

A Common European Law on Investment Screening

Preserving “Public Order and Security” in the European Union

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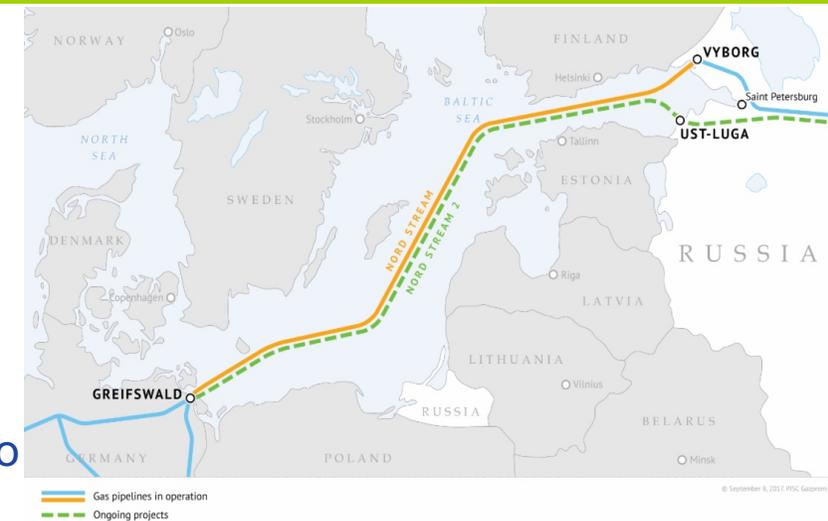
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Introduction: Nord Stream 2 Project

- One of the world's longest subsea gas pipeline projects
- Nord Stream 2 AG with more than 200 employees, headquarters in Zug (CH)
- Financial Investors and Shareholder (50% from RUS, 50% from EU)
- Twin pipelines running through the Baltic sea
- Crossing waters of GER, DEN, SWE, FIN and RUS (Territory and EEZ)
- Transports natural gas (55 bcm³ capacity) from natural gas field Bovanenkovo Yamal Peninsula to Western Europe
- Plugs the gap created by declining gas production in Europe and increasing market demand
- Follows on from the success of its sister project, the Nord Stream 1 pipeline
- Total contract commitments of approx. 5.8bn
- Under construction (pipelay started September 2018). Targeted completion end 2019





Example of «Investment Screening under Danish Law»

Nord Stream 2 AG (“NS2”) has on 3 April 2017 submitted to the Danish Energy Agency (“DEA”) an application for a permit for construction of the Nord Stream 2 project (“NSP2”) in Danish waters **via the optimal route (as considered for NSP1)**

Against this background the Danish government has adopted a new law with effect on 1 January 2018, allowing Denmark to evaluate if projects passing through its territorial waters are **compatible with the nation’s foreign policy, security and defence interests (“New Law”)**

The Ministry of Transport and Energy/DEA would no longer make decisions on its own, but a binding recommendation by Danish Foreign Minister if permit should be granted

potential to block/increase costs of investment/infrastructure



Principal content of the New Law (1/2)

- > Amendment to Act on the Continental Shelf (Permission for certain pipeline installations in the territorial waters)
- > A permit for the laying of transit hydrocarbon pipelines in the territorial waters will only be issued if this is compatible with national foreign, security and defence policy interests.
- > The Minister for Energy, Utilities and Climate (“Minister”) will obtain a positive or negative recommendation from the Minister for Foreign Affairs that includes national foreign, security and defence policy interests. If the recommendation is negative, the Minister must decline the permit application on this basis.
- > The recommendation will be based on a wide, political discretionary basis, including considerations for national security and defence, politics, economics and/or military capacities, and foreign policy, including European and alliance interests



Principal content of the New Law (2/2)

- The recommendation will not be a decision, and is therefore not subject to the rules regarding appeal, consultation with parties involved, access to documents, or the obligation to provide justification for the recommendation.
- The Minister's decision to decline a permit application on the basis of a negative recommendation can only be brought before the Danish courts by instituting legal action against the Minister. The limitation period is 6 months.
- The New Law will apply to applications which are received before the date the act enters into force, but where the processing of the application is not finalised by that date.



Analysis of the New Law

- > There are no clear indications that the New Law is unconstitutional, and on this basis could be set aside by the courts in Denmark.
- > However, there are elements in the New Law which give rise to substantial concerns from a legal perspective:
 1. Singular legislation (only applies to one project, only to pipelines and not cables)
 2. Risk of abuse of powers/legal certainty (wide political discretion, no public access or consultation of party, not all relevant aspects to be taken into account)
 3. Due process (no right to appeal!)
 4. Retroactive effect (applies to pending applications, no transitional provision included)
 5. No timeframe
- > There are legal-policy concerns that the New Law is a measure for Denmark to sanction Russia which objective may better met at EU level (eg. sanctions, anti-trust rules)
- > The New Law gives rise to implications on international investments (ECT) and freedom of transit (WTO)



“Security and Order” – how to apply the concept?

- > Support of statements made by Professor Nettesheim
- > Under the concept “security and order” governments have a broad discretion
- > Such broad discretion should be limited by having the regulation or MS laws including at least
 - No support of protectism
 - Define and apply objective criteria
 - No discrimination
 - Transparent process
 - Defined timeframes
 - Right to Appeal
 - No retroactive effect (not “completion” as a reference, but “FID”)
- > Beneficial coordination among MS and opinion from Commission mitigating negative effects on affected MS



Conclusion

Common European Law on the investment screening – should be applied with caution based on objective criteria and transparently

