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The Application of EU Law Beyond Its Borders

Federico Casolari and Mauro Gatti (eds.)

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FEDERICO CASOLARI AND MAURO GATTI (EDS.)

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TERRITORIAL EXTENSION OF EU LAW THROUGH PIPELINES: NORD STREAM 2 AND THE EVOLUTION OF THE GAS DIRECTIVE AMENDMENT

Anna Pau*

1. INTRODUCTION

An international entity is not allowed to exercise its powers outside its territory as this is against the principle of territoriality, which is one of the tenets of international law¹ to which the European Union is subject.² The *ratione loci* scope of EU treaties extends to the combined territories of the EU Member States, as indicated in Article 52 TEU, and to those specified in Article 355 TFEU. If EU law applied to territories other than those identified by primary law, this would be an example of the extraterritorial application of Union law. At times, the territorial extension of EU law may be confused with the extraterritorial application of this body of law. The distinction is important, as the latter is not permitted under international law, while the former is legal to the extent that there is a territorial link to the EU Member States. One of the first areas in which the issue of the alleged extraterritorial application of EU law emerged in the case law of the EU Court of Justice (ECJ) is that of competition law.³ Another relevant case concerned one of the instruments designed to combat climate change, the

* University of Pisa, PhD Candidate in EU Law. Please note that this paper was written before the outbreak of the Russian war in Ukraine and, therefore, it does not take into account all the relevant consequences for the energy sector and, in particular, for the Nord Stream 2 pipeline.

¹ See F. A. Mann, *The Doctrine on Jurisdiction in International Law* (Leyden: A. W. Sijthoff 1964) and F. A. Mann, *The Doctrine of International Jurisdiction Revisited After 20 Years* (The Hague : M. Nijhoff 1985); I. Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press, 8th edition 2012); K. M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London: Kluwer Law International 1996); J. Crawford, *Brownlie's Principles of Public International Law*, (Oxford: Oxford University Press, 9th edition 2019).

² There are cases where extraterritorial jurisdiction is exceptionally triggered by special circumstances in the application of principles of international law, such as personality, protective or universality principles. However, these exceptions are not relevant for the purpose of this paper and will not be discussed further. For more information on the circumstances able to trigger a state's jurisdiction over situations that occur outside its borders, see J. Wouters and N. Pineau, 'L'extra-territorialité du droit de l'Union européenne au regard du droit international public', in F. Picod and E. Dubout (eds.), *Extraterritorialité et droit de l'Union européenne* (Bruxelles: Bruylant 2021 forthcoming).

³ ECJ, Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to 129/85, *A Ahlstrom Osakeyhtiö v Commission (Wood Pulp)*, [1988] ECLI:EU:C:1988:447; ECJ, Case C-48-69 *ICI v Commission (Dyestuffs)*, [1972] ECLI:EU:C:1972:70; ECJ, Case T-102/96 *Gencor v Commission*, [1999] ECLI:EU:T:1999:65, para. 90; ECJ, Case T-286/09, *Intel Corp. v Commission*, [2014] ECLI:EU:T:2014:547, para. 40; ECJ, Case C-413/14 P, *Intel Corp. v Commission*, [2017] ECLI:EU:C:2017:632, 44-49, all available at <http://curia.europa.eu/jcms/jcms/j_6>. See, also, B. Zelger, 'EU Competition Law and Extraterritorial Jurisdiction: A Critical Analysis of the ECJ's Judgement in Intel', 16 *European Competition Journal* 2020, 613-627.

so-called EU Emission Trading Scheme,⁴ whose instituting legislation was considered compatible with international law.

The extraterritorial application of competition law in the energy domain has not been fully explored by legal scholars. However, the issue remains politically salient, particularly when, as in the case at hand, it has repercussions on the operation of major gas infrastructures, such as the *Nord Stream 2* (NS2) pipeline. Consequently, it is interesting to examine the case study concerning a piece of secondary law in the energy field, proposed by the Commission and contested by the Council. This is Directive 2019/692 (2019 GMD),⁵ amending the so-called 'Gas Market Directive' 2009/73/EC (2009 GMD),⁶ which was adopted in the framework of the 2009 EU 'Third Energy Package' (TEP). The 2009 GMD was designed to ensure the completion of the internal gas market,⁷ but has clear implications for the security of energy supply. The fundamental competition rules contained therein were only applicable to gas pipelines connecting EU Member States, while the 2019 GMD is now applicable to infrastructures connecting Member States with third countries. This amendment affects pipelines that are currently under construction, such as NS2, which, upon completion, is supposed to allow gas imports from Russia to Germany.

The question raised in this paper is whether the Commission's proposal, extending the *ratione loci* scope of the Directive to gas transmission lines (to and from third countries) in the Exclusive Economic Zones (EEZ) of the Member States, can be considered an example of the extraterritorial application of EU law (unlawful under international law) or, on the other hand, an example of the territorial extension of EU law (lawful under international law). As will be shown, the Commission's proposal is considered by the Council to be in violation of some of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) regulating the jurisdiction of states in their EEZ and would therefore not be approved. It is submitted here that the application of the 2009 GMD to the offshore parts of the pipelines can be considered a territorial extension of EU law, due to the connection of the external pipelines with Member States' territories.

The paper will begin with a brief description of the context in which the changes to the 2009 GMD were proposed by the Commission. In particular, the NS2 project, with its significant implications for the energy security of EU Member States, will be briefly illustrated (section 2). Next, in section 3, the Commission's recommendation to the Council to open the negotiation of an agreement

⁴ ECJ, Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change (ATAA)*, [2011] ECLI:EU:C:2011:864, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0366>>.

⁵ Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas [2019] OJ L 117/1 (hereafter: '2019 GMD').

⁶ 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 [2009] OJ L 211/94 (hereafter: '2009 GMD').

⁷ The legal bases are found in Articles 47(2), 55 and 95 of the Treaty establishing the European Community (now Articles 53(1), 62 and 114 TFEU).

with Russia on the NS2 project, with the intention of applying the EU *acquis* to the pipeline, will be discussed. Sections 4 and 5 will address the rationale of the Commission's proposal to amend the 2009 GMD and, in particular, the extension of EU energy market principles to transmission lines connecting third countries to Member States and up to their EEZ; section 5 will also then explain the position of the Council's Legal Service on the extent to which the proposal is in conflict with the principle of territoriality, with UNCLOS, and with the division of competences between the EU and its members. Next, the 2019 GMD will be assessed, examining its possible effects on the legal position of foreign energy operators (section 6). It is argued that the Directive has reinforced the set of mechanisms envisaged by the EU to ensure both respect of internal gas market principles and the security of supply. Section 7 will then consider the legal implications of the 2019 Directive on Member States' power to conclude international agreements concerning transmission pipelines in future and the enhanced role of the Commission in safeguarding EU energy security. Concluding remarks will follow in section 8.

2. THE RELEVANCE OF NORD STREAM 2 FOR THE EU'S SECURITY OF ENERGY SUPPLY AND THE IMPORTANCE OF FREE COMPETITION IN THE EU GAS MARKET

The EU is strongly reliant on the import of fossil fuels from abroad: in particular, approximately 40% of its gas is imported from Russia.⁸ Germany is not only the largest purchaser of gas among the EU Member States, but also the largest purchaser of Russian gas, with long-term contracts extending as far as 2034.⁹ Given that Russia has already interrupted in the past the supply of gas to Ukraine for foreign policy purposes, their dependence on the supply of gas from Russia places Member States in a vulnerable position.

The construction of the NS2 pipeline, which is nearing completion, increases the level of dependence on Russia.¹⁰ NS2 is not 'just an economic project'.¹¹ Indeed, it has strong geopolitical repercussions on relationships between the EU and Russia, the EU and its Eastern neighbourhood, and even between EU members.¹² It is projected to pump an annual volume of 55 billion cubic metres

⁸ Eurostat, 'EU Imports of Energy Products – Recent Developments', available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=EU_imports_of_energy_products_-_recent_developments>. The EU imports almost 60% of its fossil fuels from abroad. See Eurostat, 'Energy Production and Imports', available at <https://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports#Imports>.

⁹ K. O. Lang and K. Westphal, *infra* note 12, at 10.

¹⁰ The 'Nord Stream 2' pipeline project will be laid alongside the Nord Stream 1 pipeline in the Baltic Sea; as a result, gas will be imported directly from Russian natural gas fields to Germany.

¹¹ A. Rettman, 'Merkel: Nord Stream 2 is "Political"', *EUobserver* (Brussels, 11 April 2018).

¹² K. O. Lang and K. Westphal, 'Nord Stream 2 – A Political and Economic Contextualisation', 3 *SWP Research Paper* (2017); A. V. Belyi and A. Goldthau, 'Between a Rock and a Hard Place: International Market Dynamics, Domestic Politics and Gazprom's Strategy', 22 *EUI Working Paper RSCAS* 2015; A. Bros, T. Mitrova and K. Westphal, 'German-Russian Gas Relations – A Special Relationship in Troubled Waters', *SWP Research Paper* (2017).

of natural gas into the EU, undermining energy security inside the so-called 'Energy Union'.¹³ The new pipeline will join the existing gas import routes from Russia (the *Yamal* and *Brotherhood* pipelines).

It should be noted that NS2 is a 'diversionary pipeline': it does not increase the energy supply but merely redirects gas – together with *Nord Stream 1* – from the *Brotherhood* pipeline into the EU, via another route.¹⁴ The new project was designed by Russia to cut Ukraine off from the gas export route, following the 2014 crisis caused by the violation of Ukraine's territorial integrity. Although Russia and Ukraine recently concluded the new 'Gas Transit Deal' for the 2020-2024 period,¹⁵ the completion of NS2 will jeopardise the relationship between these two states. Once the pipeline is completed and used to its full capacity, the transit of gas from Russia through Ukraine is likely to be reduced to 5 bcm per year (from 2022 onwards).¹⁶ If, on the other hand, NS2's capacity is not fully utilised due to amendments to the 2009 GMD, Russia will still need to route its gas through Ukraine, entailing considerable economic advantages for the latter country.

Free competition is at the foundation of the EU gas market. The proper functioning of the internal gas market is also closely connected to the *security of supply*. The International Energy Agency has described the latter concept as 'the uninterrupted availability of energy sources at an affordable price'.¹⁷ In other words, ensuring security of supply means preparing well for a possible disruption.¹⁸ Since the import of gas from third countries has ramifications in the field of competition law, the application of this body of law to pipelines importing gas into the EU is of extreme importance. It can contribute to avoiding the consolidation and abuse of dominant positions as well as to curbing the risk of dependence on an external source of energy, thereby strengthening the EU's position in relation to external gas suppliers. The consolidation of a dominant position on the EU energy market by energy suppliers located in third countries may breach EU internal market rules.

Gazprom, a public joint stock company under majority control by the Russian state, is the dominant gas supplier in a number of Central and Eastern European countries and also the sole (100%) owner of the undertaking specifically

¹³ A. A. Marhold, 'Externalising Europe's Energy Policy in EU Free Trade Agreements: A Cognitive Dissonance between Promoting Sustainable Development and Ensuring Security of Supply?', 3(1) *Europe and the World: A Law Review* 2019, 1-18.

¹⁴ A. Riley, 'A Pipeline Too Far? EU Law Obstacles to Nordstream 2', *International Energy Law Review* (March 2018), 1-25.

¹⁵ The deal was facilitated by France and Germany through the so-called 'Normandy Four Format', formed by the President of Russia, the President of Ukraine, the German Chancellor and the President of France.

¹⁶ S. Pirani, J. Sharples, K. Yafimava and V. Yermakov, 'Implications of the Russia-Ukraine Gas Transit Deal for Alternative Pipeline Routes and the Ukrainian and European Markets', *The Oxford Institute for Energy Studies, Energy Insight* 65 (March 2020).

¹⁷ International Energy Agency, 'What is Energy Security?' (2 December 2019), available at <<https://www.iea.org/areas-of-work/ensuring-energy-security>>.

¹⁸ European Commission, 'Communication from the Commission to the European Parliament and the Council on the short term resilience of the European gas system, Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015' (Brussels, 2 March 2015) COM(2014) 654 final/2, 26.

established to construct the Nord Stream pipeline system. In 2018, binding obligations to enable the free flow of gas at competitive prices in Central and Eastern European gas markets were imposed on the Russian company by the Commission, pursuant to Article 9 of the EU's Antitrust Regulation no. 1/2003.¹⁹ Previously, the Commission had made the following statement: 'All companies doing business in Europe have to respect European rules on competition, *no matter where they are from*' and that the 'obstacles created by Gazprom (...) stand in the way of the free flow of gas in Central and Eastern Europe' (emphasis added).²⁰ At the time, the Commission's actions were defined by one scholar as 'a brazen step to export EU competition laws to Russia or in other words, the application of EU competition laws extraterritorially'.²¹

Back then, the 2009 GMD was only applicable to interconnectors crossing or spanning a border *between Member States* for the sole purpose of connecting the national transmission systems of those Member States, thus excluding pipelines *to and from third countries*.²² This was a legal obstacle to the reach of EU competition rules laid down by the 2009 GMD. In order to solve this problem, the Commission attempted to start negotiations with the Russian Federation on the operation of the new pipeline.

3. THE INAPPLICABILITY OF THE GAS MARKET DIRECTIVE TO PIPELINES TO AND FROM THIRD COUNTRIES AND THE COMMISSION'S ATTEMPT TO NEGOTIATE AN AGREEMENT WITH RUSSIA ON NORD STREAM 2

When the construction of NS2 began, the 'Third Energy Package' (TEP) was the legal framework in force in the EU gas market. The 2009 GMD, which was part of the TEP, established quite a demanding liberalisation regime. The most significant obligations concerned, firstly, ownership unbundling for new infrastructures (the separation of energy supply and generation from the operation of transmission networks),²³ secondly, third party access to all transmission and

¹⁹ Commission Decision of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement – Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1; European Commission, 'Antitrust: Commission imposes binding obligations on Gazprom to enable free flow of gas at competitive prices in Central and Eastern European gas markets' (Brussels, 24 May 2018), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921>.

²⁰ 'Antitrust: Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets' (Brussels, 22 April 2015), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4828>.

²¹ P. S. Morris, 'Iron Curtain at the Border: Gazprom and the Russian Blocking Order to Prevent the Extraterritoriality of EU Competition Law', *European Competition Law Review* 2014, at 605.

²² Art. 2(17) 2009 GMD.

²³ Art. 9(1) 2009 GMD.

distribution pipelines through a system of periodic capacity auctions,²⁴ and, thirdly, the publication of transparent and non-discriminatory tariffs, pre-approved by the relevant national regulatory authority.²⁵ Without unbundling, regulated third party access and tariff regulation, the owner of a gas pipeline connecting third countries with the EU can effectively control access to the internal energy market (or parts thereof). As described in section 2, the 2009 GMD adopted a definition of 'interconnector' which excluded pipelines such as NS2 from its field of application.²⁶

In order to build major transit pipelines, long-term investment and a network of agreements between states or between states and enterprises are needed.²⁷ This set of agreements commonly constitutes the specific normative framework governing a particular trans-boundary project, whose offshore sections are not subject to national legislations. In the case of NS2, the pipeline was not to be built with EU or state funding, but only with the intervention of private investors. The builders had to comply with the procedures set out in the national legislations of the Baltic states which, in accordance with UNCLOS, regulate the issuing of permits for laying sub-sea pipelines in the EEZ and territorial sea of the countries concerned.²⁸ However, the governments of the transit countries did not follow the state practice of concluding an international agreement. It was therefore unclear whether EU Member States' or Russian national jurisdiction should be applied to the offshore parts of NS2 lying *outside the territory* of the states concerned.

In 2015, the Commission took the following view: 'As with any other pipeline in the EU, this pipeline [NS2] will have to fully respect EU law, in particular the [TEP]'.²⁹ The European Council took a similar stance and held that 'any new infrastructure should entirely comply with the [TEP] and other applicable EU legislation as well as with the objectives of the Energy Union'.³⁰ On 9 June 2017, the Commission submitted its Recommendation to the Council on the opening of the negotiation of an agreement between the EU and the Russian Federation on the operation of the NS2 pipeline. The Commission considered at the time that the NS2 project could not contribute to the Energy Union objectives and that it could lead to a further concentration of supply routes. The problem was due to the following situation: while any onshore pipeline to transport gas coming through NS2 in Europe would have to comply fully with EU energy rules under the TEP, some of its offshore section, including its only

²⁴ Art. 32(1) 2009 GMD and Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems [2017] OJ L72/1.

²⁵ Art. 32(1) 2009 GMD.

²⁶ *Ibid.*

²⁷ D. Azaria, 'Transit of Energy via Pipelines in International Law', 110 *American Society of International Law Proceedings* 2017, 131-139.

²⁸ The last licence was granted by Denmark on 30 October 2019, almost three years after NS2 filed its application.

²⁹ European Commission, State of the Energy Union 2015, SWD (2015) 404 final, at 6.

³⁰ European Council meeting (17 and 18 December 2015), Conclusions.

entry point, lay outside the EU's jurisdiction.³¹ As a consequence, Russia could import gas inside the Union without complying with some fundamental obligations regulating competition in the EU energy market.

Surprisingly, the Council disagreed with the other institutions and decided not to follow the Commission's recommendation; furthermore, it considered the Commission's reasoning behind its support for opening the negotiation of the agreement to be unconvincing. In particular, the Commission had raised two alternative concerns as a justification for the envisaged negotiations with the Russian Federation: the need to avoid, on one hand, a legal void (according to which part of the pipeline was *unregulated*) and, on the other, a conflict of laws (according to which part of the pipeline was *overregulated* by conflicting laws).³² For the Council, the offshore parts of the pipeline would be subject to the relevant rules of international law, including the Law of the Sea;³³ the national laws of Russia and EU Member States would be applicable to the onshore parts of the infrastructure, based on the section of the pipeline in question.³⁴ Moreover, the Commission's point that 'applying two different legal regimes' to the same stretch of pipeline was risky was rejected.³⁵ The Council Legal Service explicitly stated that the 2009 GMD '[did] not apply to the Nord Stream 2 pipeline'.³⁶ In conclusion, the Council considered that the envisaged agreement did not fall into an area of exclusive Union competence.³⁷

It was not the first time that the Commission had tried to apply the aforesaid legislation to an import pipeline. One of the reasons why the *South Stream* construction remained uncompleted was that, according to the Commission, Member States with an interest in the project had to respect the EU *acquis*.³⁸ At the end of 2013, the Commission found that an agreement between Russia and EU Member States regulating the operation of that pipeline was not in line with some of the EU's internal market rules on competition.³⁹ An infringement procedure was opened against Bulgaria for its failure to respect the rules of the

³¹ European Commission, 'Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2' (Brussels, 9 June 2017), available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1571>.

³² Council Legal Service Opinion, 'Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues' (27 September 2017), paras. 13 et seq.

³³ *Ibid.*, para. 16.

³⁴ *Ibid.*, para. 17.

³⁵ *Ibid.*, paras. 20 et seq.

³⁶ *Ibid.*, at 44 and 55. The Commission was already aware of the impossibility of unilaterally applying EU rules to third countries' national authorities. See 'Brussels Admits EU Law Does Not Apply to Nord Stream 2', Reproduced with permission by Energy Intelligence, 17(186) *Oxford Institute of Energy Studies Intelligence* (21 September 2017), available at <<https://www.oxfordenergy.org/wpcms/wp-content/uploads/2017/06/Brussels-Admits-EU-Law-Does-Not-Apply-to-Nord-Stream-2.pdf>>.

³⁷ *Ibid.*, at 61.

³⁸ A. Behrens, 'The Declared End of South Stream and Why Nobody Seems to Care', *CEPS Commentary* (5 December 2014).

³⁹ D. Keating, 'South Stream must be Renegotiated – Commission', *Politico* (5 December 2013), available at <<https://www.politico.eu/article/south-stream-must-be-renegotiated-commission-3/>>.

internal market.⁴⁰ Ultimately, Bulgaria decided to halt the construction of the pipeline.⁴¹ Russia's position in this matter was that EU legislation was not applicable to the pipeline insofar as the latter connected EU Member States with non-EU countries and that only an agreement between the states with an interest in the project was required.⁴²

It is worth stressing that some legal scholars hold the view that no EU authority has ever applied the provisions of the TEP to any of the existing pipelines comparable to NS2.⁴³ Existing import pipelines are governed by international agreements or contractual agreements which may or may not incorporate elements of the EU energy *acquis*.⁴⁴ However, this opinion fails to consider that EU energy policy cannot be managed in dissociation from the Common Foreign and Security Policy and without considering the implications of the choice of one Member State on the energy concerns of others, as we will see in section 7.

The Commission would have been better placed than individual Member States to negotiate those agreements, given that projects such as NS2 have implications for states other than those on whose territory (or EEZ) the pipeline is laid, and the Union is responsible for ensuring the functioning of the energy market and the security of energy supply, under Art. 194(1) TFEU. The project fell within the scope of EU energy policy. Union responsibility in the energy area is described in Article 4(2)(i) TFEU as an area of shared competence between the EU and the Member States. However, the division of competences in the Treaty reserves for the Member States the right to decide on the general structure of energy supply (Art. 194(2), second paragraph). Entrusting this power to the Commission would have had a pre-emptive effect and would have meant Member States had lost the exclusive power to conclude those treaties.⁴⁵

Having clarified the context and accounted for the Commission's failed attempt to obtain a mandate to negotiate an agreement with Russia on the operation of the NS2 pipeline, we will now examine the Commission's next initiative: the proposal made to amend the 2009 GMD to extend its application to pipelines coming from third countries.

⁴⁰ INFR(2014)2176, 'In compliance with EU Law of the Intergovernmental Agreement concluded with the Russian Federation for the construction and operation of the South Stream gas pipeline and the relevant award procedure', 2/06/2014, Formal notice, Art. 258 TFEU.

⁴¹ D. Keating, 'Bulgarian Government under Threat as South Stream Construction Is Stopped', *Politico* (10 June 2014), available at <<https://www.politico.eu/article/bulgarian-government-under-threat-as-south-stream-construction-is-stopped/>>.

⁴² A. Behrens, *supra* note 38.

⁴³ U. Lissek, 'Regulation of Nord Stream 2: Rule of Law, Equal Treatment and Due Process – A View from the Project Developer', *CEPS Commentary* (15 November 2016), at 2.

⁴⁴ L. Hancher, A. Marhold, 'A Common EU Framework Regulating Import Pipelines for Gas? Exploring the Commission's proposal to amend the 2009 Gas Directive', *Journal of Energy & Natural Resources Law* 2019, at 8.

⁴⁵ See, for further details, sections 5 and 7.

4. THE COMMISSION PROPOSAL TO APPLY THE GAS DIRECTIVE TO PIPELINES IN MEMBER STATES' EXCLUSIVE ECONOMIC ZONES

On 8 November 2017, the Commission issued a proposal⁴⁶ to amend the 2009 GMD. This proposal pursued the objective of completing the EU internal market of natural gas by eliminating obstacles deriving from the non-application of single market rules to gas pipelines to and from third countries and, consequently, contributing to legal clarity, security of supply, competitiveness of prices and sustainability, also avoiding possible distortions of competition.⁴⁷ It is therefore clear that the main objective related to the internal market, while the 'securitarian aspects' of the directive were subsidiary.

In its proposal, the Commission pointed out that EU law generally applies in the territorial sea and in the EEZ of Member States.⁴⁸ Subsequently, it noted that the 2009 GMD did not apply to pipelines connecting the EU with third countries. The Commission took the view that the new EU act should apply to the sections of pipelines laid in the territorial waters and EEZ of the Member States: this was considered to be in line with the territoriality principle. The change in scope was significant, as the proposed new act extended the application of EU competition rules on ownership unbundling, transparency, non-discriminatory tariffs and third party access to transmission systems (distributing gas to and from third countries) situated in their territorial waters as well as in their EEZ. In order to justify the extension in the scope of the Directive, the Commission maintained that 'there is a practice of applying core principles of the regulatory framework set out by the [2009 GMD] in relation to third countries, notably via international agreements concerning gas pipelines entering the European Union,'⁴⁹ emphasising the need for coherence and for the uniform regulation of pipelines. The Commission envisaged the application of the Directive 'up to the border of EU jurisdiction'.⁵⁰

The issue at hand here is how to qualify the Commission's proposal to widen the Directive's scope of application. Firstly, a distinction must be made between the extraterritorial application and territorial extension of EU law. While the former is contrary to international law,⁵¹ the latter is not, due to the existence of a territorial link which justifies the application of EU law outside the territories of its members.⁵² The EU engages in the practice of territorial extension to provoke different types of legal or behavioural change, such as to incentivise a

⁴⁶ European Commission, 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 of 08.11.2017.

⁴⁷ Commission proposal, Recitals (1) and (3).

⁴⁸ *Ibid.*, Explanatory Memorandum, Context of the Proposal.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, recital (5) and Art. 1(1). See, also, L. Hancher, A. Marhold, *supra* note 44, at 11.

⁵¹ Except in some cases where the exercise of extraterritorial jurisdiction is triggered by special circumstances (see the Introduction).

⁵² J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 *The American Journal of Comparative Law* 2014, 87-125.

high level of performance on the part of third country operators⁵³ or to shape their organisation and governance.⁵⁴ Interestingly, Scott suggested that the EU also uses territorial extension to encourage the conclusion of international or bilateral agreements.⁵⁵ In this case, it is probably the impossibility of concluding an EU agreement that led the Commission to propose the widening of the territorial scope of the Directive (in other words, it can be assumed that the Commission's attempt to extend the reach of EU law resulted from the impossibility of concluding an agreement with Russia, due to the Council's opposition).

According to the explanation given by the Commission during the Working Party on Energy of 12 December 2017, the pipeline's onshore landing in a Member State triggers Union jurisdiction to adopt legislation on offshore pipelines in the EEZ.⁵⁶ This position appears reasonable to the author and can be agreed. In this case, as in others,⁵⁷ the attempt to apply EU law *outside* the territories of the EU Member States cannot be considered unlawful. Rather, the proposed amendment should be classified as a territorial extension of EU law, as the application of EU competition rules to pipelines coming to and from third countries is triggered by the fact that they end in the territory of a Member State.⁵⁸ As stated by the ECJ in *ATAA*, 'the European Union legislature may in principle choose to permit a commercial activity (...) to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the (...) objectives which it has set for itself'.⁵⁹ These measures 'incorporate an extraterritorial element through making market access conditional, directly or indirectly, on conduct of foreign operators or suppliers occurring abroad'.⁶⁰ Their effect is 'to impose an extra cost on foreign producers'.⁶¹ The Commission proposal can be considered to be in line with the aforementioned case law. In the following section, we will explain the reasons why the Council opposed the proposed extension of the territorial scope of the new Directive.

⁵³ The EU Aviation Emission Trading Scheme is one example and the EU Regulation instituting the system to prevent, deter and eliminate illegal, unreported, and unregulated fishing is another.

⁵⁴ J. Scott, *supra* note 52, 106-107.

⁵⁵ *Ibid.*

⁵⁶ UNCLOS Opinion, *infra* note 62, para. 4.

⁵⁷ The most well-known is the case of the EU emission trading system, assessed by the ECJ in *ATAA*, *supra* note 4. See J. Scott, 'The New EU Extraterritoriality', 51 *Common Market Law Review* 2014, at 1344.

⁵⁸ J. Scott, *supra* note 52. See, also, Advocate General Kokott's Opinion in Case C-366/10 (6 October 2011), 150-155 and ECJ, Case C-286/90, *Poulsen and Diva Navigation*, [1992] ECLI:EU:C:1992:453, 30-34.

⁵⁹ Case *ATAA*, *supra* note 4, para. 128.

⁶⁰ N. Dobson, 'Extraterritorial Climate Protection Under International Law: A Jurisdictional Analysis of EU Unilateralism' (PhD thesis, Utrecht University 2018), chapter 2.3, at 62.

⁶¹ *Ibid.*

5. THE CHALLENGE OF THE *RATIONE LOCI* SCOPE OF THE PROPOSED AMENDMENT BY THE COUNCIL

The Council Legal Service issued two opinions on the Commission's proposal to amend the 2009 GMD. The most important one for the purpose of this paper concerns the compatibility of the proposed changes with UNCLOS.⁶² The basic premise was that the EU is entitled to rule on matters over which the Member States have sovereignty or jurisdiction under international law, *including in maritime areas*, as established by case law.⁶³ However, for the Council, the application of Union energy law to the EEZ breached UNCLOS, which is binding for both the Union and its members.⁶⁴

First of all, the legal service of the Council stated: '[e]xtending the scope of the Gas Directive to the EEZ of the Member States would result in treating an offshore pipeline passing through the EEZ of a Member State like a pipeline crossing its territory, even if the transmission line is not connected to its national transmission system.'⁶⁵ This is the case with NS2, as the pipeline *passes* through several EEZ (Finland, Sweden, Denmark and Germany) but *ends* in a single Member State (Germany). The Council's words can be interpreted as supporting the view that the proposed extension of the *ratione loci* scope is contrary to the principle of territoriality. However, the Council failed to identify the fundamental reason for the extension: the connection of the pipeline to one of the Member States would justify the extension of competition rules to the EEZ of all Member States.

As to the conflict with UNCLOS, the point was made that under this Convention – as interpreted by the ECJ – the coastal state's sovereignty over the EEZ is functionally limited and strictly tied to the exploration and exploitation activities defined by the Convention.⁶⁶ This is also recognised by scholars.⁶⁷ In addition, the coastal state's sovereign rights in the EEZ must coexist with other countries'

⁶² Council of the European Union, Opinion of the Legal Service, Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC – Compatibility with UNCLOS (6738/8, 1 March 2018) 2017/0284 (COD) 2 (hereafter, *UNCLOS Opinion*), pdf available at <<https://data.consilium.europa.eu/doc/document/ST-6738-2018-INIT/en/pdf>>.

⁶³ ECJ, Case C-405/92, *Établissements Armand Mondiet SA v Armement Islais SARL*, [1993] ECLI:EU:C:1993:906, para. 12, available at <<https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX:61992CJ0405>>; UNCLOS Opinion, *supra* note 62, para. 8.

⁶⁴ The Union is a contracting party to UNCLOS and its provisions thus form an integral part of the Union legal order and are binding upon the institutions and upon the Member States. See Articles 3(5), second sentence and 216(2) TFEU.

⁶⁵ UNCLOS Opinion, *supra* note 62, para. 5.

⁶⁶ *Ibid.*, para. 21; ECJ, Case C-111/05, *Aktiebolaget NN v Skatteverket*, [2007] ECLI:EU:C:2007:195, para. 59, available at <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62005CJ0111>> and ECJ, Case C-347/10, *A. Saleminck v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekering*, [2012] ECLI:EU:C:2012:17, para. 35, available at <<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0347>>.

⁶⁷ In its EEZ '[t]he coastal state does not have full sovereignty as on its land or in its territorial sea but a right of jurisdiction that is related to certain purposes.' See C. A. Fleischer, 'The Exclusive Economic Zone under the Convention Regime and in State Practice', in *The 1982 Convention on the Law of the Sea, Proceedings of the Seventeenth Annual Conference* (July 12-16, 1983); C. Quince, *The Exclusive Economic Zone* (Delaware: Vernon Press 2019), at 36.

freedoms, including the right to lay submarine pipelines.⁶⁸ The Council acknowledged that under Article 58(3) UNCLOS those freedoms can only be exercised in compliance with the laws and regulations adopted by the coastal state following the provisions of UNCLOS or public international law.⁶⁹ However, the coastal state can only take reasonable measures that regulate the laying of the pipelines and are connected to its right to exploit natural resources or prevent pollution from pipelines (Articles 56(1) and 79(2) UNCLOS). By contrast, coastal states (and, as a result, the Union) cannot apply their respective legislations to the EEZ for other purposes, for example, to protect security of supply.⁷⁰ The provisions of the 2009 GMD regulating competition in the internal market of natural gas can also not be applied to this area, as they are unrelated to the economic exploitation of the resources present in the EEZ.⁷¹ This means that, in the absence of a direct connection with any of the subject matter listed in Article 56(1) UNCLOS, the proposed GMD was considered to be incompatible with Part V of this Convention.⁷² Accordingly, if the EU had extended the scope of the GMD to the EEZ of the Member States, it would have been acting in breach of EU and Member States' obligations under the Law of the Sea Convention.

The legal implications of the Commission's proposal on the allocation of competences between the Union and the Member States were addressed in a second opinion of the Council Legal Service.⁷³ The point was made that the proposed expansion of the *ratione loci* scope of the 2009 GMD would have major consequences: under Article 3(2) TFEU, the adoption of internal rules in the field of the gas market would trigger the Union's exclusive competence to conclude agreements regulating the operation of third country pipelines.⁷⁴ In parallel, Member States would lose their external powers to conclude such agreements and would be obliged to eliminate any incompatibilities between the existing intergovernmental agreements with third countries and the Gas Directive.⁷⁵

We will now examine the Council's position. The Council never referred to the (alleged) extraterritorial application of EU law as being the main reason

⁶⁸ See Art. 58(1) and 79, UNCLOS.

⁶⁹ UNCLOS Opinion, *supra* note 62, 16-17.

⁷⁰ Art. 79(4), UNCLOS; see also ECJ, Case C-266/13, *L. Kik v Staatssecretaris van Financiën (Kik)*, [2015] ECLI:EU:C:2015:188, para. 41, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0266>>.

⁷¹ By contrast, there is Union legislation in force which applies to the EEZ and the continental shelf of the Member States, such as Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations.

⁷² UNCLOS Opinion, *supra* note 62, para. 17.

⁷³ Council of the European Union, Opinion of the Legal Service, 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 – legal basis, allocation of competences, derogations (7502/18, 26 March 2018), 2017/0294 (COD) (hereafter: Allocation of competences opinion), filed with the author.

⁷⁴ Allocation of competences opinion, para. 19.

⁷⁵ *Ibid.*, 23-25.

behind its opposition to the Commission's proposal to extend the application of the energy *acquis* to offshore pipelines coming from third countries lying in the EEZ of coastal states. However, the opinion of the Legal Service is ambiguous in this respect. For the Council, the incompatibility with international law was based both on the absence of a connection to onshore landing (for states that are not 'entry points') and on the fact that, according to UNCLOS, Member States' jurisdiction is limited in their EEZ. As already seen, the Commission convincingly argued that a pipeline's onshore landing in a Member State would trigger Union jurisdiction to adopt legislation on its offshore sections lying in the EEZ of its members, despite the limited jurisdiction of coastal states in this maritime zone, particularly as this would be in line with the position adopted by the ECJ in *ATAA* (see section 4).⁷⁶ In other words, from an international law perspective, the EU can rely on the territoriality principle in this case, as the decisive element is the adequate link with the country or international organisation concerned.⁷⁷

The Council's position seems to have been inspired more by the fear that Member States would lose their competence to conclude agreements with third countries than by genuine concerns that the application of EU secondary law would breach the territoriality principle and/or the UNCLOS provisions related to the EEZ. Thus, the Council's restrictive view taken on the *ratione loci* scope of the EU Energy Directive seems to be linked to the need to safeguard Member States' exclusive external powers.

As we will see in the next section, in the final text of the 2019 GMD the Commission's proposal was changed: in the approved version, the reference to the EEZ was removed. Nevertheless, the effects of the new piece of legislation on the activity of foreign operators such as Gazprom should not be underestimated.

6. THE REDUCED *RATIONE LOCI* SCOPE OF THE NEW DIRECTIVE AND THE EFFECTS OF THE NEW LEGAL REGIME ON THIRD COUNTRY OPERATORS

On 15 April 2019, the Council backed the controversial revision of the 2009 GMD. However, according to the final text, EU legislation applies only to the sections of the pipeline that lie in the *territorial sea* of the Member State where the first interconnection point is located.⁷⁸ As a result, the 2019 GMD applies to pipelines to and from third countries but not to their sections lying in the EEZ, as proposed by the Commission. As will be shown, the amendment will, in any case, entail effects outside the territory of the EU Member States. It remains to be seen whether, despite the reduced *ratione loci* scope of the 2019 GMD, the

⁷⁶ Case *ATAA*, *supra* note 4, para. 128.

⁷⁷ See Advocate General Kokott's Opinion in *ATAA*, paras. 149 onwards.

⁷⁸ Article 1(1) 2019 GMD. See, also, K. Yafimava, 'Gas Directive Amendment: Implications for Nord Stream 2', *The Oxford Institute for Energy Studies, Energy Insight* 49 (March 2019).

Union can impose respect of certain competition principles on foreign operators such as Gazprom.

Given that a pipeline is an uninterrupted conduit, the application of EU competition law to just one portion of it does not seem to make any legal sense. Seemingly, undertakings that own and operate external pipelines will have to adapt to EU internal market rules. In fact, it is very likely that third country operators will still have to comply with the requirements of the 2019 GMD, as the ownership unbundling model imposes on operators the choice between *producing* natural gas and *supplying* pipeline transport services. In other words, foreign operators may be required partially to alter their organisational and business structure so as to be able to continue importing gas into the EU. This would fundamentally weaken the basis for providing funding for that infrastructure. In addition, they could be obliged to publish the methodology used to establish the terms and conditions for accessing their capacity and may be asked by the relevant Member States' regulatory authorities to publish their tariff methodology.⁷⁹

The 2019 GMD grants *existing* infrastructures the opportunity to obtain a derogation⁸⁰ from their obligations. As for *new* infrastructures (pipelines *not yet completed* at the time of its entry into force), these may obtain an exemption under its Article 36. This may be a way for non-EU companies temporarily to avoid complying with European rules.⁸¹ However, in order to obtain the aforesaid exemption, a number of conditions would have to be met, particularly after the 2019 GMD has entered into force. One of the most important requirements is that the investment must *enhance* competition in gas supply and security of supply⁸² and the exemption must also now not be detrimental to: firstly, competition in the relevant markets *which are likely to be affected* by the investment; secondly, the effective functioning of the internal market in natural gas; thirdly, the efficient functioning of the regulated systems concerned; or, lastly, *security of supply* of natural gas in the Union.⁸³ Furthermore – and this is a major innovation – the national authority competent for granting the exemption is obliged to consult the national regulatory authority of the other Member States 'the markets of which are likely to be affected by the new infrastructure'⁸⁴ and the relevant authorities of the third countries connected with the Union through the pipeline.⁸⁵

⁷⁹ Art. 9(1) and 32(1) 2009 GMD; see K. Yafimava (*ibid.*) for an analysis of the ways of ensuring the compliance of (the German section of) NS2 with the amended Directive. See, also, K. Talus, M. Wüstenberg, 'Risks for the Geographical Scope of EU Energy Law', 26(5) *European Energy and Environmental Law Review* 2017, at 141; the authors argue that operators located in third countries 'at the other end of [a] pipeline' importing gas into the EU may be affected.

⁸⁰ See new Art. 49a, Art. 1(9) 2019 GMD.

⁸¹ Obtaining a certification by the national regulatory authorities under Article 9 GMD is another possibility, but it would still require companies such as Gazprom to make certain ownership/operatorship changes; see K. Yafimava, *supra* note 79.

⁸² Art. 36(1)(a) and (8)(e) 2009 GMD.

⁸³ New Art. 36(1)(e), Art. 1(5)(a) 2019 GMD.

⁸⁴ New Art. 36(3)(a), Art. 1(5)(b), 2019 GMD.

⁸⁵ New Art. 36(3)(b), *ibid.* See section VII for further comments on the role of the Commission in the exemption procedure.

In the past, Article 36 was used to grant an exemption to the *OPAL* pipeline (one of *Nord Stream 1*'s onshore extensions). However, the Commission's decision to exempt the pipeline was successfully challenged by Poland before the General Court (GC) in the *OPAL* case,⁸⁶ thus contributing to it being made more difficult for new pipelines to obtain exemptions from some of the Gas Directive obligations. This ruling was based on the principle of energy solidarity, which is an expression of a general principle of law. The GC considered the latter a parameter for the legitimacy of the Commission's decision. In particular, the judges held that energy solidarity translates into an obligation for EU institutions and Member States 'to take into account, in the context of the implementation of that policy, the interests of both the European Union and the various Member States and to balance those interests where there is a conflict.'⁸⁷ As stated, it will no longer be possible for Member States to develop energy infrastructures while ignoring the energy interests of other EU members.⁸⁸

The *OPAL* ruling has far-reaching implications for the application of the 2019 GMD. It is likely that the criteria of Article 36 – particularly the criterion according to which the exemption must not be detrimental to competition in the relevant markets that are likely to be affected by the investment – will be interpreted in light of the aforementioned decision.⁸⁹ The lesson that can be learnt from this ruling is that by requiring the Commission to balance the impact of its decision on Polish, German and EU energy security, the GC is contributing to the coordination of energy policies.⁹⁰ The question is whether the current division of competences between the Union and its members – providing the latter with important retained powers in the energy field – is satisfactory, considering that decisions such as those concerning the building of NS2 affect the position of other Member States, as is clear from the *OPAL* ruling. In light of this consideration, the Commission's enhanced overseeing role will be assessed in the following section.

7. THE COMMISSION'S OVERSEEING ROLE AS A GUARANTEE OF THE UNION'S ENERGY SECURITY

The 2009 GMD amendment reinforced the set of mechanisms established by the EU to guarantee respect of internal gas market principles and the security

⁸⁶ ECJ, Case T-883/16, *Poland v Commission (OPAL)*, [2019] ECLI:EU:T:2019:567, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016TJ0883>>.

⁸⁷ *ibid.*, para. 77; see, also, paras. 69 and 78; T. M. Moschetta, 'La solidarietà interstatale nella politica energetica dell'Unione europea: note a margine della sentenza del Tribunale Polonia c. Commissione', *I I Post di AISDUE* 2019, 'Note e commenti' no. 12 (31 December 2019), available at <[aisdue.eu](https://www.aisdue.eu)>.

⁸⁸ A. Riley, 'The "Principle of Solidarity": OPAL, Nord Stream, and the Shadow over Gazprom', *Atlantic Council* (17 October 2019), available at <<https://www.atlanticcouncil.org/blogs/energy-source/the-principle-of-solidarity-opal-nord-stream-and-the-shadow-over-gazprom/>>.

⁸⁹ See Advocate General Bordona's Opinion, Case C 848/19 P (18 March 2021), *Federal Republic of Germany v Republic of Poland, European Commission*, para. 37.

⁹⁰ A. Boute, 'The Principle of Solidarity and the Geopolitics of Energy: Poland v Commission (OPAL pipeline)', *57 Common Market Law Review* 2020, at 890.

of supply. While for derogations for existing infrastructures⁹¹ the Commission acts merely as an ‘observer’ in the consultation between the Member State in whose territory the first connection point is located and the third country,⁹² under Article 36 it enjoys the power to withdraw or impose amendments to requests for exemptions.⁹³ The relevant regulatory authority must comply with the Commission decision.⁹⁴

Since the 2019 GMD widened the scope of application of the 2009 GMD, the Commission’s power of veto is now extended to exemptions to (new) interconnectors distributing gas between a Member State and a third country while, prior to the amendment, only the pipelines connecting Member States were entitled to apply for exemptions from some of its provisions. In addition, the criteria to be fulfilled in order to obtain an exemption have been modified, and the possible detrimental effects to other Member States’ energy markets now have to be taken into account. As a result, it is more difficult to obtain an exemption (see section 6).

The 2019 GMD also had effects on the Commission’s power to influence Member States’ decisions in the energy field. In this particular case – presumably due to the Council’s concerns – Member States retained their competence to conclude international agreements regulating the operation of import pipelines, but a centralised control mechanism was established (so-called ‘empowerment procedure’).⁹⁵ Under the 2019 GMD, if a Member State intends to enter into negotiations with a third country to amend or conclude an agreement on the operation of a pipeline concerning matters falling within the scope of the Directive, it must notify the Commission of its intention. Therefore, the new legal regime empowers the Commission to *refuse* a Member State authorisation to start negotiations for an agreement that *may affect* Union common rules. More precisely, the EU institution will not authorise the opening of negotiations if the prospective agreement is in conflict with, *inter alia*, Union law or is detrimental to the functioning of the internal market in natural gas, competition or security of supply.⁹⁶

The Commission’s overseeing role in this policy field must be seen in light of the significant interconnection (and consequent interdependence) of the Member States’ energy markets. It is no coincidence that the EU competence in these matters must be exercised ‘in a spirit of solidarity between Member States’⁹⁷ and that ‘in order to safeguard a secure supply on the internal market in natural gas, Member States shall cooperate in order to promote regional and bilateral solidarity’.⁹⁸ As already demonstrated (see section 6), the *OPAL* judgment heightens the importance of energy solidarity.

⁹¹ See new Art. 49a, Art. 1(9) 2019 GMD, and section 6.

⁹² New Art. 49a(2), second sentence.

⁹³ Article 36(9) 2009 GMD; L. Hancher, A. Marhold, *supra* note 43.

⁹⁴ Article 36(9) 2009 GMD.

⁹⁵ New Art. 49b, Art. 1(9) 2019 GMD.

⁹⁶ *Ibid.*, para. 3.

⁹⁷ Art. 194(1) TFEU. Besides, in all cases of shared competence, the Member States and the Union have a mutual duty to cooperate sincerely with each other (Art. 4(3), TEU).

⁹⁸ Art. 6 2009 GMD.

Article 194(2) second paragraph TFEU grants a Member State the right to determine its choice between different energy sources and to preserve the general structure of its energy supply. However, decisions such as those concerning the building of NS2 may significantly affect the position of other Member States.⁹⁹ Moreover, since the gas market is highly dependent on infrastructures – to the extent that, without them, it would neither function nor exist¹⁰⁰ – it is essential to guarantee the correct application of competition principles. Even though the EU and its members share competences in the areas of the internal market and energy,¹⁰¹ the exclusive competence for establishing competition rules necessary for the functioning of the internal market lies with the EU.¹⁰² As suggested by Talus, ‘energy forms part of the pursuit of creating a functioning internal market’.¹⁰³ This is also clear from the wording of Article 194 TFEU, which states that the Union policy on energy will aim, *inter alia*, to ensure the functioning of the energy market. Other important objectives are to ensure the security of energy supply in the Union and to promote the interconnection of energy networks.

It is debatable whether it is still appropriate for Member States to retain part of their sovereignty in the energy field, or whether it would be more appropriate to transfer greater control to European level in this area, in order to align national policies and to safeguard the interests of all – also in light of the cited principle of energy solidarity. The Commission’s communication of 16 October 2014 on the short-term resilience of the European gas system analysed the effects of a partial or complete disruption of gas supplies from Russia and concluded that *purely national approaches* would not be very effective in the event of severe disruption, given their scope, which is, by definition, limited.¹⁰⁴ When examining the proposal to amend the 2009 GMD, the European Economic and Social Committee advanced the possibility that some Member States may see the amendments as limiting their sovereignty to some degree.¹⁰⁵ Nevertheless, it clarified that the Commission was seeking to create conditions for *significant* intervention, where necessary and at an *agreed EU policy level*, which could restrict the creation of further dependency on Russian gas and thus stimulate

⁹⁹ While Central and Eastern European countries previously enjoyed greater energy security, from the time the new pipeline is operational, Russia will be free to cut off or reduce energy supplies to these regions without leaving Western countries short of gas. One such scenario sees Central and Eastern Europe countries subject to the risk of energy shocks, as well as poor diversification of supply and higher prices than in the Western market. See A. Riley, *supra* note 14, 9-10.

¹⁰⁰ Furthermore, the European gas market is dominated by a few large national companies, which control and share the market. A vertically integrated structure, characterised by long-term supply contracts, is also conducive to abuse and anti-competitive practices.

¹⁰¹ Art. 4(2)(a) and (i) TFEU.

¹⁰² Art. 3 TFEU.

¹⁰³ K. Talus, ‘Introduction to EU Energy Law’, *Oxford University Press Scholarship Online* (November 2016), at 12.

¹⁰⁴ Recital (5) EU Reg. 2017/1938 of the European Parliament and of the Council of 25 October 2017 [2017] OJ L 280/1 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010.

¹⁰⁵ Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC [2018] OJ C 262/64, para. 4.4.

diversity of supply. As correctly stated, this is an objective which will further the best interests of the EU.¹⁰⁶

8. CONCLUDING REMARKS

In this paper we have seen how the Commission unsuccessfully attempted to extend the territorial scope of EU sector-based legislation on the internal market of gas to pipelines connecting a third country and a Member State. It did so through two legal paths. Initially, the Commission sought to obtain a mandate from the Council to negotiate an EU-Russia agreement that would require compliance with the EU *acquis*. The international agreement would have regulated the operation of pipelines, including their offshore sections, thus being applicable extraterritorially, that is, in the EEZ of some Member States. Secondly, it proposed to amend the 2009 GMD and make it applicable to the portion of the pipelines importing gas from third countries to the EU lying in the territory, territorial sea and EEZ of the Member States. The latter would have amounted to a territorial extension of EU law based on the territorial link of a pipeline terminating in a Member State's territory. As a result, it would have been compliant with international law. The final text of the 2019 GMD does not contain any reference to the EEZ as the Council considered that amendment to be contrary to certain provisions of the Law of the Sea regulating the jurisdiction of states in their EEZ (which is functionally limited to specific activities by UNCLOS). In the meantime, the Council's main intention appeared to be to avoid the pre-emption effect and to safeguard Member States' power to conclude agreements with third countries concerning the operation of external pipelines.

Notwithstanding its reduced scope compared to its original proposed form, the 2019 GMD is expected to have significant effects on third country operators, which will probably need to make some adjustments in order to import gas into the EU. Until then, the EU could extend the global reach of its energy law through the adoption of bilateral or multilateral international law instruments externalising the European *acquis*, such as the Treaty establishing the Energy Community.¹⁰⁷ With the adoption of the 2019 GMD, the EU has gone further: the new GMD, despite being *de jure* applicable in the 'Union territory', is *de facto* capable of producing effects that will affect third country operators. The need to extend the reach of EU law beyond its members' territories in the 'Gas Directive' saga is due to the concern that dependence on Russian gas may affect EU energy security. As far as the writer is aware, this is the first time that the territorial extension of EU law has been proposed for the purpose of safeguarding the Union's energy security.

As recently emphasised by the High Representative J. Borrell (HR), the Commission has acknowledged that the completion of NS2 does not lead to the diversification of the EU's energy sources, this being one of the objectives of

¹⁰⁶ Ibid., para. 4.7.

¹⁰⁷ See, in particular, Title II on the Extension of the Acquis Communautaire, available at <<https://www.energy-community.org/legal/treaty.html>>.

the Energy Union.¹⁰⁸ Nonetheless, as has been seen, the Union is powerless when it comes to Member States' decisions on their different energy sources and the general structure of their energy supply. As stated by the HR, what the EU can do is 'to require that [NS2] will be working in a non-discriminatory and in a transparent way with an adequate degree of regulatory oversight, in line with the key principles of International and European Union Energy law'.¹⁰⁹ The pipe-laying has been interrupted several times due to US secondary sanctions against companies involved in the project. In response to this move, the EU condemned the US sanctions as being contrary to international law.¹¹⁰ The pipeline should be inaugurated by the end of 2021, but new tensions between the EU and Russia, confirmed by the HR's declarations,¹¹¹ could lead to a further delay and, in the worst-case scenario, the abandonment of the project. With a recent deal between Germany and the US, Germany emphasises that 'it will abide by both the letter and the spirit of the Third Energy Package with respect to Nord Stream 2 under German jurisdiction'.¹¹²

In view of the above, the Commission's aim can be considered to be achieved, at least with regard to NS2. Instead of using the connection with the Union as a trigger for the territorial extension of EU competition principles through the pipeline, respect of the *acquis communautaire* will, in any case, be guaranteed. As a consequence, foreign operators such as Gazprom may be forced to align with some European internal market rules.

¹⁰⁸ EEAS Press Release, 'Russia: Speech by High Representative/Vice-President Josep Borrell at the EP Debate' (Brussels, 29 April 2021), available at <https://eeas.europa.eu/headquarters/headquarters-homepage/97446/russia-speech-high-representativevice-president-josep-borrell-ep-debate_en>.

¹⁰⁹ Ibid.

¹¹⁰ EEAS Press release, 'Statement by the High Representative/Vice-President Josep Borrell on US Sanctions' (Brussels, 17 July 2020), available at <https://eeas.europa.eu/headquarters/headquarters-homepage/83105/statement-high-representativevice-president-josep-borrell-us-sanctions_en>.

¹¹¹ EEAS Press Release, *supra* note 107.

¹¹² US Department of State, Joint Statement of the United States and Germany on Support for Ukraine, European Energy Security, and our Climate Goals, 21 July 2021, available at <https://www.state.gov/joint-statement-of-the-united-states-and-germany-on-support-for-ukraine-european-energy-security-and-our-climate-goals/?utm_source=POLITICO.EU&utm_campaign=862f7081b6-EMAIL_CAMPAIGN_2021_07_21_08_44&utm_medium=email&utm_term=0_10959edeb5-862f7081b6-190589839>.



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- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
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