord Stream 2 were to be built, it would require coordination with the LNG terminals development and North-South gas corridor functioning.

While political experts are arguing that Nord Stream 2 project has negative security and geopolitical implications for the EU¹⁴, and European lawmakers are proposing changes to the Third Energy Package and insist on law clarity in regulating third countries pipelines to the EU border, German politicians continue to accentuate commercial gains of the project for the chemical industry of the country, and to cover losses from the coal phase-out and closed nuclear plants. Bulgaria after denial from the European Commission to build South Stream

¹³ EUROPEAN PARLIAMENT RESOLUTION of 25 October 2016 on EU strategy for liquefied natural gas and gas storage. Tuesday, 25 October 2016, Strasbourg [online]. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2016-0406&language=EN>

¹⁴ Judy Asks: Should Germany Dump Nord Stream 2? Can it? CARNEGIE EUROPE, June 14, 2018 [online]. Available at: <http://carnegieeurope.eu/strategieurope/76597>

from Russia to Bulgaria is accentuating its commercial interests to transport Russian natural gas from TurkStream to Central and Eastern Europe. Austria supports Gazprom initiatives because almost all natural gas consumed in the country is from the Russian Federation. Short-term commercial considerations and national agendas are undermining the long-term vision of the problem and unity and solidarity of the EU.

The issue of transparency also raises many questions about Russian geopolitical moves in the energy sector and their regulation by European law. Nord Stream AG, company which operates construction of the Nord Stream 2 project, is registered in Switzerland, which has lower standards for transparency of financial operation than the EU law requires. GASCADE, company, which operates the EUGAL project, also did not specify the costs of the project¹⁵. Susanne Götze¹⁶ also accentuates that Germany's position on the project is influenced by a broad network of Russian lobbyists in the country and that lobbyism regulation in Germany needs revision because of the representation of the lobbyists as neutral experts in media, research institutions, NGO's, and political debates.

Consequently, there are many uncertainties about the long-term legal frameworks for natural gas trade between the EU and Russia. European Commission for a long time argues that the EU needs legal clarity in energy relations with Russia¹⁷. The Third Energy Package provides instruments for regulations, but it currently cannot be used in cases of Nord Stream 2 or more complex geopolitical situations as with Russian plan of re-routing natural gas transit via Ukraine to weaken its economy and have levers of influence on the EU. However, it could be implied in the regulation of EUGAL and OPAL pipelines which are the continuation of the Nord Stream and Nord Stream 2 on the continent. For instance, one of the instruments is Ownership Unbundling¹⁸ instead of Independent System Operator and the Independent Transmission Operator as well as no exemption of obligations for these projects. Russia in an attempt to win stronger positions in

¹⁵ ŁOSKOT-STRACHOTA, A., POPLAWSKI, K. *The EUGAL project: the German branch of Nord Stream 2* [online]. Available at: <https://www.osw.waw.pl/en/publikacje/analyses/2016-06-15/eugal-project-german-branch-nord-stream-2>

¹⁶ GÖTZE, S. *The shadow man of Nord Stream 2*. Spiegel Online, June 26, 2018 [online]. Available at: <http://www.spiegel.de/wirtschaft/soziales/friedbert-pflueger-der-schattenmann-von-nord-stream-2-a-1219841.html>

¹⁷ REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. Implementation of the Communication on Security of Energy Supply and International Cooperation and of the Energy Council Conclusions, November 2011. COM/2013/0638 final [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52013DC0638>

¹⁸ Questions and Answers on the third legislative package for an internal EU gas and electricity market. MEMO/11/12. Brussels, 2 March [online]. Available at: 2011 http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en

the EU market started a legal case against the EU Third Energy Package in the World Trade Organization. Russian position was that it is discriminatory against Russian suppliers, but WTO stated lawfulness of the European energy law¹⁹.

3. Conclusion

The EU energy relations with Russia require a new legal base²⁰. It includes a complicated geopolitical situation with the re-routing of natural gas supply to Europe, which aims to weaken Ukraine, make Eastern Europe more vulnerable and broke solidarity within Europe and in Transatlantic cooperation. European Parliament resolution on the EU strategy for liquefied natural gas and gas storage also admits that such projects as Nord Stream 2 put in danger diversification of natural gas sources, increase energy dependency, and interferes the plans of the development of LNG industry. Russia's Nord Stream 2 pipeline is not just controversial²¹, but in connection with Gazprom abusive practices²² and Kremlin geopolitical goals, it is a powerful political instrument, which needs a robust legal reaction from the EU.

Nord Stream has already decreased one of the previously dominant transit lines via Ukraine, Slovak Republic, and then through the Czech Republic or Austria to Germany. Quarterly Report Energy on European Gas Markets shows that in the first quarter of 2018 Nord Stream became the main supply route of Russian gas delivered to the EU²³. Together with TurkStream Nord Stream 2 could cut off the existing transit via Ukraine. Only the use of the Gas Directive

¹⁹ Commission welcomes WTO ruling confirming lawfulness of core principles of the EU third energy package. EUROPEAN COMMISSION [online]. Available at: http://europa.eu/rapid/press-release_IP-18-4942_en.htm

²⁰ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. *On security of energy supply and international cooperation „The EU Energy Policy: Engaging with Partners beyond Our Borders“*. COM/2011/0539 final [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1408370068358&uri=CELEX:52011DC0539>

²¹ Gazprom's controversial Nord Stream 2 pipeline. EUROPEAN PARLIAMENT. *At Glance*, July 2017 [online]. Available at: http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608629/EPRS_ATA%282017%29608629_EN.pdf

²² Antitrust: Commission invites comments on Gazprom commitments concerning Central and Eastern European gas markets. *EUROPEAN COMMISSION PRESS RELEASE*, Brussels, 13 March 2017 [online]. Available at: http://europa.eu/rapid/press-release_IP-17-555_en.htm

²³ Quarterly Report Energy on European Gas Markets. *Market Observatory for Energy*, Volume 11, Issue 1, 2018 [online]. Available at: https://ec.europa.eu/energy/sites/ener/files/documents/quarterly_report_on_european_gas_markets_q1_2018.pdf

without any exemptions and a special agreement with the Russian Federation could weaken Kremlin's geopolitical positions. Development of the single Energy market and integration of Ukraine with its transit and storage capacities should be of special importance for the EU.

However, at the moment EU solidarity and subsidiarity are under question. Such projects as Nord Stream 2, EUGAL in their connection to a broader picture of Russia's re-routing Ukraine plans should have a more extensive examination and discussion of the possible legal solutions including broader implications of the Gas Directive or special agreement with Russia. European Commission proposition to change the Third Energy Package did not receive much attention and support from the Member states. Germany states that operation of the Nord Stream 2 should take into account transit via Ukraine, but there are no transparent talks on the issue with a single EU position as is written in Energy Security Strategy. Moreover, Germany is against the United States interference in the European energy relations with Russia, while the US has a stronger position on the issue and proposed Protect European Energy Security Act²⁴, which is against the construction of the Nord Stream 2 pipeline.

Russia plans to finish construction works before the end of 2019 when the contract between Gazprom and Naftogaz Ukraine ends; however, still there are no talks on a special agreement between the EU and Russian Federation as the third side on the new conditions of natural gas supply, separation of the supply to the EU border and transmission of natural gas in the jurisdiction of the EU, Gazprom position on the EU energy market, and unbundling procedures. Question about the participation of Ukraine in such talks due to Association Agreement articles about communication on projects that can undermine energy security is also unresolved. Meanwhile, Russia started construction works on Nord Stream 2 in the Baltic Sea, is finishing TurkStream project, lobbying continuation of TurkStream to Bulgaria, and is actively working on the construction of EUGAL pipeline as the continuation of Nord Stream 2 in Germany. Moreover, Nord Stream 2 project is in disagreement with the development of Southern Gas Corridor, diversification by LNG supplies, cooperation with emerged Mediterranean producers of natural gas, and new gas infrastructure in North Africa, which are Energy Security Strategy priorities.

²⁴ H.R.6224 – PROTECT EUROPEAN ENERGY SECURITY ACT. 115th Congress [online]. Available at: <https://www.congress.gov/bill/115th-congress/house-bill/6224/text?q=%7B%22search%22%3A%5B%22nord+stream+2%22%5D%7D&r=1>

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